

# AFTER THE GOLD RUSH?

## GRUTTER, SANDER, AND ‘AFFIRMATIVE ACTION’ “ON THE RUN” IN THE TWENTY-FIRST CENTURY\*

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### I. INTRODUCTION: “A SYSTEM OF RACIAL PREFERENCES”<sup>1</sup>

*What I find and describe . . . is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries.*<sup>2</sup>

To tag ‘affirmative action’ efforts in higher education with the adjectives “factious,” “choleric” or “inflammatory” is to court no controversy among the many interested sub-communities focusing on the matter in twenty-first century America. Developed in the fertile, turbulent 1960s, directly in consequence of the American civil rights revolution touched off the decade before, ‘affirmative action’ has proven controversial in each of its forms,

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\* With apologies to legendary—and, with regard to the particular creative work sampled here, prescient—singer/song writer/performer, Neil Young.

\*\* Professor of Law, Norman Adrian Wiggins School of Law, Campbell University. I dedicate this wholly to my wife, who has supported me at every turn in all aspects of my work, and who deliberately made encouragement of me in this piece one of the very last acts of her beautiful life. Thank you, Huguette.

1. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371 (2004).

2. *Id.*

for every moment of its institutional existence since then.<sup>3</sup> It has commanded inordinate political attention, involving both houses of Congress and each of the more than fifty state and territorial legislatures, generating testimony, debate, and reams of written recordation across its lifespan.<sup>4</sup> It has invaded political campaigns across the face of American electoral democracy—from local ward plebiscites to federal Presidential elections and all in-between—for the last third of the twentieth century at least. It has received an intensity of consideration and review by the federal government’s ‘least dangerous branch,’ which that body has reserved for few such issues in recent history,<sup>5</sup> with no clear end to the trend anticipated any time soon.<sup>6</sup>

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3. I should explain my preference for quotation marks highlighting the operative term. As an African-American who has been intimately connected with the impetus of the project since the early 1970s at least, I applaud its timeliness and its direction, though I share with many others less enthusiasm about its ultimate outcomes. Indeed, given the kinds of rhetoric surrounding it over the last generation or so, I have an increasingly difficult time endorsing the ‘affirmativeness’ of ‘affirmative action’ in its broadest and most energetic sense. As my reasons for moving in this direction are tangential to the theme of this paper, there is little more for me to do here than highlight the fact and move on. Indeed, some of my reasons for so stressing the phrase will be alluded to at least in the later stages of this paper, and in any event ought to be intuitive throughout, to the careful reader.

4. This is not putting the matter too strongly. Following closely and remedially on the heels of American hyper-focus on matters of race and racial politics, the remedy has proven to be every bit as ubiquitous as the problem it was designed to address.

5. Beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954), the ‘race case’ that in many ways started it all, ‘affirmative action’ rulings following in its wake read like a ‘greatest hits’ of that Tribunal, commanding public attention at a level reserved for few other issues coming before it. They include in their ranks *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev’d*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, *Texas v. Hopwood*, 518 U.S. 1033 (1996); and *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003). Of course, to this point we must add, as something of a capstone to this juridical edifice, the Court’s most recent missive on the subject, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (U.S. Reports citation is pending), which in many ways is the most important comment from that Tribunal yet in this contentious debate. Clearly the ‘last judicial word’ in the matter has yet to be spoken.

6. With her famous and portentous “25 year” dicta, Justice O’Connor assured that ‘affirmative action’ and its ancillary policies and programs will be within the consciousness of that Court—and therefore this nation, in some form—for that period of time at least:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

*Grutter*, 539 U.S. at 343 (citation omitted). See also, in support of this premise, *Ricci*, of course.

The deep controversy engendered by the 'affirmative action' experiment has spread across the entire face of American culture as well. Liberal analysis has supported the appropriateness of the effort as a necessary and natural outworking of the spirit of American civil rights reform, though a conservative contingent has decried the supposed discriminatory engine at its heart.<sup>7</sup> Similar disharmony also is found in the minority culture, particularly African-America, where the 'party line' defends the sheer necessity of 'affirmative action' against all comers, while deliberately isolating its own dissenting voices as contentious outliers.<sup>8</sup> Academicians and social scientists struggle to give deeper meaning to American 'affirmative action' initiatives, obliquely reflecting their sponsoring institutions' bland endorsements as 'necessary evils'—emphasis falling on the first of the two-word defensive. Buried deep within the nether regions of this important American controversy is the one question most naturally at the core of its self-commending character as *the* prescriptive palliation for the American tragedy of race: Does 'affirmative action' work?

A clear answer for the critical question has proven frustratingly elusive, and the reasons for this are by no means difficult to appreciate. First and foremost is the daunting task of imagining appropriate meaning for, and measurable significance of, the concept '*work*' within the particular context with which it is referenced. By 'work,' ought we to focus on sheer numbers of minorities entering historically dammed professional streams, or on individuals gaining access to previously restricted vocational avenues, or on cultural areas enhanced by 'affirmative action' beneficiaries, or all of these, or something else? And how ought 'works' be rightly measured beyond definition: by socio-economic data, or by 'quality of life' indicators, or by theories of majority culture 'value added' through exposure to the 'minority experience,' or something different from any of these? Intransigent difficulties aside, with each year of the controversial life of 'affirmative action' in the warp and woof of the American body-politic, the question has gained vitality while its answer grows more elusive, hanging just beyond reach of its variously motivated seekers.

That is, until Professor Richard H. Sander came along. Sporting the right political pedigree,<sup>9</sup> from the right sort of academic institution<sup>10</sup>

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7. There is an anti-pathetic irony in the passionate reference to the term 'reverse discrimination' by majority-culture individuals who, in too many instances, did nothing to combat the worst of American discrimination when it did not involve them. Nevertheless, this particular reference/argument forms one of the key tension points in the 'affirmative action' debate in the 21<sup>st</sup> century.

8. Included among the more notorious of these 'outliers' are Justice Thomas and the famous Californian Mr. Ward Connerly, though in point of fact, and for a host of complex reasons, 'affirmative action' critics and skeptics among African-Americans are growing significantly in number and in sophistication of thought as the years go by.

9. If one is to undertake a thorough critique of 'affirmative action,' one's credibility in both synthesizing and broadcasting definitive conclusions—especially

publishing in the right kind of journal,<sup>11</sup> with the right pair of institutional contestants in his crosshairs,<sup>12</sup> and wielding an impressive array of charts and graphs, the sum of the Professor's immense work seems to be this: No, it doesn't work, as evidenced by any number of precise and relatively easily distilled indicators.<sup>13</sup> Whether via the 'cascading effect'<sup>14</sup> or by the

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where those conclusions are not entirely supportive of the initiative—is enhanced in the academic community by mild liberal leanings, I would think. Support for this supposition lies in common sense: When someone who 'ought' to be in favor of something is not, the reasons for their perceived deviance command more attention. From his interesting opening prose outlining his background and related experiences, Professor Sander would appear to fill this bill, if only with regard to issues related to 'affirmative action.'

10. In our business, it is difficult to deny that credibility often follows pedigree, slavishly; though the essential anti-intellectuality of this condition is remarkable, it remains very real. As applicable here, Professor Sander is writing from the rarified perch of one of the most 'elite' law schools in America, UCLA—to employ a term and concept prominently featured in his own work—and publishing in an even more prestigious academic journal, Stanford. This commands for him more attention from the academy and beyond.

11. The same argument presented above would apply with equal force here.

12. Nothing sinister is meant by this particular comment, and Professor Sander's explication of the reasons for the 'battle lines' chosen do not ring disingenuous:

My exposition and analysis in this Article focus on blacks and whites. I do this principally for the sake of simplicity and concreteness. Many of the ideas that follow are complicated; to discuss them in the nuanced way necessary to take account of American Indians, Hispanics, and Asians would force me to make the narrative either hopelessly tangled or unacceptably long. And if one is going to choose a single group to highlight, blacks are the obvious choice: the case for affirmative action is most compelling for blacks; the data on blacks is the most extensive; and law school admissions offices treat "blacks" as a group quite uniformly.

Sander, *supra* note 1, at 370. Still, even if only by happenstance, for sheer drama and notoriety in terms of public attention and response to a work in the American context, it is unarguably fortunate when the protagonists in a compelling story are two in number, pitted in contradistinction, one against the other, 'black' v. 'white.' That is to say there is something prosaically American about this which works to Professor Sander's advantage here.

13. To be precise—and fair—Professor Sander's work considers the effects of 'affirmative action' initiatives in the area of professional legal education alone. However, given the direction of his thesis and the precision and energy of his conclusions, it is by no means untoward to consider his outcomes as readily transferrable to the effects of the palliative more broadly than that.

14. As did Professor Sander himself in his work, I reference here the phrase effectively coined by Clyde Summers in *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377 (1970); Sander lays out this important concept in clear, even transparent terms:

Affirmative action thus has a cascading effect through American legal education. The use of large boosts for black applicants at the top law schools means that the highest-scoring blacks are almost entirely absorbed by the highest tier. Schools in the next tier have no choice but to either enroll very few blacks or use racial boosts or segregated admissions tracks to the same degree as the top-tier schools. The same pattern continues all the way down

various consequences of his interesting ‘mismatch hypothesis’<sup>15</sup>—mean end-of-law school GPA; numbers of black graduates, bar passers and/or practitioners, etc.—‘affirmative action’ for its most needy target group amounts to something nearing a complete ‘zero’ or worse.<sup>16</sup> Leaving the ‘good hearted’ motivation behind the “massive social experiment” unchallenged, he is nevertheless categorical and well-nigh apocalyptic regarding their ultimate, unintended and even unanticipated results: “Taken as a whole, racial preferences in law schools lower black academic performance and place individual blacks at a substantially higher risk of not graduating from law school and of not passing the bar.”<sup>17</sup> The storm of controversy naturally anticipated to follow his well-conceived work and challenging outcomes has thrown the interested academy into a necessary and difficult review of ‘affirmative action’ in the context of American education and, indeed, American life.

Interestingly enough, the question at the heart of the intense and necessary review following his study’s publication has been as elegantly simple as the one at the center of his own ambitious and important academic agenda: Does Sander ‘work?’<sup>18</sup> It was a question that the

the hierarchy.

Sander, *supra* note 1, at 416–17.

15. In Professor Sander’s own words:

The premise of the mismatch theory is simple: [I]f there is a very large disparity at a school between the entering credentials of the “median” student and the credentials of students receiving large preferences, then the credentials gap will hurt those the preferences are intended to help. A large number of those receiving large preferences will struggle academically, receive low grades and actually learn less in some important sense than they would have at another school where their credentials were closer to the school median. The low grades will lower their graduation rates, bar passage rates, and prospects in the job market.

Richard H. Sander, *Reply: A Reply to Critics*, 57 STAN. L. REV. 1963, 1966 (2005).

16. Professor Sander is unequivocal in the inevitability of this untoward outcome resulting from ‘affirmative action,’ as he believes his numbers clearly capture the story:

[A] strong case can be made that . . . racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system. Affirmative action . . . does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.

Sander, *supra* note 1, at 372 (footnote omitted).

17. Sander, *supra* note 1, at 454. The categoricalness of this statement remains remarkable to me.

18. My much preferred pattern in referencing named individuals in the breadth of any of my work is to use their full names or, when applicable, their earned professional titles. I generally find the reference to an individual by their last name alone in published prose to be familiar and vaguely disrespectful, and for this reason I consciously try to avoid it. However, since Professor Sander’s work is at the center of this reflective response, and as it is thus necessary to refer to him regularly throughout, I will forego my custom for the sake of convenience, confident that neither the Professor nor the present readers will find any slight in this, as none is intended.

accomplished scholar and ambitious author had to anticipate, and one that has occupied since the legal academy and a host of other interested social scientists. Predictably, ‘affirmative action’ apologists have come at his daunting numbers and startling categorical results with greater or lesser intensity, seeking thereby to rescue the pith of the social strategy from its growing army of detractors.<sup>19</sup> Empiricists on both sides of the divide have taken refuge in their own multiple regressions and standard deviations, alternately bolstering or attacking his work with the energy and passion the study both elicits and deserves.<sup>20</sup> But even as the smoke begins to clear and the implications of his categorical conclusions on the future of ‘affirmative action’ are anticipated and imagined, the critical question remains, and does not easily go away: Does Sander ‘work?’<sup>21</sup>

While I am neither an empiricist nor particularly professionally committed to the question occupying Professor Sander and the many other sympathetic academics taken by various aspects of his inquiry,<sup>22</sup> it is one I am simply unable to escape. As a law professor of color teaching in a

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19. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); andré douglas pond cummings, “Open Water”: *Affirmative Action, Mismatch Theory and Swarming Predators: A Response to Richard Sander*, 44 BRANDEIS L.J. 795 (2006); Daniel E. Ho, *Affirmative Action’s Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005); Kevin R. Johnson & Angela Onwuanchi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools,”* 7 AFR.-AM. L. & POL’Y REP. 1 (2005); and Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005).

