
 André Douglas Pond Cummings

 University of Arkansas at Little Rock William H. Bowen School of Law, acummings@ualr.edu

 Seth Harper

Follow this and additional works at: https://lawrepository.ualr.edu/faculty_scholarship

Part of the Civil Rights and Discrimination Commons, Law and Society Commons, and the Legal Education Commons

Recommended Citation

"OPEN WATER":1 AFFIRMATIVE ACTION, MISMATCH THEORY AND SWARMING PREDATORS – A RESPONSE TO RICHARD SANDER

andre' douglas pond cummings2

I. INTRODUCTION

Affirmative action continues to divide and fracture the United States of America.3 The current conceptualization of affirmative action survives precariously in U.S. law and consciousness following the Grutter v. Bollinger4 and Gratz v. Bollinger5 Supreme Court decisions,6 and the recent retirement of

1 OPEN WATER (Lion’s Gate Films 2004).
2 Associate Professor of Law, West Virginia University College of Law; J.D., Howard University School of Law. I am grateful to Professor Adrien Wing, University of Iowa College of Law, for extremely helpful feedback in both the conceptualization of this Article and in early drafts. I also wish to acknowledge Professor Devon Carbado (UCLA College of Law), Professor Dorothy Brown (Washington & Lee University School of Law), and Professor Steven Huefner (The Moritz College of Law at the Ohio State University) for helpful comments to later drafts of this Article. I am grateful to my extraordinary colleagues at the West Virginia University College of Law for incisive commentary and feedback during several informal scholarship meet-ups, particularly Professor Kevin Outterson, Professor Caprice Roberts and Professor Joseph Grant (now at the Appalachian School of Law). Thanks also to the Mid-Atlantic People of Color Scholarship Conference, February 2005, at the University of Louisville’s Brandeis School of Law, and all who participated for superb feedback and critique. Genuinely terrific research assistance was provided by West Virginia University College of Law students Nick J. Sciullo, class of 2006, James Heishman, class of 2006, Jennifer K. Bennington, class of 2006, D. Carter Hardesty, class of 2006, Tina Cecil, class of 2006, and Seth Harper, class of 2006. As always, to Lavinia and Cole Kaianuanu for support, collaboration and peace. As usual, the politics and errata of this Article belong exclusively to me.
3 See Lani Guinier & Susan Sturm, The Future of Affirmative Action, in WHO’S QUALIFIED 3 (Guinier and Sturm eds., 2001) (“For more than two decades, affirmative action has been under sustained assault.”); see also andre douglas pond cummings, Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: “The Sun Don’t Shine Here In This Part of Town”, 21 HARV. BLACKLETTER L.J. 1, 2-9, n.5, n.19 (2005) (detailing media stories that report the passionate affirmative action debate that continues to capture the attention of the U.S. citizenry).
5 539 U.S. 244 (2003).
6 See infra notes 8-10 and accompanying text.
swing vote Justice Sandra Day O'Connor. For the first time in twenty-five years, the U.S. Supreme Court in \textit{Grutter} and \textit{Gratz} directly addressed the question of whether the use of race as a positive factor in university decisions was still constitutional. According to \textit{Grutter}, constitutional consideration of race may in fact continue to be used as a "plus factor" in university admissions decisions, while, per \textit{Gratz}, assigning specific points or numerical boosts to candidates of color is unconstitutional in admissions decisions. Currently, the law of the land is that college and university officials may consider race as a plus factor in admissions decisions. However, much like the stranded scuba divers in the 2004 motion picture \textit{Open Water}, affirmative action continues to survive perilously as academic sharks and other predators nip at the heels and

\begin{itemize}
\item[7] See O'Connor Taking Swing Vote Into Retirement, NPR, http://www.npr.org/templates/story/story.php?storyId=4726166 (last visited May 7, 2006) ("Sandra Day O'Connor was the first woman named to the U.S. Supreme Court when President Ronald Reagan nominated her in 1981 to fill the seat vacated by Justice Potter Stewart. She has often been the deciding vote on a divided court in recent years."). Justice O'Connor authored the majority opinion in \textit{Grutter v. Bollinger}.
\item[8] See Regents of University of California v. Bakke, 438 U.S. 265, 320 (1978). In \textit{Bakke}, the Supreme Court stated:

\begin{quote}
[T]hat portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed. In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.
\end{quote}

\textit{Id.}

\item[9] 539 U.S. at 334 ("Universities can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant").

\item[10] 539 U.S. at 270 ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.").