20. See generally Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007); David L. Chambers, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Jesse Rothstein & Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 75 U. CHI. L. REV. 649 (2008); and L. Darnell Weeden, *Raising the Bar in the Affirmative Action Debate: A Pragmatic Comment on Professor Richard H. Sander’s Systemic Analysis of Affirmative Action in American Law Schools Article*, 15 S. CAL. REV. L. & WOMEN’S STUD. 195 (2006).

21. The continuing freshness of this question has been dramatically underscored by the U.S. Commission on Civil Rights itself, in the 2007 release of its own report entitled *Affirmative Action in American Law Schools*. There the Commission received direct testimony on the matter from Professor Sander himself, and heavily relied on his statistical work and his conclusions following in conceiving and drafting their own. For this and many other reasons, the ineluctability and importance of the simple question I put here should naturally be impressed on all students of this aspect of Sander’s work. Beyond the numbers, his conclusions are so categorically conceived and forcefully presented, and their implications so dramatically clear, that the academy must of necessity be very, very certain about each and every aspect of his work before taking even the first step in the ‘direction’ clearly implicated.

22. Indeed my scholarly interest is in American legal history: focusing on the root of the problem of race in the American context, the matter at the base of Professor Sander’s concern, and examining the effectiveness of the solution presently in use.

school deeply enmeshed in the struggle of defining, creating, and nurturing a spirit of diversity against majority culture rip-currents, decency and professionalism all but require my vocational interest in the topic. Further, my own students of color have required it of me, focusing on the Sander piece and its out-workings with an intensity which I suspect is ubiquitous among similarly situated African-American law students, and which strikes me as vaguely inappropriate, and deeply worrisome.<sup>23</sup> As well as the question at the heart of his study resonates with the more visceral general considerations of race in American cultural context, I must maintain an interest in its broader implications as a concerned post-civil rights movement African-American. And so, for the next few pages at least, the question occupying empiricists, policy managers, and social scientists in and out of the legal academy has been adopted as my own: Does Sander ‘work?’

In adequately setting out the thesis of this paper it is useful first to reiterate what it will not attempt, in order to highlight better what it will. As should be plain from the above, I intend to leave all the raw number data results of Sander’s study unchallenged and, indeed, effectively untouched. First, while interested readers may be piqued by various details from his careful work, anecdotally at least, the broader story of African-American achievement-malaise in the face of ‘affirmative action’ efforts is neither new nor surprising.<sup>24</sup> More importantly, beyond the skill-set deficits already revealed (making such a task unwise on my part), I believe a confrontation with Sander on this familiar ground is, at its most basic level, wrong.<sup>25</sup> It is my position that the problem here lies not in his math-

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23. While the response was not immediately intuitive to me, I was initially drawn to the Sander piece by one of my students of color who had carefully digested each of its many lines and had been left profoundly troubled and even shaken by its prose, process, and direction. Having taken the opportunity to encourage her, I thought thereafter about the implications for the present generation of African-Americans currently involved in legal study, imagining a similar response in a good number of them. Such a response within this community does not undercut the appropriateness or validity of Sander’s work, though, I believe, it does require attention to it. This essay represents the out-workings of the attention which his scholarly work product has demanded of me, as a colleague and a teacher of this generation of African-American students, among others.

24. Of course, the true innovation of Sander’s work here is not in the highlighting of a problem already well known to the academy, but rests in so clearly placing the source of the problem within the intended remediation itself. This is a powerful and important conclusion, of course, *but only if it is correct*. After carefully reading all that Sander has to say on the matter, for reasons I hope to lay out herein, in clarifying detail, my strong doubt in this remains.

25. It is interesting—though not at all surprising—that a good bit of the scholarship following and directly addressing Sander’s alarming work has done so at the numbers level. Both critics and apologists have taken to their own sets of regressions and standard deviations to present their own responses, against or for him. In the end, this impresses me as beside the point. His numbers are what they are; if anywhere at all, the problem with his work lies not in the numbers themselves nor in

work (*systemic*) but, rather, in his derivative conclusions (*analysis*)—not in his data results but in the ultimate meanings he assigns to them—and, for that reason, direct engagement with his numbers work would be beside-the-point and even counterproductive.

Instead, I will focus on the conclusions themselves, highlighting several background factors inherent in and derivative from his work, challenging his own outcomes and questioning the linearity of his conclusions. I will commence my critique with Sander himself, looking generally at the matter of *personal bias* shadowing the outcomes he reaches, and suggesting, in the broadest terms, how that human constant may have affected the researcher's work and his preferred outcomes. Next, I will take the quickest look at the analytics themselves, not to refute his work, but, rather, to isolate possible *shadows* in it—contrapuntal echoes in his own numbers phalanx which point quietly in a direction opposite the one at which he blithely arrives. Finally, and most significantly, I will highlight what I believe is plainly missing in Sander's methodology, thereby suggesting an alternative universe to the one to which he stays comfortably tethered, one offering quite different outcomes from those he too firmly advances. I will close by suggesting appropriate alternative remedies to those naturally following Sander's harsh conclusions, remedies which may prove constructively and even therapeutically significant in fully addressing the difficult situation highlighted by his work.

## II. THE INNER LANDSCAPE OF 'BIAS': "A MASSIVE SOCIAL EXPERIMENT. . ."<sup>26</sup>

*For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society.*<sup>27</sup>

Before commencing a constructive review of Professor Sander's important work, I begin by stating my own strong intellectual tendency: Where human beings are at 'ground zero' in any statistical review, numbers (of any kind, no matter how definitive or thorough) never ever (ever) tell the 'whole story' (creating one set of inescapable conclusions, and one set only) about anything (anything), period (period).<sup>28</sup> While I am no

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the stories they tell, but rather in the meanings he subjectively derives from them. It is at the level of his subjective 'truths,' derived from the numbers, to be sure, but existing outside and apart from them in the end, that he should be met and challenged.

26. Sander, *supra* note 1, at 368.

27. *Id.*

28. In my family it is called the 'celebration of the irrational,' and there I am famous for it. I do not mean here to cast aspersions at numbers and their inherent value in quantifying the human, and, hence, gaining some understanding of it, but I do



empiricist, I have just enough facility with ‘numbers’ to have arrived at the above-stated position honestly,<sup>29</sup> and to have extensively tested it over the last 30 years of my personal and professional life. The simple fact is that *all* numbers under-girding social observations and related public policies, however well grounded in pristine logic, pass through the most illogical ‘inner landscape’ in existence in achieving their goals of education and action: the human mind. There, external logic meets internal *bias*: the individualistic internal topography of human illogic and para-rationality influencing even the most erudite empiricism, from the conception of the hypotheses addressed by the data to the subjective outcomes derived from the quantitative pictures. The data-monger who does not fully appreciate this truth severely hampers the ultimate effectiveness of her work; she believes too strongly in the single ‘story’ that her inner biases inevitably prefer, and thereby appreciates too vaguely and, even too little, the full potential of the empirical data disclosed.

Sander seems at least cognizant of this reality, and candidly goes about the useful exercise of “disclos[ing] my own peculiar mix [of biases]”<sup>30</sup> at the outset of his work. However, upon even semi-careful review, his disclosed ‘biases’ at this point are not really biases at all, as I mean the term. Aside from outlining his credentials as a socially active person likely cast in the ‘liberal’ mode of American politics,<sup>31</sup> he gives no real attention to the sorts of things of which fully engaged empiricism must be self-aware in order to be fully self-actualizing.

By ‘bias’ I mean the subjective lenses reflexively preferred by researchers, the subtle ‘inner landscape’ which, though resisting easy human exposure, resides in every human being and influences the most logical of human reasoning in seeking to define outcome. These things deeply influence the individual in question; have profound sway over the way in which the empiricist *sees* the breadth of the number story before her; and inform the subjective qualitative of the conclusions at which she

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remain ever vigilant to their limits which, for all things human, are not insubstantial.

29. My undergraduate work in public policy sciences brought me into rudimentary contact with the tools of the econometrician—macro and micro economics, statistics, stats-based policy analysis and decision-making, *etc.*—allowing me some literacy with the symbolic language of ‘numbers’; nevertheless, my strengths in these matters, if any at all, clearly lie on the qualitative side of policy analysis, and not on the quantitative side. Those who operate out of similar gift/skill areas will not be surprised to know that for this I feel no ‘second class’ citizenry, nor offer any apology. While less enamored with the true power of numbers than perhaps I should be, I have always been left keenly aware of their natural limitations.

30. Sander, *supra* note 1, at 370.

31. In this capacity he discusses in his graduate work ‘heartland’ Midwestern American roots, community organizing in South Side Chicago, and liberal agenda research related to housing. He marks his continued activist housing work in his post-graduate life, and his own special attention to racial issues deriving from his parenting, as fostering a race consciousness naturally carried into his professional life.

arrives. While Sander's own admissions yield nothing regarding these important biases, the ease and honesty with which he writes and presents his work, in my view, conveniently leave their evidence strewn across its face for the critical reviewer to both consider and appreciate.<sup>32</sup>

Sander conveniently provides the first glimpse of the contours of his own 'inner landscape' in the very opening statement of his substantial work, when he innocently avers: "For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society."<sup>33</sup>

What an interesting, telling way of summarizing the pith, substance and impetus of the 'affirmative action' movement over the length of its history, coming as it does at the very outset of his study. Many reviewers would conceive that impetus in very different terms, stressing equality of opportunity or reparative response to historical injustice beyond the almost epithetical 'full integration' thesis that he references,<sup>34</sup> and Sander would disavow none of these. Yet the language he has self-consciously selected through which to frame the debate may tip his hand as a 'top-down, bottom-up' person, imagining the impetus, goal and success of American 'affirmative action' in narrow, *status quo* terms: welcoming African-America as a full member in what steadfastly remains the 'majority culture' fold. Not wrong in itself, it is nevertheless socially conservative and, as a *bias*—a 'lens' through which the empirical yield is evaluated and given meaning—implicates the way in which the researcher will determine 'success' from the raw numbers used. We must keep this uppermost in mind in assessing—and, necessarily, challenging—the conclusions at

32. Let me be clear in stating that I mean Professor Sander no ill will nor poor intention in the exercise that follows. That he *has* subjective bias which may impinge upon, if not hamstring, the good work he has endeavored to address is not a question; his full membership in the odd fraternity of the 'human race' settles that matter beyond rational contest. The shape and contour of those biases is of no consequence to anyone beyond the close group of *confreres* of which his daily discourse brings him into contact. But they *may*—and almost incontestably *do*—inform his work, and his work here is very, very important. This reality justifies, if not necessitates, the exercise following.

33. Sander, *supra* note 1, at 368.

34. Here I mean only to tip my hat to the not insubstantial argument to be made challenging the values of the 'integration' heuristic when it is couched in 'majority culture' terms, as is too often and perhaps even inevitably the case. In this way, 'integration' may mean injection into the 'majority culture' paradigm *as it is*, necessarily shedding as many of the things as possible not valued by that culture as an 'entrance fee' of sorts. This 'whitening' effect among the various minority culture integrators is the cost of integration at this level, rendering it ultimately suspect on these grounds. I do not mean here to suggest this as Sander's meaning by use of the term, but simply instead to point out the problem deriving from its unalloyed preference.

which Professor Sander too confidently and too conveniently arrives from the information his careful work has produced.<sup>35</sup>

More problematic for present purposes is the remarkably clear and uncontested *elitism* with which Professor Sander seems to imagine the world he is studying and African-America's place within it. He directly references the term three separate times in the first two paragraphs alone of his study: 1) "in giving nonwhites in America access to higher education, entrée to the national *elite*;"<sup>36</sup> 2) "beneficiaries of affirmative action at the most *elite* universities;"<sup>37</sup> 3) "[a]nd how do these preferences play out across the entire spectrum of education, from the most *elite* institutions to the local night schools?"<sup>38</sup> It is riddled with alarming ease throughout the

35. I do not intend any slight to Professor Sander in these comments and I trust there will be none received or taken. I mean only to underscore the extremely conservative parameters with which he purposefully frames the 'affirmative action' story—the 'whiteness' of his perspective, in the American context—and to highlight the undoubted effect that posture will have on his assessment of outcomes and policies following from his work, in the end.