\item[12] See \textit{Open Water} (Lion's Gate Films 2004). In \textit{Open Water}, a scuba-diving couple is stranded in the open sea by a diving boat and crew due to a miscount of participating divers in the scheduled launch. The film is shot by hand-held camera and seeks to chronicle the real danger of being left to float in the open ocean hoping for some type of rescue. Eventually, the man and woman begin to notice circling sharks and the man is soon thereafter bit on the leg by a shark. The remainder of the motion picture tells the story of the couple adrift, hoping to be discovered and saved while evading swarming sharks.
\end{itemize}
ankles of the doctrine. The latest critic to nip at the heels of affirmative action is UCLA Law Professor Richard Sander, who recently conducted a comprehensive analysis of affirmative action in U.S. law schools and concluded in a Stanford Law Review article that it does not benefit African American students and in fact does positive injury to them.

Sander posits that African American law students attend law schools that they are academically mismatched, and thus unqualified, to attend. Because most United States law schools use substantial racial preferences in their admissions decisions, Sander argues that many black law students are admitted to law school with significantly lower academic indicator numbers than their

---


14 I use the terms “African American” and “black” interchangeably throughout this Article.

15 See Sander, supra note 13, at 371.

16 See Sander, supra note 13, at 371. Sander writes:

The admission preferences extended to blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences.

Id.; see also infra Part II.

17 Academic indicator numbers in the law school setting refers almost exclusively to a law school applicant's LSAT score (Law School Admissions Test) and his or her UGPA (Undergraduate Grade Point Average). Most U.S. law schools subscribe to a formula that combines the LSAT score and the UGPA to predict a grade point average or that predicts the likelihood of success that the student might attain in the first year of law school. This is commonly referred to as an "indicator" score or as academic indices. See Sander, supra note 13, at Part IV. Obviously, this is an inexact science, where students with low indicator scores often finish much higher than the predicted success rate and where students with high indicator scores end up in the bottom portion of the class, due to many varied factors that influence performance, outside of indicator numbers. See Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law
white classmates, which places African American law students at "an enormous academic disadvantage." According to Sander, black law students are ill-equipped to compete at the law schools that admit them using "racial preferences," and thus they earn very poor grades and are at-risk to complete law school and pass the bar examination upon graduation. Sander arrives at these conclusions through empirical evidence and statistical evaluations, ultimately concluding that if racial preferences (i.e., affirmative action) were eliminated, African American law students would be admitted to the schools they were appropriately qualified to attend, secure better grades, drop out of law school less, and pass the bar exam with greater success. 

\(^{18}\) See Richard H. Sander, Summary: A Systemic Analysis of Affirmative Action in American Law Schools, http://www.law.ucla.edu/sander/Systemic/summ/AffirmativeActionSummary.htm (last visited May 7, 2006) ("[B]lack students admitted through preferences generally have quite low grades in law school — not because of any racial characteristic, but because the preferences themselves put them at an enormous academic disadvantage."); see also infra Part II.

\(^{19}\) See Sander, supra note 13, at 447; see also Sander, supra note 18.

\(^{20}\) See Sander, supra note 13, at 417. Sander states, "In a race-blind system, the numbers of blacks enrolling in the top twenty schools would be quite small, but the numbers would be appreciable once one reached schools ranked twentieth to thirtieth, and blacks would steadily converge toward a proportional presence as one moved down the hierarchy of schools." Id. Sander also claims that "[a]ll of this implies that racial preferences — boosting black applicants into higher-tier schools — ends up hurting the chances that these students will actually get law degrees." Id. at 440. Sander concludes that "[i]n a less competitive school, the same student might well thrive because the pace would be slower, the theoretical nuances would be a little
Sander's *grande conclusão* is if affirmative action were to be eliminated from law school admissions decisions, a greater number of African American lawyers would be admitted to the practice of law in the United States.\(^1\)

Sander's study and article has created a conflagration of attention and rebuke.\(^2\) The law review article and findings have been widely reported in the mass media,\(^3\) including Internet columns,\(^4\) and across the airwaves of the less involved, and the student would stay on top of the material. The student would thus perform better in an absolute as well as a relative sense.” *Id.* at 450; see also infra Part II.

\(^{21}\) See Sander, *supra* note 13, at 477. Sander writes that:

There are, in short, many uncertainties built into any prediction about how a change to race-blind admissions would change the production of black lawyers. There are a couple of conclusions that do seem to me very defensible (and which are the real point of my simulations and attendant discussion). First, the oft-repeated claim that the number of black lawyers would be decimated by the elimination of racial preferences is simply untrue. One can make an argument that the number might decline, but the balance of evidence suggests an increase is more likely.