36. Sander, *supra* note 1, at 368 (emphasis added). This reference is especially unfortunate, in my view—or perhaps telling—in that it initially frames the debate in highly troubling and problematic dichotomous terms: "Few of *us* would enthusiastically support *preferential* admissions policies if *we* did not believe they played a powerful, irreplaceable role in giving *nonwhites* in America access to higher education, entrée to the national elite, and a chance of correcting historic underrepresentations in the leading professions." *Id.* (emphasis added). Sander conveniently names the 'them' in his dichotomy: nonwhites. While it is not immediately apparent who the 'us' is in the calculus, three things are troublingly clear: 1) he is writing to—or for—the 'us'; 2) the 'us' seem to be at the center of the power of change; and 3) the dynamic flow in question is from the 'them' to the 'us' or, if you will, 'them' eventually becoming 'us', with our help ('preferential'). I may be over-reading matters here, or I may be pointing to clear evidence of unintended bias on the part of the author, through his own self-selected and telling prose. In any event, from this African-American's scholarly perspective, on its face at least, and coming at the very outset of his involved study—paragraph 1, to be precise—the above-quoted passage is problematic in no small number of ways, clearly implicating if not 'coloring' the breadth of the work that follows, if you will. If only intellectually, this is deeply concerning.

37. *Id.* (emphasis added).

38. *Id.* (emphasis added). This is my personal favorite. Running squarely into one of my own irrational biases—an almost iconoclastic suspicion of hierarchy in all its forms—this last example of his is particularly frustrating to me, and troubling. I can illustrate my point here by referencing a conversation I had recently with a prospective law student, who asked me to name "the best law school to attend in North Carolina" his state of preference for both study and practice. I responded with a definitive "It depends." "While you can get anywhere from anywhere, each law school arguably has its own definable mission, and the answer to your question thus depends directly on the needs driving you as a prospective student. If you see yourself in a national/international practice setting, the very best North Carolina law school would likely be Duke or, as an alternative, Chapel Hill. If you see yourself in high profile state/regional practice or high level state political administration or judicial office, Chapel Hill would likely stand out, and not Duke. If you want to be part of a reasonably close-knit alumni network, in practice in the large North Carolina

rest of the piece. While each of us in the academy knows exactly what Sander means here, it is not at all clear that we understand its possible reflection—*bias* on the part of the empiricist—or its effect with regard to the full veracity of his ‘results.’ In the present circumstances, I suggest that this is a matter of significance and urgency. The problem at the heart of the potential bias in question involves *positioning* and *result*, for both the academy and the “nonwhites”—the subject of this grand “social experiment”—and deserves a word more of explanation to be fully explicated with regard to this critique of Sander.

Frankly, elitism always commences—and usually concludes—with assigned positions and expected outcomes, and it will surprise no one that the defining elite begins with themselves in the ‘high place,’ with all other comers situated somewhere below. In self-reflexively opening its own ranks to these comers, the elite are inevitably invested in their own personal status as the *right cultural norm*,<sup>39</sup> and are inclined to measure the success of its integration efforts against that norm. Should the ‘experiment’ be less than successful and the elite be honestly inclined to examine the experiment in quest of the reasons for that outcome, its own predilection too often becomes a bias in the effort, affecting the result. Simply put, the elite is preternaturally disposed to reifying its own institutional norm in assigning blame for the failure. Should the true nature of the problem lie outside the elitist norm, results are not going to be affected in any way by the bias suggested here. However, in the case of the elite itself, to the extent that “the problem, dear Brutus, lies not in our stars, but in ourselves”,<sup>40</sup> this bias is very much at issue.

The suggested implication with regard to Sander’s efforts and the possible effect of the bias in question here should be plain. Sander’s

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demographic markets, Wake Forest would be worth a close look. If you envision yourself in small practice in ‘small town’ North Carolina, or ‘solo’ practice, Campbell would seem your best bet. If you are hoping to transition into a legal career from another active career over a period of time, N.C. Central is the place, as they have both a program and a special expertise in this area for these kinds of students. If you add a bit of the adventurer/pioneer to your other ‘success’ qualities, both Elon and Charlotte offer opportunities to “get on the ground floor” in the building of new and potentially innovative legal education paradigms. Thus, the ‘best’ (the ‘most elite’ in a more serviceable rendering of that term, I would suggest) North Carolina law school would depend entirely on the student asking the question.” In this view ‘hierarchy’ is subjective rather than systemic, as it ever ought to be.

Against this backdrop my problem with Sander’s comment here—and the bias it transparently reflects, I believe—should be plain. Indeed, it is a bias rife across the academy, and reflexively ought to raise questions for anyone trying to understand the problem Sander claims to have solved.

39. Think ‘British high tea at 4:00 pm,’ across the face of the Empire at its apex, as incongruous as that no doubt appeared in places like Mumbai, Beijing, Kingston Jamaica, Accra, Beirut, the Falklands, etc.

40. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

numbers reflect, with some valuable empirical precision, a problem that was well known anecdotally across the face of the academy prior to his work—even if it was not fully appreciated. And the conclusions that he draws from his data more or less precisely fix responsibility for the failure in particularized places involving some combination of institutional process and intellectual deficit on the part of the intended beneficiaries. If this outcome is practically correct, the bias of elitism clearly reflected across the face of Sander's work is not implicated and is effectively of no consequence, whatever the extent of its activity. However, to the extent that the problems fueling the crisis outlined by Sander's numbers actually lie *somewhere within the construct of the academy itself*,<sup>41</sup> it will take a critical, even skeptical eye to locate them. From his repeated reference to elitism itself and the bias underlying that reference, which stems from his own self-selected and self-reflexive prose, Sander simply is not the critical skeptic needed for this task.<sup>42</sup>

A third area of 'inner bias' operating in the shadowy ethos of Sander's work lies in his own self-limiting expectations—"[t]he results in this article are not intended to be definitive"<sup>43</sup>—contrasting with the striking definitude of his final conclusions. His above-quoted caveat is the correct one, amounting to a boilerplate disclaimer necessary in any thoughtful empirically based presentation. However, just four pages into the one-hundred-fifty page article, and six paragraphs removed from his above-referenced caveat, we learn, categorically, "What I find and describe in this Article is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries."<sup>44</sup> Later in that paragraph Sander does employ the modifier "a strong case can be made" to properly couch his results, but he then closes that very paragraph in the following uncompromising fashion: "Affirmative action as currently practiced by the nation's law schools does not, therefore, pass even the

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41. Along with its inevitable following implications, this possibility will be more fully addressed herein.

42. Again, I mean no disrespect to Professor Sander. As I reference qualitative consideration over quantitative review herein, and suggest other reasonable problem areas from the data different than the single one Sander repeats—academic 'mismatch'—I mean only that it is his self-reflected status as a "child of the system" which may have blurred his vision to other sources of the problem his data at least suggests.

43. Sander, *supra* note 1, at 369.

44. *Id.* at 371. The problem in this context, of course, is the linear use of the unalloyed verb 'produces . . .' without out any modifying, mediative languages. His numbers can outline the fact of a problem and even its reach and extent, and they do this in fact here. However, the source of the problem can only ever be *hinted at* by the numbers and is always open to counter-conjectures therefrom, by nature of the natural limitations framing empiricism. They simply cannot categorically establish the source or sources with any degree of precision, Sander's own confidential pronouncements notwithstanding. This will be further developed *infra*.

easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.”<sup>45</sup> This unadulterated causative definitude is repeated by Sander again and again, in unblushing terms, throughout the length of his not insubstantial piece.<sup>46</sup>

The bias I am highlighting here is the one to which quantitative analysts are most susceptible and the one of which they are usually most aware and most wary: the sirenic seduction of numbers. There is a significant difference between *correlation* and *causation*, of course; the thorough econometrician keeps a very close eye on the two, holding them in artful balance throughout the creative process of giving real meaning to quantitative information. The failure to maintain that vigilance and that balance may indicate bias in that regard on the part of the researcher, a bias which would have its most potent negative impact on the outcomes derived from the data and on the policy implications that appear to follow from those outcomes. In summarizing his striking statistical information, it is statements like the following that raise in Sander’s work the issue of bias suggested here: “This data tells a powerful story: racial preferences in law school admissions significantly worsen blacks’ individual chances of passing the bar by moving them up to schools at which they will frequently perform badly. I cannot think of an alternative, plausible explanation.”<sup>47</sup>

Lacking even the most benign ameliorating pejoratives—*e.g.*, “would seem to,” “is strongly suggestive of,” or “seems positively correlated to”—we are forced to consider a telling reality from the above: Sander’s view of causation, in such uncompromising terms, may evidence the bias in question, implicating all of the results he presents in conclusion. That is no small or impotent critique of his important work.

In summary, this quick review of possible biases implicating Sander’s valuable work should not be marginalized to the trifling category of

45. *Id.* at 372.

46. With regard to the categorical nature of his results, Professor Sander becomes even more uncompromising as he progresses. Thus, “Because of low grades, blacks complete law school less often than they would if law schools ignored race in their admissions process.” *Id.* at 373. Sander speaks of “the low grades that are a by-product of affirmative action,” *id.* at 432, directly connects “[t]he weaknesses in black [law school] performance” to “large admissions preferences based on race,” *id.* at 436, and notes that “black attrition rates are substantially higher than white rates, simply because racial preferences advance students into schools where they will get low grades.” *Id.* at 441. Each and every one of the connections Sander makes could do with qualitative information providing needed and valuable underpinning, though Sander proves completely averse to this throughout his entire article. Under the circumstances, and repeated often across the entire face of his prose, the lack of modifying language accompanying the stark recitation of his results is remarkable.

47. *Id.* at 447. In its naked definitude and veiled if no doubt unintended hubris, this strikes me still as a startling, most remarkable statement. Thankfully, that Professor Sander cannot think of meanings alternative to his own, almost apocalyptic vision, does not foreclose their possible existence.

“scholarly ‘nit-picking;’” far from it. Rather, because empirically grounded presentations tend to bear particular weight in any academic community receiving them, the empiricist bears particular responsibility with regard to possible existing bias influencing her work. Further, because the end result of effective empirical work is often policy decisions and the creation of particular programs—programs impacting human lives—it is incumbent upon the empiricist to address bias and to carefully craft causation conclusions. Given the heft of his work and the delicate subject at its heart, Sander’s responsibilities in this regard are great indeed. It is in this context that the above review of possible biases affecting the messenger’s message is offered, in the spirit of scholarly caution and thorough consideration of the quality of the ultimate outcomes of his work.

### III. QUANTITATIVE QUANDRY: “SHORT SHRIFT, FOR THE MOST PART”<sup>48</sup>

*The “costs” to blacks that flow from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters . . . that might result from differential admissions standards. These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough and objective enough for my purposes.*<sup>49</sup>

In introducing this second area of critique of Professor Sander’s work, it is necessary for us to be bluntly honest with ourselves here: Beyond their uncontested utility, numbers can be slippery, tricky, worrisome things. To begin with, they feed our concrete, rational side like nothing else: Conceptually constant and apparently solid, they allow us to enforce order and to add predictive measurability to the vast subjectivity and irrationality of human life. However, at their very real center, frustratingly but undeniably, they are very much like Satchel Paige’s anecdotally famous beard: They are air.<sup>50</sup> They are valuable when quantifying tendencies that

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48. Sander, *supra* note 1, at 369.

49. *Id.*

50. Among the many rich, colorful stories associated with legendary Negro League baseball pitcher, showman, and legitimate icon and artifact of twentieth century Americana, Leroy ‘Satchel’ Paige, is one related both to pitching—of which he was the acknowledged master among his peers—and beards. Competing in the barn-storming circuits crisscrossing America throughout the Great Depression years, he one day faced a baseball team made up entirely of orthodox Jews, touring under the provocative team name *The House of David*. Known for their unique uniforms and, particularly, their long, majestic beards worn consistently with their cultural and religious customs, the colorful players utterly fascinated Paige. As batter after batter came to the plate to face him, Paige’s fascination grew to a fixation, until at last he could resist it no longer. Uncorking one of his famous fastballs, and relying upon his legendary pitching accuracy, his toss ran precisely where he had intended it to run: right through the very long beard of the surprised batter standing before him at the plate. When the umpire managing the game rightly applied the “hit batsman” rule and awarded the startled

seem to highlight consistent human outcomes or patterns of behavior—correlatives—but must always be held in a weightless, skeptical hand if they are to retain that value and descriptive power. And sometimes their best value lies not in their light—what they seem to say, aver, and predict with consistent accuracy—but in their *shadows*: what they allude to and hint at, even in their own internal and inevitable inconsistencies.