*Id.*


United States. Sander's critics have responded in strength and with much vigor as his conclusions have been widely panned and criticized. The portions of his study that have generated the most censure are his statistical and empirical conclusions. Many prominent scholars and practitioners have called into question Sander's methodology, conclusions and statistical analysis. In fact, Dr. Marta Tienda, a Princeton Professor of Sociology and Public Affairs, flatly stated at the January 2005 AALS meeting in San Francisco that Sander's conclusions were implausible and could never withstand challenge in any mathematical or methodological sense in any peer-reviewed field of research.

Sander's conclusions trouble me. After carefully reading Sander's Systemic Analysis, all of the critiques and replies, and each of Sander's
responses to them, I have become convinced by the manner, logic and number of criticisms levied against his statistical analysis that his study is numerically, methodologically and mathematically flawed. However, I comfortably leave that analysis and critique in the hands of those better situated than me to challenge his numbers. My critique comes from a much different place than that of those scholars challenging the accuracy or authenticity of Sander's study.

Admittedly, Sander's Systemic Analysis and its conclusions are seductive and simple. Notwithstanding, his law review article and conclusions therein trouble me for a range of reasons. First, I am deeply troubled by Sander promulgating a most distasteful and objectionable form of paternalism in his anti-affirmative action stance. Second, I am acutely troubled by Sander casting himself in the fateful and historically disturbing role of the "Great White Father." Third, I am profoundly troubled by Sander's manipulation of the mass media in drawing attention to his study and purported findings, particularly the use of his real life role as the father of a biracial son and his claim that he came to his difficult conclusions as a sympathetic and reluctant white liberal. Fourth, I am intensely troubled by the failure of Sander to consider, in any recognizable sense, crucial issues that impact his conclusions such as the clear benefits of diversity in the law school classroom and the significant work that law school admissions committees' undertake in evaluating applicants aside from strict LSAT and GPA considerations.

29 See Ayres & Brooks, supra note 22, at 1810-11; see also Chambers et al., supra note 22, at 1857; Dauber, supra note 22; Ho, supra note 22, at 1997; Harris & Kidder, supra note 17, at 103; Tienda & Alon, supra note 27.

30 See supra note 27; see also infra Part III.

31 See Sander, supra note 13, at 371; see also infra Part IV.

32 See Sander, supra note 13, at 370; see also infra Part V.

33 See supra notes 23-25 and accompanying text.

34 See Sander, supra note 13, at 370 ("My son is biracial, part black and part white . . . .").

35 See id. at 370-71; see also infra Part VI.

36 As a committee member of the West Virginia University College of Law's admissions committee, I am keenly aware of the manifold issues and considerations that go into the decisions as to whether a student will be offered a seat in a law school class. For us, LSAT and GPA considerations are only the starting point as to whether a student will be invited to join our law school. We carefully consider at least ten or eleven other issues before making our determinations, including residency, background, letters of recommendation, undergraduate grade patterns, race, socioeconomic status, life experience, etc. In Cry Me a River, U.C. Davis law professors Johnson and Onwuachi-Willig respond to Sander's allegation that it is impossible to explain diverse law school admissions outcomes without presuming that law schools unconstitutionally add points to academic indices or place minorities into racially
What causes me the most angst and distress, however, is that while Sander's study sheds light upon troubling statistics which he did not create (not new, just now more publicized) that expose the serious United States education problem of the racial testing gap between white students and minority students, labeled the "Black-White Test Score Gap" (the "testing gap"), the difficult segregated admissions pools by plainly stating "the various disparities might well be explained by the information gleaned from individual review of each application and the consideration of difficult to quantify variables such as extracurricular activities, community involvement, leadership abilities, and disadvantages overcome. ... Sander's study fails to account for such considerations." See Johnson & Onwuachi-Willig, supra note 22, at 4 (citation omitted); see also infra Part VII.


African Americans currently score lower than European Americans on vocabulary, reading and mathematics tests, as well as on tests that claim to measure scholastic aptitude and intelligence. This gap appears before children enter kindergarten and it persists into adulthood. It has narrowed since 1970, but the typical American black still scores below 75 percent of American whites on most standardized tests. On some tests the typical American black scores below 85 percent of whites.