As stated at the outset, I am here neither capable of nor interested in ‘attacking the numbers’ undergirding Professor Sander’s work. Indeed, for purposes of this response, I would be prepared to join Sander himself in his otherwise self-serving claim that, “[m]ost of the [countervailing] contributors concede (and none dispute) the basic facts that frame *Systemic Analysis*.”<sup>51</sup> However, in assigning ultimate quantitative meaning to the information Sander has uncovered, in adding depth and clarity—and even accuracy—to the story it tells, much must be made of the *shadows* in his work: those numbers that pointedly ‘belie the numbers.’ Small but nevertheless significant, these are the ‘echoes’ in Sander’s data, the places that do not follow the general sweep and tide of the numbers before the researcher and even deny them in some not insubstantial way. In these places, “[s]omething else is going on”<sup>52</sup>—something *qualitative* I suggest, with explication to follow: shadows putting into sharp relief Sander’s quantitative work, allowing us to consider—and even to recover, if it is there—the ‘real story.’<sup>53</sup>

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batter first base, Paige was reportedly incensed: Charging home plate, he exclaimed for the benefit of both the offending umpire and any other interested by-stander, “A beard ain’t no part of a man. A beard are air!” Among the many touring baseball teams for which he played thereafter, Paige—an African-American—was reported to have donned a long, obviously fake beard on occasion, and gleefully pitch for the *House of David*.

51. Sander, *Reply*, *supra* note 15, at 1964. The full form of Sander’s claim bears repeating here:

Most of the contributors concede (and none dispute) the basic facts that frame *Systemic Analysis*: [B]lacks are nearly two-and-a-half times more likely than whites not to graduate from law school, are four times more likely to fail the bar on their first attempt, and are six times more likely to fail after multiple attempts.

*Id.* at 1964-65. Setting aside the fact that he is somewhat over-optimistic in the observation, where it is in fact made, this is no concession at all, in reality. Even taking the raw numbers for what Sander determines them to be, contrapuntal commentators instead struggle with Sander’s take on the seminal matter of *causation*, which, in my view, even at the close of his ambitious work, remains very much ‘up for debate.’

52. Sander, *supra* note 1, at 449. Here I quote one of the few handfuls of phrases in Sander’s otherwise sprawling prose which reflects even a hint of the “qualitative story” that no doubt lies beneath his avalanche of numbers.

53. I use the term ‘real’ here almost cavalierly, personally subscribing in fact to the post-modern ‘truth’ that all of human experience is mired in the subjective. However, I do mean to suggest that we do not come closer to whatever objective truth may be ‘out there’ either by qualitative review of a problem alone, or by quantitative review of it, but always by a careful marriage of the two. That marriage isn’t even



The first of these ‘shadows’ is not really a shadow at all, but rather a simple statement found in the historical portion of the introduction to his topic, which while true on its face, nevertheless raises the most cynical of ‘conspiracy theory’ scenarios in the diligent skeptic’s hand. In laying out the chronology of events presaging and implementing the integration of American law schools in the 1960s, Sander notes: “Ironically, during the same period when law schools were eliminating the last vestiges of discrimination and finally reaching out to blacks, the schools were also becoming transformed into more selective institutions.”<sup>54</sup> In the face of the effective reality that “[t]he rise of more competitive admissions placed a new hurdle in the path of blacks just getting a foothold in mainstream American education,”<sup>55</sup> this matter, in the *status quo* hands of Sander, is merely ‘ironic.’ However, even Sander must acknowledge the convenience of the ‘irony’ when considering this troubling fact: It is the out-workings of that very selectivity trend by which African-American success is presently measured, by Sander and others, that is found wanting. While this is not to say that the academy has been complicit here,<sup>56</sup> it may suggest this at least: that the source of some of the African-American ‘numbers deficit’ struggle may lie within the coincidentally and deliberately changed structure of the academy itself.<sup>57</sup>

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hinted at by Sander, who seems comfortable relying on quantitative analysis only to reflect the ‘whole story’. Indeed given his consistent preference for categorical quantitative flourish in framing his discovered ‘truths,’ there is little evidence that he appreciates the supportive value of qualitative process at all.

54. Sander, *supra* note 1, at 377.

55. *Id.*

56. And it is not to say it is not. I simply cannot leave this point without highlighting the unfortunate equivocal evidence in this regard: the academy that preferred competitive numbers-based admissions decisions, coincidentally with African-American admissions—and by which African-Americans placed in the academy would ultimately be reified as wanting thereafter—is the same academy that resisted African-American full access and inclusion in the first place, for as long as it was politically possible to do so.

57. I am putting the matter as kindly as I can here. Recognizing the potential irresponsibility of this statement, I should be very clear about what I mean—and do not mean—to say. Sander rightly puts the integration of the American legal academy and its lurch toward selectivity, and all that has followed, at roughly the same place on the relevant time line. And if his own work is to be both understood and accepted, it is that very trend toward selectivity—hierarchical disposition and elitism—that is the means by which African-American academic success is conceived, measured and, in the present case, found lacking. He denominates that connection ‘ironic,’ and that may be all that it reasonably could be. However, given the full history of the academy regarding race over that time, some of its number—and many among its African-American members—would be excused for seeing a bit more in the marriage in question than irony alone. In any event, my simple point here is this: If the heuristic numbers selectivity trend originated at precisely the time African-Americans were finally admitted to broader American legal education, and if African-American success (or its lack) is measured by that very standard, it is irresponsible not to look beyond the numbers *simpliciter* to uncover all of the possible sources of the current problem. For

A second ‘blip’ in Sander’s numbers, and, in my view, a true ‘shadow,’ would appear to lie in his presentation of the decile distribution of “*First-Year Grade Performance of Black Students* (Table 5.3),”<sup>58</sup> where he notes:

Since, as we have seen, large racial preferences at the top of the law school hierarchy reproduce themselves at the vast majority of other law schools, we would expect to see similar patterns of black performance across most of the spectrum of legal education. Table 5.3 confirms that this is so. . . . Generally, around fifty percent of black students are in the bottom tenth of the class, and around two-thirds of black students are in the bottom fifth. . . . *Only in Group 6, made up of the seven historically minority law schools, is the credentials gap, and the performance gap, much smaller.*<sup>59</sup>

That is to say, in comparison with majority culture colleagues, black students ‘under-perform’ in all law school settings—‘elite’ national schools, mid-range public schools, lower range private schools—with the exception of the ‘historically black’ law programs. Adding the ‘index gap’ figures to the discussion, this notable anomaly would seem to have only two possible explanations: Either black students in historically black programs are outperforming their counterparts in all other law school environments (this is Sander’s decile distinction), or white students are underachieving at these ‘black’ law schools (Sander’s ‘index gap’ treatments), or some combination of these.<sup>60</sup> Perhaps because the statistical facts lay outside his ‘mismatch theory’—or because a suitable explanation could be found only in murkier ‘qualitative review’—Sander makes no attempt at harmonization whatsoever, other than to note it in reporting the data. Given the definitude with which he cites ‘mismatch’ alone as the culprit in the numbers crisis, this is a blind spot in his work, one which holds great potential for those seeking ‘depth’ beyond ‘breadth’ in addressing and understanding the mystery behind the statistical puzzle.<sup>61</sup>

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the academy this is a test of sincerity regarding the breadth of the problem in its midst and of its own integrity in looking into every reasonable place—including to itself and its own ministrations regarding the historical disempowerment of minorities—for sources and following solutions.

58. Sander, *supra* note 1, at 431.

59. *Id.* at 430 (emphasis added).

60. *Id.*

61. I would take great issue with any of the ‘numbers’ types who might be inclined to put off Sander’s failure to address this statistical anomaly as due to the relatively minor numbers-profile involved. To begin with, the numbers point in something of the spiritually opposite direction from his ‘mismatch’ declaration. For that reason alone the depth of his work *requires* him to directly address and explain this aberration if he can—or to candidly admit the fact if he cannot—to add necessary support for his categorical conclusions. In my view, given the incendiary nature of his meta-theory and the extreme conclusions that follow from it, his failure on this point might be considered mildly irresponsible.

The academy cannot afford to do as the confident statistician has done and ignore this ‘blind spot.’ Simply put, hidden deep within the phalanx of numbers supporting his ‘mismatch theory’ is one set, small but significant, echoing an opposite story and contrary conclusion, and of a discrete, telling character. If we are to continue to suggest with authority that black underachievement in legal education is owing to the remedy of ‘affirmative action’ itself, as Sander insists,<sup>62</sup> we must understand why the trend is at least mildly contradicted in ‘historically black’ institutions. Put another way, to the extent the unbroken pattern of comparative African-American failure in historically hostile majority-culture law schools is broken in schools of these students’ own cultural affinity, the ‘mismatch theory’ is legitimately challenged while other possible sources of the problem are concomitantly highlighted. Sander’s failure to attempt to address this matter casts a long shadow across his too-quick conclusions, one that the academy receiving his work cannot afford to similarly ignore.<sup>63</sup>

A third ‘shadow’ across the face of Sander’s ‘mismatch’ tableau—if only a slight one—is captured by a single word looking askance at every hard-and-fast statistical rule and presents a ‘bug’ in Sander’s own numbers machine: *outliers*. Sander notes their existence in his statistical horizon with only a few words, making not even the merest attempt at harmonization with his own categorical meta-theory: “Other black students (about 10%) will significantly outperform predictions based on their credentials, and will also be in the middle of the class or higher. Some white students . . . who significantly underperform their credentials, will

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The second point should be intuitively obvious to any interested observer. In considering this aberration, we are not suggesting that the anomalies to the numbers story are showing up at Midwestern Jesuit law schools, for example. The one place where black students are moving away from Sander’s ‘mismatch’ morass is in schools that share the one characteristic most at issue in and at the heart of Sander’s own study: *race*, or, if you will, *racial diversity* at a unique quality and level within the American legal academy. *Black students are resisting ‘mismatch’ in statistically significant numbers at black law schools and at black law schools only.* Absent a credible and persuasive harmonizing of this ‘shadow’ fact with the remainder of his ‘mismatch’ panacea, that explanatory theory is done measurable harm by this number. That harm is only increased—and markedly so—when the author uncovering the statistical anomaly offers no explanation for it whatsoever.

62. See Sander, *supra* note 1, at 482.

63. Clearly Sander has rightly done a service to his readers by remaining on the ethical high road and following the numbers wherever they lead and reporting the results. Given the unvarnished certitude with which he presents his conclusions, however, and the peculiar quality of the conclusions offered, his failure to at least attempt to address the contra-shadow of the numbers in question is beyond puzzling. He is too thorough a researcher to have missed the implications of this mild aberration from his theory, and should not have failed to appreciate the necessity of some harmony between the two in fully supporting his adopted conclusions.

fall into the bottom quarter of the distribution.”<sup>64</sup>

Indeed, the Law School Admissions Council (LSAC) notes similar statistical results: Up to 15% of all students entering law school with ‘bottom quartile’ statistical predictors will graduate in the top quartile, with an equivalent distribution for those entering law schools with top quartile predictors.<sup>65</sup> These are Sander’s *outliers* in the purest employment of that term, and they are of particular importance in the face of a study expressing its conclusions in such uncompromising language as the following: “It is only a slight oversimplification to say that the performance gap [between white and black law students] . . . is a by-product of affirmative action.”<sup>66</sup> These individuals challenge his bald conclusions—oppose and deny them, in fact—and in not insignificant numbers; if they did not succeed in warning Sander that the ‘black and white’ story he confidently relates may be qualitatively nuanced in ways his quantitative empiricism has not disclosed to him, they must not be consigned to a similar fate by others of us.<sup>67</sup>

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64. Sander, *supra* note 1, at 431–32.