Id.; see also Harris & Kidder, supra note 17, at 104. Harris and Kidder describe the testing gap as follows:

Sander's finding, however, is contradicted by the Bar Passage Study as well as the consistent findings of researchers in the field showing that black students with the same law school tier earn lower grades. This leads to an inference that directly contradicts Sander's thesis: If black and white students with the same entry credentials do not earn the same grades, then something else besides credentials must explain the outcome.

Id.; see also Chambers et al., supra note 22, at 1880-1887. Chambers et al. report that discouraging gaps exist although they cannot be attributed to affirmative action:

Our analyses of both the NSLSP and BPS thus reveal that Sander is wrong when he concludes that the current lower performance by African Americans in law school is "a simple and direct consequence of the disparity in entering credentials between blacks and whites." It is not. ... [Sander is wrong again when he] rejects the possibility that stereotype threat and test anxiety contribute to the lower grades African Americans receive.

Id. at 1880-81; see also Claude M. Steele, A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance, 52 AM. PSYCHOLOGIST 613, 614-15 (June 1997). Claude Steele, one of the leading researchers to discuss stereotype threat reports:

Although black students begin school with standardized test scores that are not too far behind those of their white counterparts, almost immediately a gap begins to appear that, by the sixth grade in most school districts, is two full grade levels. ... Perhaps most discouraging has been the high dropout rate for African American college students: Those who do not finish college within six years is 62%, compared with a national dropout rate of 41%. And there is evidence of lower grade performance
performance and grade gap between minority law students and white law students (the “performance gap”), and the bar examination passage gap between black and white students, labeled the “Black-White Bar Passage Gap,” he does not undertake a fundamental examination of the root causes of these problems. These are very serious evils indeed – disturbing issues that many of us in the legal academy should be (and are) working hard to understand and resolve. Sander, however, takes the easy

among those who do graduate of on average two thirds of a letter grade lower than those of other graduating students. . . . At the graduate level, although black women have recently shown modest gains in PhDs received, the number awarded to black men has declined over the past decade more than for any other subgroup in society. 


In the bar examination, a[n] . . . observable difference in the bar passage rates of Blacks and whites can be called the “Black-White Bar Passage Gap.” It is the size of this gap and the resulting impediment to efforts to diversify the legal profession that have raised concerns about the continued use of the bar examination as an impartial gatekeeper to the legal profession.

The effect of the Black-White Bar Passage Gap is that “the bar examination operates as a substantially greater barrier to entry into the legal profession for Blacks and Hispanics than it does for whites.” Id. (quoting Dannye Hollen & Thomas Kleven, Minorities and the Legal Profession: Current Platiitudes, Current Barriers, 12 T. Marshall L. Rev. 299 (1987)); see also Roland G. Fryer Jr. & Steven D. Levitt, Understanding the Black-White Test Score Gap in the First Two Years of School, 86 Rev. of Econ. & Stat. 447, 447-464 (2004) (discussing the pervasiveness of the Black-White test score gap and its prevalence across all age ranges). The gaps in test performance cannot be explained fully by socioeconomic stratification. See Steele, supra note 37, at 615 (“Group differences in socioeconomic status (SES), then, cannot fully explain group differences in academic performance.”).


In the case of law schools, the discriminatory practice is the misuse of the LSAT in the admission process. Specifically, it is estimated that at least 90% of law schools, have admission practices that presumptively deny applicants based on how they fall on a grid formulated around LSAT and Undergraduate Grade Point Average (UGPA). For example, based on a LSAT cut-off of 145, over 60 percent of black applicants will be presumptively denied, but only 20 percent of white applicants will be “presumptively denied.” While “presumptive” denial need not be absolute, for some schools less than .5 percent of the applicants in the “presumptive deny” category are subsequently admitted.
road, looking for a scapegoat upon which he can pin the entirety of the racial testing gap predicament, rather than undertaking a careful and thoughtful examination of the source(s) of the problem. Sander chooses his scapegoat (affirmative action) and then inexplicably attaches the entirety of the resolution to these problems on eliminating that scapegoat. In my mind, this scapegoating is immeasurably deleterious, dangerous and divisive for a multitude of reasons. Sander, a self-avowed “empiricist,” will likely blanch to hear or read that I intend to critique his work from a normative and narrative position. For all of the things that it is, this Article is definitively not an empirical critique. That said, this Article will proceed as follows:

First, the Article will very briefly review Sander’s Systemic Analysis and describe the conclusions that he draws from his study. Second, also very briefly, this Article will explicate a few of the scholarly articles that reject Sander’s study from a statistical, methodological and empirical position. Thereafter, the Article will critique Sander’s work from a different place, by