65. Admittedly, this statistical profile is ‘anecdotal’ rather than ‘hard.’ I was introduced to it during a presentation by a senior representative of the Law School Admissions Council (LSAC) at a conference sponsored by that group in Seattle, Washington in November, 2003, titled *Dreamkeeping: Empowering Minority Faculty—a Dialogue*. While the number itself may vary from year to year, law school to law school and situation to situation, its underlying truth is consistent and anecdotally attested to by everyone who has taught students in this business. Indeed, at the conference mentioned above, LSAC officials used this fact to underscore what it plainly called misuse of Law School Admissions Test (LSAT) results in admissions decisions, misuse religiously adhered to by law school admissions offices across America. In its official presentations the LSAC is more anecdotal than statistical, though the message is the same: “The LSAT, like any admission test, is not a perfect predictor of law school performance. The predictive power of an admission test is limited by many factors, such as the complexity of the skills the test is designed to measure and the immeasurable factors that can affect students’ performances. . . .” <http://www.lsac.org/pdfs/InformationBookweb.pdf>. In the case of African-American students, within the context of the general tone of Sander’s work, such ‘immeasurable factors’ may nevertheless be very important indeed.

For a more general discussion of possible discriminatory effects of the present use of the LSAT in admissions decisions, see Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN’S L. REV. 107 (2006) and Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41 (2006).

66. Sander, *supra* note 1, at 429. In seeking a suitable reference for the point here, Sander’s work presented a veritable host of possible choices.

67. Disturbingly, this is not the only place where ‘outliers’ challenge Sander’s neat statistical picture, nor even its most significant challenge. On the other end of the quantitative spectrum, Sander’s numbers define another group of outliers moving in the opposite direction, the *negative outliers* that present their own discrete challenges to quantitative analysts determined to do things ‘by the numbers’ only. These are the “black students with good [numbers],” *id.* at 448, who ought to perform well according to the very quantitative story Sander presents and relies upon, but whose actual

The reasons behind this necessary added attention should be obvious to anyone interested in the problem and who is committed to developing an appropriate, effective solution. First, the numbers represented by this shadow group—one or more in ten—are by no means so statistically insignificant as to warrant the relative short shrift afforded them by Sander himself. Second, and most importantly, the individuals populating this vital sub-group are practical and statistical *overcomers*. They have slipped the surly bonds of Sander's erstwhile ironclad 'mismatch' in ways which should command our full attention rather than receiving our bland lack of interest. They may in fact be harboring a pristine story, one lying utterly outside the ability of Sander's numbers to even begin to recover, no matter how thorough his regressions nor how ambitious or careful his math. They may offer a *key*, a *holy grail* of sorts, in the present, important debate, one which is both incisive and hopeful in an area badly in need of both, and if Sander is effectively under-impressed with that possibility, the remainder of the academy must not be.

In summary, it is very important to understand the two terms at the heart of all econometric analysis, engaging econometricians at the deepest level of their work—*correlation* and *causation*—and, further, to appreciate their complex interaction. Numbers can establish correlations between discrete factors—say, 'African-American students' and 'law school 'success''—to a great degree of certitude, and correlations can allow reasonable connection to *causation*, depending on the level of their strength. However, causation is always a matter of guesswork from correlation, no matter how strong the 'numbers story': Results can be connected to

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performance seems unmoored from the numbers and dependent instead on *the 'eliteness' of the school to which they matriculate*. Sander sets out this statistical reality ("The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school . . . will have a significantly lower chance of passing the bar than the same student would have had if she had attended a [less 'elite'] school. . . ." *Id.*), dutifully presenting the important question: "But why exactly should the same student have a lower chance of passing the bar [because of this] . . . ?" *Id.* at 449. Why indeed. Interestingly enough—and tellingly—it is here that Sander first and finally moves out of his quantitative haven, referencing rudimentary qualitative considerations to explain a dilemma resisting quantitative explanation. Waxing somewhat lyrical about his own earlier challenges when an undergraduate at Harvard, he spins this qualitative experience into his own intellectually interesting 'mismatch hypothesis,' settling the matter quantitatively thereafter. But his qualitative foray is *not broad*, and therefore it is *not strong*: There may be *many* more things qualitatively at work in these students than 'mismatch' alone (or even 'at all'), giving rise to these important and troubling outcomes. As it is, however, the one qualitative theory most consistent and easily harmonized with his previously developed and preferred quantitative thrust, assumes first place in 'explaining' this critically important counter-trend. I address Sander's qualitative debilities in more detail in the following section of this paper, but I must not leave this discussion without highlighting this significant 'negative outlier' story, or without suggesting the ultimate inadequacy of Sander's qualitative attempts at categorical explanation.

particular factors to a significant statistical level, but numbers alone should *never* blind a researcher to the complexity of any problem involving human beings, nor to the vast vagaries of their possible ‘causes.’ The fact remains that there is *always* a margin of error between ‘correlation’ and ‘causation,’ however slim, and that ought to remain uppermost in the mind of the econometrician, and be plainly disclosed in her final presentation. This would appear to be a place of strength and also of weakness in Sander’s work here, when taken as a whole.

These ‘shadows’ are made more significant by two internal, interactive tendencies in Sander’s work, focusing the pith of his outcomes and ultimately challenging their reliability. The first is his failure to address them in any satisfactory way, and the second is the utter fundamentalism of his conclusions despite this failure. If, through his world of numbers, Sander tells us categorically how things *are*—and he does this in spades—his ‘shadows’ insistently whisper a subtler, but perhaps even more important, (and more wholesome and robust) counter-message: “not so fast.” If Sander is confident enough in his numbers to measure out their ‘truths’ with algebraic precision, his ‘shadows’ remind us of the intense *humanity* of his subject of study, and the inevitable truth that follows that humanity with its own internal precision: No human story can *ever* be fully understood through numbers alone, no matter how concrete they may appear. Simply put, there is a gloriously irrational aspect to every rational human story,<sup>68</sup> lying so far outside the reach of ‘numbers’ that their inabilities—or, more precisely, their *disabilities*—are substantial when seeking to fully uncover that story. To assay these critical ‘shadows’ and determine the substance, if any, behind their significance, we must bolster quantitative empirical work with *qualitative* review, for it is in the *quality* of a matter, and not in its quantity alone, that any truly human story gains sharp focus.

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68. I use the adverb ‘gloriously’ here quite deliberately, and, in its use, effectively come ‘out of the closet’ as an unapologetic ‘qualitativist’ in all that I do. Understanding the relative comfort in rational consistency and the objective universe it seems to create, for the life of me I have never completely grasped the concomitant resistance by rationalists to acknowledge and even embrace the reality of the irrational and the subjective in each individual human story. Indeed, as a historian who must work in the world of the subjective, I find this ‘truth’ inevitable, and its avoidance completely undesirable, even if it were possible to do so. While rationality gives our lives necessary rhythm and pace, form and structure, and even substance, it is *irrationality* which gives them their color and life, and makes them uniquely *human*. While much of our human actions are grounded in the rational, some of the most important of our motivations are not, and this whole reality cannot be clearly captured with quantitative tools alone. The implications of this truth against the backdrop of Sander’s work will be carefully considered and fully explored *infra*.

IV. SOME 'QUALITATIVE' TRUTHS: "LET US PONDER THIS A LITTLE."<sup>69</sup>

*But it may not be obvious to many readers why it should be that black students with good credentials should lower their chances of passing the bar simply by attending a better school. Let us ponder this a little.*<sup>70</sup>

My final critique of Professor Sander's *Systemic Analysis*, and in many ways the pith of my concerns with it, is best illustrated by referencing a personal anecdote demonstrating the *quantitative/qualitative* interface being here advanced. Among the many students greeting me several years ago at the small, private, conservative institution to which I had just moved to teach were four African-American males bunched together at the front of the classroom auditorium, right before my podium. They each came from an historically black university very different from the law school at which they had arrived, and, though I had no actual knowledge, each almost assuredly benefited from admissions preferences of the kind at the heart of Professor Sander's study. They impressed me as being 'at ease' in my classroom, maintained punctuality and diligence in class attendance, and remained prepared enough to voluntarily engage in group discussion throughout the semester; the four apparently forming a valuable support group for one another. Each weathered what came to be vilified as a horrific examination at semester's close,<sup>71</sup> and together they all outperformed on my examination their other final examination grades, I came to understand afterward.<sup>72</sup>

Now here is a 'mismatch' worthy of Sander's own hypothesizing and theorizing: In a law program prototypically struggling to add African-Americans to the legal profession in just the ways Sander's work has highlighted across the academy, each performed in my classroom at a level different from their performance in their other classes, well beyond the outcome which the *Systemic* regressions would have warned them to expect.<sup>73</sup> When a colleague good-naturedly questioned the relative over-

69. Sander, *supra* note 1, at 448.

70. *Id.* (emphasis added).

71. This was my fault alone, of course. Reflecting ambivalence at least, if not ability, the examination-drafting skill remains, in my view, the one teaching skill in which I remain measurably deficient.

72. Indeed, one in that group of four, about whom I had harbored some real reservations based on classroom performance, performed very well, and another wrote what remains the very best examination paper I have read from a first year student in the years I have been teaching.

73. Put loosely in Sander's terms, they seemed to follow his 'mismatch' hypothesis across all of their individual classes save for my own where, for them, the school became akin to a HBCU (Historically Black Colleges and Universities), in effect. This is very interesting, of course.

And with regard to those particular students, they did not stop there. Despite the dire graveyard of buried hopes that Sander's 'irrefutable' numbers prognosticated for

performance of these students in the only African-American professor's class, I chuckled along, as required, though I did extensively consider the interesting aberration.<sup>74</sup> Might their performance have depended even somewhat on the 'statistical anomaly' of what they saw when they walked into my classroom, different from the others in which they were invited to learn? Might the clear portent of 'business not as usual'—my simple African-American presence at the point-end of their hierarchically designed classroom—have awakened in them unique dreams of their own possibilities in consequence of my apparent achievements?<sup>75</sup> Might the peculiar, unique environment in which they were called to learn in my classroom have had some spiritually ameliorating effect on what they learned and, indeed, on their very ability *to* learn, despite the 'mismatch' echoes all around them?<sup>76</sup>

These are *qualitative* questions backing *qualitative* considerations, and they stand in marked contra-distinction to the quantitative methods deliberately framing the whole of Sander's work and driving his conclusions. They depend for their energy on a very different sort of consideration—*micro* rather than *macro*, *individual story* over and against *group character*—and they provide very different information and therefore may yield very different conclusions. They do not stand in

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each or some active subset of this small group, each of them graduated, each 'passed the bar,' and each is in the process of becoming a great addition to the profession in which they are all growing.

74. In the interest of full disclosure I must say that I do not have even anecdotal evidence that their experience is replicated by every African-American student whom I teach. Nevertheless, the value of the point being advanced here remains.

75. I mean by this to be deliberately and transparently utopian, even to the point of naiveté, and I reference my own educational experiences in support. From my earliest education at an 'elite' private university and through stints at two different 'elite' public programs, I typically took no great notice of the professors managing my classrooms, with one notable and consistent exception: the rare classroom experiences directed by people that 'looked like me' to put the matter concisely and familiarly. Of them I took immediate and deliberate notice: I was extra-critical of their performances and extra-interested in their routes to 'success.' While I cannot say that my extra attention always translated into superior academic performances in those classes, I can definitively aver that their individual achievements always stimulated in me a sort of 'possibility thinking' that was encouraging all along my way. This is a *qualitative* truth, lying quite outside the reach of quantitative analysis, and it is important.

76. In support of this point, I recall—anecdotally and always with amusement—the first criminal law lecture I delivered in my then new law school, experienced by the four African-Americans in question along with their many other classmates. One of the four came up to me immediately afterward and, with a measure of wonder, excitement and, noticeably, to my mind at least, relief, proclaimed in almost reverential terms, "That was one of the most remarkable lectures I have ever heard. . . ." I viscerally understood his feeling.

Though I never felt similarly regarding any of my majority culture professors, I inevitably breathed out a reflexively subconscious prayer before my African-American professor's first lectures— "Please don't screw up" —and a less subconscious sigh of relief when they did not. This strikes me as sad, interesting, and important.



opposition to quantitative analysis, but rather, in the best of circumstances, would *augment* quantitative information in key ways, nuancing numbers and teasing from them different views on the possible stories to be rightly derived from the statistical outcomes. That is to say, Sander's *quantitative* analysis provides information, but is naturally short on *story* following from the numbers it finds; meanwhile *qualitative* considerations in effect provide the story itself, and, as such, provide the best means by which full, right conclusions might be recovered from that information. Without solid qualitative review, one can *never* be sure of the story quantitative analysis isolates and, concomitantly, can never be confident that the remedies suggested by the analysis are the *right remedies* to palliate the real problems that the numbers have highlighted.

More must be said to appreciate fully the relevance and weight of this point. Anyone even casually familiar with the pristine psycho-spirituality of learning and academic achievement knows the key place of *personal confidence* in the process, and the devastating potential effects of the lack of it on ultimate outcome. And any African-American coming under the glaring benefit of 'affirmative action,' in any of its many manifestations, will qualitatively reflect that its naturally attendant by-products—"stigma and stereotypes that might result from differential admissions standards"<sup>77</sup> among others—inevitably threaten that confidence in just these sorts of ways.<sup>78</sup> Yet as powerful as these configuring qualitative truths might very well prove to be, they become here for the quantitative analyst, "rather subtle matters . . . interesting and important"<sup>79</sup> though given only "short

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77. Sander, *supra* note 1, at 369.

78. My first iteration of this paper came several years ago in the form of a presentation at a 'debate' on 'affirmative action' conducted by the Young Lawyers Division of the North Carolina Bar. I was recruited by the Division President to take the 'anti-' side and only did so because he found it difficult to find someone willing to take that position, and that 'he' was my younger brother! Taking a tack very different than that anticipated by my 'pro-' side debating partner, I had occasion during my presentation to reference the inevitable negative effects of such programs as usually experienced by their erstwhile beneficiaries: mild guilt, confidence loss, 'outsider' feelings, *etc.* At a reception following I was approached by every African-American in the audience, it seemed, who individually and conspiratorially thanked me for voicing what they each had felt in their 'affirmative action' histories but had never shared, guessing that they were alone in these reactive responses. Though anecdotal only, my strong suspicion lies toward the ubiquity of these negative feelings with the majority of said 'beneficiaries,' and in fact strongly echo my own.

79. Sander, *supra* note 1, at 369. By use of the term 'subtle' to describe these things, Sander may be referring only to their measurability using the traditional econometric tools of the day, though his characterization remains stark, uncomfortably spare, and wrong, I believe, at least where African-Americans are concerned. The net negative message of present 'affirmative action' initiatives, whether benignly or acerbically communicated and received, are by no means 'subtle' for the African-American. They do not speak their messages into an experiential vacuum, but rather against a deep backdrop of similar messages for the typical African-American, even one of 'high achievement.' Thus, the 'affirmative action' impetus becomes but one

shrifft” by Sander, in the end.<sup>80</sup> That taken care of, he is then free to prosaically fix the source of the problem quantitatively in the *action* part of the ‘affirmative action’ construct, while wholly ignoring the qualitative *affirmativeness* part of the curative, where the problem is in fact equally free to reside.<sup>81</sup>

In the spirit of full understanding and critical self-investigation, if nothing else, in order to be as certain itself of Sander’s cathartic conclusions as he is, the academy must be prepared to do the very thing he has dismissed and ignored, to go where he has refused to go. It must ask the *qualitative* question, taking an unvarnished, critical look at the ‘affirmativeness’ of the environments into which the “intended beneficiaries”<sup>82</sup> are invited to learn and achieve—“from the most elite

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more ‘handout’ from the ‘majority culture’ downward to the minority individual, reinforcing ‘difference’ and ‘disability’ in the process, rather than reifying ‘competence’ and ‘ability.’ And all this occurs on terms created by and managed for the synthesizing culture, to the decided detriment of the minority ‘beneficiary’. If this is not the direct communication, it is the subordinate message for the African-American: in receiving ‘affirmative action’ support, business is decidedly ‘as usual’ in every way for both the proponent and the recipient, with the usual results expected to follow.

80. Sander, *supra* note 1, at 369. A full rendering of the above truncated quote puts the matter in its most revealing light. In addressing in his introduction the issue of “‘costs’ to blacks that flow from racial preferences,” *id.*, Sander casually lists them—“the stigma and stereotypes that might result from differential admissions standards”—and just as quickly dismisses them:

These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough or objective enough for my purposes. The principal “cost” I focus on is the lower actual performance that usually results from preferential admissions.

*Id.* at 369–70. In truth it is difficult to know where to begin in critiquing this remarkable statement. That he dismisses with such confident ease these essentially qualitative matters about which reams of critical literature have been produced is in itself problematic, though his reasons for such dismissal, plainly presented, deepen the problems many-fold. Recognizing that such matters resist easy quantification and numbers profiling, he is prepared for this reason alone to effectively ignore them, preferring instead the ‘story’ his numbers can directly get at. His not-so-subtle message might reasonably be summed up as follows: For a problem whose true sources may lie in any number of reasonably anticipated directions, Sander is prepared to follow only those leads lying in his strength areas. He will neither shore up his weak areas nor enlist the services of someone who could do this for him, but rather ignore these matters altogether, or at most only give them the rather unfortunately phrased ‘short shrift.’ Of course, the biggest problem lies in the reality that his own categorical conclusions are undercut significantly by this failure on his part. For the many gifted investigators strongly encouraging sourcing black under-performance in these very qualitative areas which Sander gives short-shrift, he has no cogent critiques and, therefore, nothing to say. This will be referenced further and more directly *infra*.

81. The problems naturally following from this choice on the part of the quantitative analyst, problems extending to the very core of his extensive work and terse conclusions, should be plain.

82. Sander, *supra* note 1, at 368–69.

institutions to the local night schools”<sup>83</sup>—the *affirmativeness* of ‘affirmative action,’ if you will. It might conveniently begin at the very foundational basis and deliberately articulated motivation of the action itself. Repetitively relying on such loaded rhetorical standards such as “special admission[s],”<sup>84</sup> “racial preferences;”<sup>85</sup> and their equally pernicious cousins—“preferential admissions policies”<sup>86</sup> or, more tersely, “preferences”<sup>87</sup>—the modus and message behind presently conceived ‘affirmative action’ initiatives is inescapable: It declares, “By present day strictures of the legal academy you are at a competitive disadvantage and do not really belong. Further, you do not measure up to the standards of the community to which you have been ‘admitted’—majority culture standards, through and through—though you will be rigorously judged by them, and likely found wanting. Welcome to law school!”<sup>88</sup>

Though different individuals would respond to these systemic, constructed challenges very differently,<sup>89</sup> the question nevertheless survives Sander’s ‘mismatch’ magic: What, pray tell, is *affirmatory* in any way by such ‘affirmative action,’<sup>90</sup> and, in its plainly imagined disability, might it

83. *Id.* at 368. The phrase is deliberately referenced for its irony.

84. *Id.* at 370.

85. *Id.* at 368–69.

86. *Id.* at 368.

87. *Id.*

88. In a curriculum and program which has proven challenging for both African-Americans and transfer students, among others, an African-American transferee to my school reported that she was greeted with that very information, followed by the comment “I wonder how long you will last?” It was a triumph of that student’s character that she did graduate, though it was a very unfortunate beginning at her new law school.

89. In the early days of ‘affirmative action’ the architects were not subtle about their message. In the early 1970s my own oldest sibling surprisingly gained admission to an excellent public university on the strength of a thoroughly pedestrian secondary school record, through hard but uninspired work. In the days far prior to the politically correct era still to come, the admission process had no need to be coy; in deciding the matter, the university used raw data to project a final grade-point average in the 1.75 range, in circumstances where minimum graduation standards were institutionally set at 2.0. Yet admission was forthcoming for my sibling for one articulated reason alone: at that time the federal government had put a financial ‘bounty’ on the heads of African-American matriculates as an incentive favoring institutional desegregation. The motivational effect of that letter may simply be ‘family lore,’ but the results in the case of my stubborn and provoked sibling were remarkable: graduating from that institution ‘with honors’ in a difficult ‘hard sciences’ program, he carried his record into medical school and a productive medical career. My sibling’s actions represent a ‘right response’ to the unfortunate challenges placed before him, but a difficult and increasingly rare one across the breadth of today’s African-American culture, for complex reasons, I am sure.

90. This challenge is by no means novel nor singular. Apart from the much-to-be-expected reactionary attacks on affirmative action as a conceptual whole, the numbers of thoughtful minority scholars challenging the ‘affirmativeness’ of present initiatives is by no means insubstantial. Derrick Bell has criticized presently conceived

itself be a source of its own outcome-poverty?

Neither would the liberal spirit and positive intention of the action be redeemed in any effective way by its amalgamation with more constructive and less attenuated notions of *diversity*—the latest rallying point undergirding the value and necessity of ‘affirmative action.’ For the ‘student of color,’ lurking just behind the bright and inviting façade of the otherwise benign, positive notion of ‘diversity’ is the dual reality of how it actually looks and what it impliedly means for the parties in question. Unable to enter the arena through the ‘front door’ of competitive ability, ‘diversity’ hallmarks the academy’s willingness to forge an alternative entrance<sup>91</sup> for these individuals who bring something else with them that it independently recognizes, values and ‘needs.’ Whether for mere color alone,<sup>92</sup> or for the useful experiences with which diversity is stereotypically expected to enrich teaching environments and class discussions,<sup>93</sup> or some

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affirmative action initiatives as essentially giving “blacks the sense of equality while withholding its substance.” Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1598 (1989). In this way, “affirmative action remedies have flourished because they offer more benefit to the institutions that adopt them than they do to the minorities whom they’re nominally intended to serve.” Derrick Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 154 (1987). For Richard Delgado, affirmative action “is at best a mixed blessing” for its intended beneficiaries. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1230 (1991) (stating that its programs are “designed by others to promote their purposes, not ours.” *Id.* at 1226). Stephen Carter notes that “the durable and demeaning stereotype of black people as unable to compete with white ones is reinforced by advocates of certain forms of affirmative action.” STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49-50 (1991). To be sure, there are many minority scholars who support presently conceived affirmative action initiatives. Nevertheless, thoughtful and committed scholars have raised the very issue of the true ‘affirmativeness’ of ‘affirmative action,’ and this from the perspective of the supposed direct beneficiaries.

91. Dare we denominate this a ‘back door’?

92. This enables the academy and its individual members to create a picture more sympathetic to its own practical and political convictions.

93. One moment of real and lingering regret in my teaching experience came during a class discussion in a seminar on *Issues in American Justice*. The topic at issue concerned aggressive policing tactics and, frustrated with the timid, theoretical nature of the discussion among the ten majority culture students, I broke my own self-imposed rule against “calling on” seminar students, and invited/required the one African-American student to weigh in. He was reluctant, as expected, and I ought to have respected this. Nevertheless—admittedly for my own purposes, irrespective of his—I pulled him into the discussion, and he obliged with the well-anticipated egregious stories of personally experienced police excess, uncomfortably relived in the classroom retelling. His participation had the anticipated and intended effect of electrifying class discussion thereafter, but at a cost which left me deeply dissatisfied, now as then. The simple fact was that I was using this young man’s experience for some shapeless, anticipated benefit of the other students who had no similar stories to tell, likely sacrificing his privacy and, in some way, his ‘self,’ in the process. It struck me at the time, and continues to impress me today, that this was/is the *dark side* of ‘diversity’: the using of a human being’s hard gained experiences for some benefit in which that

other anticipated ‘value added,’ the message is clear: Having previously highlighted competitive disadvantage, law schools are then prepared to notoriously ignore it in seeking some other benefit on behalf of the broader community being served. This is a cynical perspective, of course, but it is not an unreasonable one; to the extent it accurately reflects the pith of ‘diversity’ in legal education, it is potentially as debilitating as the qualitative non-affirmation of present-day ‘affirmative action’ initiatives.

Separate from each of the above, though alluded to by both in combination, is the general atmosphere which greets the African-American student on ‘day one’ of their law school experience and which continues for every day thereafter.<sup>94</sup> The law school is its own unique world, to be sure, but to the extent that it is a truly *foreign* cultural community, for most African-Americans, its ‘foreignness’ tracks much closer to majority-culture values than minority. From the ‘minority’ student status greeting them, the majority-culture dominated faculty and administrations in visible authority positions, to even the pseudo-Socratic classroom tones,<sup>95</sup> these students see precious little of ‘themselves’ in the typical law schools. Here, then, is a ‘mismatch’ of a very real sort, though not of the quantitative, cognitive type Sander points to with such confidence in outlining the source of the ‘success’ problem.<sup>96</sup> What might be the independent effect of *this* mismatch on the ultimate outcomes expected of those coming directly under its discomfiting influence?<sup>97</sup>

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same human being cannot equally participate, and at some likely personal cost to that person. I am doubtful that any of the majority culture students received any deep thing from the experience other than the cheap chance to gawk at another person’s difficulties, with myself orchestrating the viewing as a kind of culpable ‘ringmaster.’ At its rawest level, is this what we mean to value by referencing ‘diversity of experiences’ in the classroom? Does this take even the merest step toward really addressing cultural injustice in America, or does it instead merely reference and highlight it to some ignoble and visceral end and this in the most cynical of ways?

94. The only real exception to this for these students is the atmosphere in historically black law schools, the very exception to the ‘performance gap’ rule outlined by Sander in his own empirical profiles.

95. Its origins are western European in both form and effect, of course, and ‘after all.’

96. Sander, *supra* note 1, at 429.

97. Here let me indulge my own qualitative story by way of example. Different from Professor Sander’s foreign language woe (further referenced *infra*), my own undergraduate ‘waterloo’ came in the form of freshman calculus. Already reeling from the utter ‘foreignness’ of the frighteningly different place in which I had landed in my ‘elite’ private university, my undoing came in that first class of a subject I had reasonably expected to enjoy. Intimidated by the sheer size of the course’s text, I had just attained a measure of calm and resolve in that first class meeting when a ‘wise guy’ (of the type I have since come to understand as a ‘prep school all-star’) called out, for all to hear, “Are you serious? This is the text we used in *high school!*” I heard. Though hours of fretting and avoidance and general discomfort lay ahead of me before I dutifully picked up my dismal grade at semester’s end, on reflection I have since realized that I ‘lost it’ at that very moment. I was *intimidated*, and in a way that was

I do not mean here to suggest that these things are always active for each minority law student, but that they *may* be, singly or in combination, and that where active, the trajectory of their effect on educational outcomes is not greatly a matter of guesswork. Individually representing powerful impediments to a full-orbed, positive, *successful* law school experience, the actual effects of these things can be isolated and defined through qualitative considerations only, and not through quantitative analysis. They stand independent of any cognitive disadvantages reflected in a quantitative story and, in combination with those disadvantages, where existing, form a potent tandem threatening the way of the hopeful African-American achiever. They originate outside of the innate abilities of the student, are *systemic* in nature, to use Sander's own term, and raise the central question in a way that calls the academy to self-examination in fully appreciating the problem and properly developing its solution. This qualitative consideration is *important*; indeed, it is so critical to any such quintessentially human question that its absence represents a major flaw in any complementary quantitative study, clouding its vision and challenging its conclusions in the most foundational of ways.<sup>98</sup>

These qualitative considerations are entirely absent from Professor Sander's sprawling study, and their absence is of no small import to the breadth of its clarity or the right weight of its categorically presented

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new and daunting for me. It was not the subject that overcame me, but instead the atmosphere in which I was invited to master it. While all of my concentration would have been necessary in the best of circumstances to manage the class well, the distinct feeling of being on the short side of a 'stacked deck' made sure that that would not happen. I disconnected from the learning process altogether at that moment, with untoward results naturally following. The 'mismatch' which derailed my academic experience was not one of cognitive ability, in that case, but was instead the '*mismatch of experience*', with the crisis of confidence naturally following and with its pernicious intimidation in tow, having its ultimate effect on my success, or lack thereof.

98. The stronger the argument for these independent factors at work in the experience of the minority law student, the weaker Sander's 'mismatch hypothesis' becomes, of course. In any event, even apart from qualitative analysis addressing these issues, their possible existence alone rightly challenges the definitude with which Sander presents his related conclusions. Sander's data can highlight the fact that African-American law students are 'mismatched' in their law school placements and can separately note that they are doing very poorly in those placements, underscoring the reality that they are 'unconnected' from the educational process in some palpably negative way. However, by virtue of the numbers alone, the best he can reasonably suggest is the strength of the correlation between the two factors; he cannot conclude the existence of the one from the other (the very thing he does, over and over again, wrongly, in his piece). Qualitative work is necessary to establish—or refute—his correlative conclusion. If African-Americans are standing apart from the educational process for reasons having to do with the environment itself, for example, the ubiquity of the 'mismatch' across the law school spectrum renders it nothing more than a 'false positive,' a statistical echo which gives the appearance of a true correlation, without substance in fact. In any event, apart from supportive qualitative analysis—talking with these persons and finding out *from them* what is actually going on—Sander's correlations remain suspect, and his conclusions, therefore, palpably dangerous.

conclusions. This absence is no mystery, of course, as the careful reader explores all that Sander has to say. Yet, the matter bears repeating here: These very qualitative issues are among the “rather subtle matters” deliberately given “short shrift” by Sander’s own candid admission. They are “hard to measure” through his constricted quantitative work; but, they are, nonetheless, absolutely essential, as set out above.<sup>99</sup> In their absence, the ultimate utility of Sander’s study is drastically limited: It can tell the academy *that* there is a problem (which the academy already knew), and can put that problem in the important declarative perspective which only numbers can manage (genuinely helpful in this case), *but it must necessarily be made to stop there*. Until capable qualitative analysis comes alongside to complement—and challenge—Sander’s quantitative work,<sup>100</sup> his quantifiably neat, apocalyptic ‘mismatch hypothesis’ remains only that—a hypothesis—interesting, and possible, but *nothing more*; such is the case for all the conclusions following from his numbers.

V. CONCLUSION: “[S]IMPLY STOP USING RACIAL PREFERENCES.”<sup>101</sup>

*Once some honest conversation about affirmative action practices is underway, it will be much easier to talk about constructive solutions. The most obvious solution is for schools to simply stop using racial preferences. . . . [B]lacks as a whole would be unambiguously better off in a system without any racial preferences at all than they are under the current regime.*<sup>102</sup>

Several years ago, in the midst of the exciting, frenetic world of ‘summertime Washington D.C.,’<sup>103</sup> my then 19-year-old son and I met a

99. Sander, *supra* note 1, at 369.

100. The two forms of analysis are not mutually exclusive, of course. Indeed, in a study as ambitious in nature as the one Sander takes on, either form of analysis alone would likely reach only half the story at best. Both would be needed to fully address such an undeniably human story: *quantitative* analysis, to concretize parameters and variables in a way unavailable through any other medium of inquiry, and *qualitative* consideration to rightly give the numbers story depth and true meaning. Let me be very clear in saying here that, while I respect the work Professor Sander has completed, the lack of comparative and contrasting qualitative considerations—readily attainable but wholly lacking here—leaves me very distrustful of his too confident conclusions and the outcomes too naturally following. I ‘know’ there is ‘another story’ out there, contrapuntal to the one to which Sander has been led by his numbers, and I ‘know’ (qualitatively!) he has not reached it through his numbers (and never would, through them alone). I know this as well: Full understanding of the problem and its solutions lies in the *quality* of its review and, given its importance and the urgency of its solution, I for one cannot wait to see the progress that thorough qualitative review promises in this regard.

101. Sander, *supra* note 1, at 482.

102. *Id.* at 482-83.

103. Its unique identity as the seat of American political power, in combination with its warm summer climate, ease of access through efficient mass transit, magnetic pull for tourists and relative ease of internal navigation, makes the District of Columbia

young man who sought my signature on a petition for the defendants in the then highly anticipated *Grutter v. Bollinger et al.* case. He was a locally based law student, intellectually committed enough to the heart of the matter at issue—‘affirmative action’—that he would use his time to get involved at this level of direct action.<sup>104</sup> In acceding to his request, I could not resist asking a ‘gut’ question related to the issue with which he so passionately identified: “If matters came to it, would you be willing to yield your place to an African-American, under the aegis of ‘affirmative action?’” His response was so coldly matter-of-fact that he seemed to have anticipated the question, or had labored through it to completion at some earlier time at least: “I favor an expanding of the pie so that opportunity can be shared by all.” Repeating the question, with slightly less ‘wiggle room’ and greater emphatic inflection, his verbatim response was more categorical, with even less accompanying emotion than before: “I favor expanding the pie so that opportunity can be shared by all.”

While I might concede without contest the unfairness of the question posed in those circumstances, for me the experience has nevertheless taken on the character of something like a parable as I have considered it over the ensuing years. While the student was committed enough to the issue to have added shoe-leather to his talk, there remained in him a severe limit to that commitment, a possible personal cost he was simply not willing to consider in imagining resolution. But without that added, deeper commitment, his efforts and the solutions they anticipated were destined to be *conservative* in the most restrictive application of that term, notwithstanding the genuineness of his desire to see the problem really solved. Resisting even modestly radical reconsiderations of the problem, his limitation would preserve the *status quo*, maintaining the ‘us/them’ distinction, a distinction at the heart of the academy’s approach to equal educational access for as long as it has considered the question. The final end of the impetus seems clear: effectively mobilizing ‘us’ to reach out (down) to ‘them,’ it allows as many of ‘them’ to become ‘us’ as is reasonably to be expected,<sup>105</sup> leaving undisturbed the very structure

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a hotbed of activity of all sorts at that time of year: family tourism, indoor and outdoor cultural attractions and, of course, the ubiquitous political protest. It was the latter that had drawn my son and myself that particular weekend, he having just finished a book on the ‘protest years’ of late 1960s and early 1970s America, and wishing to experience something of that time in his own right. With the concurrent ‘gay/anti-gay’ rallies and the first well organized ‘anti-Iraq war’ protests on for that weekend, the city did not disappoint.

104. Admiring his commitment and seeking to encourage his energetic involvement, I resisted the urge to challenge this anomalous admixing of hyper-democracy—in the form of populist government petitions—with the Delphic, distanced reality that is constitutionally controlled Supreme Court politics, garrisoned as it is from popular contact.

105. Sander himself might practically place that figure at “4% of total [law school]



implicated in the perpetuation of the problem.

The academy would do well to acknowledge the unalloyed value of Professor Sander's important work, while taking special precautions regarding its profound limitations. In its favor, the study has carefully outlined the contours of the very real problem of black achievement after a generation-and-a-half of 'affirmative action,' and has done so in a richness of detail simply unavailable prior to its completion. However, to its measured detriment at best, it relies exclusively on quantitative tools to fix the locus of the problem in the numbers being used, and the 'affirmative action' flowing from their use. That African-Americans of some ability and achievement are 'disconnecting' from the American law school experience in great numbers and in professionally destructive ways was appreciated before Sander, and remains even clearer as a result of his work. But without sound qualitative analysis supporting his massive numbers regime, the academy cannot and must not be seduced by his too easy conclusions, or the plain, conservative solutions that seem to follow so naturally from them.<sup>106</sup>

Instead, the academy must take the best of what Sander has to offer and deliberately move forward from there. It must court qualitative review of the problem of a caliber akin to Sander's quantitative work—or it must commission that work itself—allowing African-Americans to 'tell their stories' to sympathetic professionals able to make good use of them. It must be prepared to take a good, hard look at what it finds—from Sander's results in combination with the all-important 'stories' that qualitative work might reasonably add—and to take a good, hard look at itself in the process.<sup>107</sup> This is not conservative; it is radical and curative and perhaps even transformative in the end, in a situation where the effects of such an

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enrollment." Sander, *supra* note 1, at 483. While many within the academy would perhaps see this as a fair and even generous proposed solution to the problem, I trust that my thinking is clear in challenging it as 'wrong headed' in every way. It is conservative at its core—even paternalistically so—and thus provides reinforcement of the flawed academy heuristic at a time when challenge is what is called for, and so badly needed.

106. And that's not all. Does anyone miss the odd retrograde force at the ultimate core of Sander's 'mismatch' hypothesis, against the telling backdrop of 'elitism' deliberately anchoring his work? As he puts it, unfortunately but clearly, the breadth of the scope of his thesis seems to be disturbingly vulnerable to the following chilling reworking: in the end, after all, there is 'ability'; thus, 'affirmative action' reifies a 'false positive' in which African-Americans—inferior as they are in these circumstances—simply cannot compete with their majority culture counterparts. A new song, with an odd, old, unsettlingly familiar refrain. And one many African-Americans like myself are tired of hearing.

107. This is not without precedent, of course. This is the very thing the academy refused to do at the time that African-Americans were first seeking entry in numbers to the segregated law schools of America. Now, in light of Sander's work and the general malaise of African-Americans in law schools today, the academy has another opportunity to proactively attend to the problem.

outcome could have both broad and deep positive effects. And, given the particular circumstances attending the question at hand, including those highlighted in Sander's work, this must occur soon.

In the meantime, for the African-American members of the academy, the matter is at once simpler yet more profound. As for its members in a 'management' capacity—minority culture administrators, professors, etc.—we must take very seriously the depth of the problems affecting African-American law students, problems that are underscored and highlighted by Sander's work. We must consider very carefully his suggestion that 'affirmative action' is itself creating devastating difficulties for our community, even while rejecting outright his misapprehended reasons as to 'why.'<sup>108</sup> We must be diligent in demanding of the academy that it ask the right questions in the wake of Sander's work, and we must be vigilant in helping it to arrive at the right conclusions and develop the right solutions

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108. My first 'post-*Grutter*' academic conference happened to be a particularized gathering of 'law professors of color' convened to consider some of the very questions at the heart of this paper. Incidentally, I was perplexed by the group response to the then just-released opinion, particularly the over-focus on Justice O'Connor's notorious "25-year" *dictum*. See *Grutter*, 539 U.S. at 343. (For my 'take' on the Supreme Court's *unconstitutional* focus on the creation of 'constitutional rules,' please see Anthony Baker, "So Extraordinary, So Unprecedented an Authority:" *A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 DUQ. L. REV. 729 (2001)). To begin with, it was on the lips of everyone at the conference, it seemed, and with an urgency that verged on desperation. The general tenor of the discussion was plain: "We only have 25 more years of 'affirmative action,' and we must determine how to use that time to greatest effect!" I must admit to having been put off by that reaction. My own initial response to that particular aspect of the Court's opinion was quite different: "You can keep your '25 years'; we don't need it, and we don't need you." (This last comment was not meant as a sign of disrespect, but comes directly out of my work as an historian, well familiar with the cathartic interaction of that body and African-America from the 19<sup>th</sup> century forward.) Through continued consideration of the same question in the ensuing years, I feel no different today from the way I felt then. As the academy's 'members of color,' we must challenge our own over-commitment to the 'false idol' of 'affirmative action' and negotiate our place within the whole of the academy against this vital backdrop: In the end, we do not need it. Indeed, as it has been both conceived and administered in the American context, with its fixed reliance on the active-negative language of "racial preferences" and "diversity justifications" as the cornerstones of our admittance, we cannot afford it. For African-Americans generally, the value system on which 'affirmative action' is *affirmatively grounded* is a false and debilitating one, and that has only grown worse with the academy's recent and ongoing self-gentrification through reactive application of the *U.S. News* profiles. The consistent, persistent 'ranking' of those law schools that are of the most practically proven value to our people, and which are historically and presently at the bottom of that gentrified 'pecking order,' ought to be our first clue. Where have we seen this before? We must reject outright the foundational constraints of 'affirmative action' and the over-narrow heuristic of 'success' on which it depends, for the benefit of ourselves and our people, and we must carefully and patiently explain to our colleagues "why." Until we do this, given the clear context of 'affirmative action' today, we are under-serving both our own people seeking entrance into the law school academy, and the academy that is actively determining their admittance.

to the problems that he has identified. And we must do all of this *with purpose*, in a collaborative spirit of collegiality and constructive cooperation.

For its African-American consumers—students presently seeking entrance into the profession through its one narrow door and its unique halls—the matter is more urgent. In a vaguely paternalistic spirit of ‘full disclosure,’ Sander suggests that law schools give African-American applicants the whole dismal numbers profile in advance,<sup>109</sup> but we should go one step further: We should request the information ourselves, for our own use and benefit.<sup>110</sup> The same thing applies to his misapprehended solution “for schools to simply stop using racial preferences.”<sup>111</sup> We ought to count the cost, appreciating the value of ‘first strike’ in this regard, and turn the ‘racial preferences’ back outright, ourselves.<sup>112</sup> We must

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109. Sander states the matter plainly:

More specifically, each law school that takes race into account in its admissions should provide to all applicants a document that lists: (1) the median academic index . . . of admitted and enrolled applicants, by race; (2) the median class rank of each racial or ethnic group whose identity is a factor in admissions; and (3) the pass rate of recent graduates from each group on the bar of the school’s home state. This information would of course greatly aid applicants (particularly those who receive preferences) in evaluating the potential costs of attending a given school.

Sander, *supra* note 1, at 482. This last sentence is reflective of his own ‘mismatch hypothesis’ and adds the vague paternalism of which I have complained above. I cannot resist noting what a wonderful suggestion this is: singling out a group of persons ‘benefiting’ from preferences they did not create, highlighting the fact of their benefit, their comparatively non-competitive class status and the long chances of their final success, all before their first law school class, and then inviting them in to compete ‘on an even playing field.’ Under the circumstances, to describe this as a “great aid” for these students is to miscomprehend fundamentally the basic trajectory of human nature.

110. Requesting that information for ourselves is significant, and significantly different from receiving it from the institution, as Sander suggests. The act of requesting affords for the requesters the important feeling of taking a hand in their own destiny, gathering information for their own purposes and use. It also serves notice to the institution receiving the request of the same thing. It has practical benefit as well. It allows African-Americans to determine ‘who’s who’ in legal education while simultaneously affording each institution an opportunity for self-reflection, measuring its own progress towards the necessary goal of creating a nurturing, enabling environment for all its constituents.

111. Sander, *supra* note 1, at 482. Sander’s thinking here also derives directly from his ‘mismatch hypothesis.’

112. Here I highlight again the empowering effect of such an action, suggesting it as a valuable and necessary action as well. Sander augments this suggestion with the colorful observation, “this is not an unthinkable Armageddon,” *id.*, and for once he and I are *ad idem*, though again for different, almost opposite reasons. We must train ourselves not to fear the outcomes of such a plan, while at the same time fully understanding the ancillary benefits of meeting these challenges before us in circumstances reifying our own discrete and important cultural values. If a refusal of racial preferences means marginally fewer colored faces at ‘elite’ institutions, what

fundamentally challenge the ‘success’ paradigm currently segregating the American legal academy and holding it hostage in the process, and we must do so in terms compatible with our own discrete character. We must declare ourselves no longer ‘for sale,’<sup>113</sup> refusing to chase after bright promises that too often hold a different reality for us than the one it holds for others in the American spectrum,<sup>114</sup> and we must chart our own

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does that really matter to us in the end? The attending cost is the fundamental challenge of the achievement and ability for every African-American throughout the system, and it is a cost our people cannot afford to pay, and should not have to. Indeed, the entire ‘elite success’ paradigm is one running naturally counter to some of our own bedrock cultural values at least, and ought to be held in some suspicion by virtue of its unremitting ‘whiteness’ alone. The ‘best’ American law school for the African-American, now as ever, does not depend on institutional reputation. That school is the one that will encourage us in the realization of our goals without great sacrifice to our values, values which are quintessentially American even if uniquely so, given our unique experience in American history. The list of those law schools is different for each of us though likely not long for any of us—or at least not as long as it might be, or should be—and it simply does not show up anywhere on the *U.S. News* profile. A thoughtful rejection of ‘racial preferences’ would aid us in identifying those law schools more naturally compatible with our direct needs while highlighting as well, for ourselves and themselves, those that are less so. And we need not fear a dearth of our own anywhere, even at the most ‘elite’ American law schools: God scatters ability across cultures indiscriminately, and those of us most suited to those particular environments will find our way there without question, and, finally, and refreshingly, on our own terms.

113. Here I mean to challenge our often under-considered, too quick grasping at financial incentives in the form of ‘scholarship offers,’ proactively and cynically designed to ‘buy us’ for particular programs. This is ‘trophy hunting’ at its base, and it unfairly and unwisely favors the ‘biggest players’ in the student enrollment sweepstakes, too often at great personal cost to the individual taking the bait. The prospect of a relatively debt-free education is of value only if the individual is able to *get the education*—in the form of the *degree*—in the end. In a case where that outcome is reasonably in the balance, students would be far more greatly benefited by forgoing the windfall and accepting debt-financed education if they can reasonably look forward to employment in their profession of choice in retiring that debt. The prospects of ruined professional opportunities and the accompanying loss of personal worth and self-esteem that accompanies failure does not justify the risks associated with being ‘bought’ into an institution which holds for that student little ability to deliver on its elite promise. Besides, the ‘buying’ prospect references its own peculiar and troubling historical echoes with regard to African-America, echoes that ought to produce concern and even skepticism in all of us.

114. Someone must say it, and we must hear and understand it: Like much in the American experience, the promise of the ‘elite’ success paradigm—the better the law school the better the job prospects—does not always translate for African-Americans. In a conversation with Justice Clarence Thomas some years ago, I was fascinated by his confessed initial job difficulties on graduation from an ‘elite’ northeastern law school. He alluded to some surprise and disappointment at the time, his experiences differing from many of his majority culture colleagues, undoubtedly. Even if the promise of ‘elite’ benefits is available to us, they can be realized only by completing the program in question, and doing so in good standing, a matter which remains connected to the particular institutions we attend.

‘success’ in unique, circumstantially relevant ways.<sup>115</sup>

In closing, if the post-civil rights ‘affirmative action’ movement in higher education were analogized to a three-act passion play, Act I would have to be considered a grand beginning indeed. Full of promise and energy, purpose, and hope,<sup>116</sup> its goal was noble—full access to professional education and experience for all ably gifted Americans, race being deliberately excepted. And its means were direct—preference to those most cruelly denied it throughout America’s apartheid past.<sup>117</sup> Sander’s *Systemic Analysis* rings down the curtain on Act I on a clear and sober note: whatever the laudable social and political intentions of ‘affirmative action,’ at its thirty-five year mark there exists ample evidence from many sources that it is not working as intended nor achieving what it should. In our play, Act II will focus on the question raised by the final scene of Act I—why?—and it falls to the academy itself to dutifully consider the proper answer. Much depends on the care given to Act II’s question, as the answer preferred will wholly define the all-important closing for Act III, the *what-to-do-about-it* act.

That Act III’s character is dependent entirely on Act II’s outcome should be plain to the most casual observer of the matters at the heart of Professor Sander’s daunting, vital study, and of this reply. For Sander the ‘why?’ is quantitatively clear—*mismatch*—and his Act III remedies are dour and

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115. While this is comparatively less often the case for our majority culture colleagues, many African-Americans currently entering the stream of higher education represent the first generation of their respective families to do so. For those persons, ‘success’ must be carefully defined in both circumstantial and culturally relevant terms. For us, merely attending a higher ranked law school is clearly secondary in value to graduating from any law school, period. While it does happen on rare occasion—and almost always regarding individuals of inordinate natural ability—seldom does an individual gaining initial entrance into any competitive arena start their journey at the very apex. For such individuals, the ‘best’ law school is not the one with the highest reputation, by any measure, but rather the one at which they individually can learn, grow, mature, develop professionally and *graduate*, wherever it finds itself in the status order. The typical rhythm of things is not necessarily wrong: My African-American father and mother took college courses, their children graduated from four-year institutions and it is their grandchildren that are now walking ‘ivy halls.’ This must be foremost in the thinking of those of us who are not simply seeking to walk halls of ‘prestige’ for a time, but rather to establish our families for generations to come, as did my own parents, patiently and realistically.

116. I am idealizing things here, of course. ‘Affirmative action’ has always had its army of detractors, some well-meaning and many otherwise. However, as a search for a viable solution to a problem, and as a byproduct of America’s tortured racial past, it was naturally visited with utopian aura in some form, an exercise focusing on harmonizing America’s practical reality with its ideal. Such an endeavor is always tinged with hope and expectation.

117. This is my personal take on the true engine behind the program’s drive—remedy and justice—rather than Professor Sander’s preferred “speed[ing] the process of fully integrating American society.” Sander, *supra* note 1, at 368. My guess is that he and I would not actually be far apart on this matter, though it is no surprise to me that our starting points are so different, in quality and character.

lifeless indeed, even if efficiently so, bleeding out color or real drama as they set about their prescriptive work. However, a thorough qualitative review of the Act II question, one seeking out the story beyond the numbers, should provide a very different answer at the end of the inquiry; this African-American writer, more intimately familiar with all aspects of the “massive social experiment”<sup>118</sup> than the Professor, is all but certain of it. And should this prove to be the case, what a different Act III remedy would be called for from the one that caps Sander’s work. Then the spotlight would turn from the victim-beneficiaries to the academy itself, locating the problem in its own processes and commitments rather than in its beneficiaries’ lack, and seeking solutions closer to home, in itself, as it has the stomach and courage to discover and implement them.

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118. *Id.* at 368.