\textit{Id.} See Sander, supra note 13, at 478 ("Law school admissions preferences impose enormous costs on blacks and create relatively minor benefits."). The term “scapegoat” has symbolic and biblical meaning:

“scapegoat” – 1: a goat upon whose head are symbolically placed the sins of the people after which he is suffered to escape into the wilderness as part of the ceremony prescribed by Biblical law for Yom Kippur; 2: an animal or person to whom sins, ill luck, or other evils are ceremonially attached and who symbolically bears them away by being sacrificed or exiled; 3 a: a person or thing bearing the blame for others; b: a person, group, race, or institution against whom is directed the irrational hostility and unrelieved aggression of others; ‘2 scapegoat’: to displace aggression or project guilt upon. ‘scapegoater’: one that makes a scapegoat of something or somebody. ‘scapegoatism’: the casting of blame upon others: the attribution of failure to the malign activities of an individual or group.

\textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY} 2025 (1986).

See infra notes 68-86 and accompanying text.

\textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY} 743 (1986).
describing how his article engages in flat-out objectionable paternalism.

Fourth, the Article will continue with a comparison of Sander's position to that of the historical "Great White Father." Following that, the Article will analyze and question Sander's use of his position as a reluctant white liberal \(^4\) and the use of his son (identified in his Systemic Analysis as "part black") \(^4\) to authenticate himself and his position. Sixth, this Article will strongly consider issues that Sander did not respect that impact his conclusions. Finally, the Article will conclude by explaining why Sander's scapegoat approach is so treacherous and why his study should be viewed suspiciously and questioned not only from an empirical and methodological standpoint, but also from a normative one.

II. "A SYSTEMIC ANALYSIS OF AFFIRMATIVE ACTION"

Sander set out at the launch of his "systemic analysis" to evaluate the impact of affirmative action in United States law schools and to examine specifically whether the benefits of affirmative action for African American students outweigh the "costs" of affirmative action on black law students. \(^4\)

Sander is able to conclude that affirmative action "produces more harms than benefits for its putative beneficiaries." \(^4\)

At the base of Sander's conclusion is the very real fact that most U.S. law schools permissibly admit students of color through affirmative action policies that allow the constitutional consideration of race as a plus factor in making admissions decisions. \(^4\)

For those law schools that actively practice affirmative action, once an applicant's file is considered in its entirety, students of color (specifically African American students in Sander's study) are admitted into most U.S. law schools with indicator numbers that are on average lower than

\(^{43}\) See Sander, supra note 13, at 370.

\(^{44}\) Id. at 370-71.

\(^{45}\) See id. at 369-70. Sander notes that he does not evaluate affirmative action in connection with other minorities or women, but just evaluates the impact of affirmative action on African American law students.

\(^{46}\) Id. at 371.

\(^{47}\) See id. at 368. Sander writes that:

Since Bakke, universities have often tended to justify affirmative action for its contributions to diverse classrooms and campuses. But the overriding justification for affirmative action has always been its impact on minorities. Few of us would enthusiastically support preferential admission policies if we did not believe they played a powerful, irreplaceable role in giving nonwhites in America access to higher education, entree to the national elite, and a chance of correcting historic underrepresentations in the leading professions.

Id.
those white students that are admitted at the same institution.\textsuperscript{48} Therefore, many African American law students attend law schools where their LSAT score and UGPA are lower, and in some cases significantly lower, than the average non-affirmative action admittee.\textsuperscript{49} While many other factors are taken into consideration when admissions decisions are being made,\textsuperscript{50} Sander’s study focuses on the disparity between the indicator averages of African American students admitted under affirmative action policies versus non-affirmative action students.\textsuperscript{51} Because this very real disparity exists between African American and white students’ indicator averages,\textsuperscript{52} Sander argues that African

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 413-14. Sander discusses the mismatch gap as:

ɫow, suppose we add affirmative action into the mix. Suppose that an elite school such as Yale wants to admit an academically strong class, but also wants to enroll a significant number of black students (Yale’s student body is regularly around 8\% to 9\% black). Even at the top of the distribution of undergraduate performance and LSAT scores, there is a significant black-white gap. The blacks that Yale admits, on our 1000-point index scale, will tend to have indices of perhaps about 750, while the white admits will tend to have indices of perhaps about 875.

\textit{Id.; see also supra} notes 18-21 and accompanying text (describing the mismatch theory).

\item See Sander, \textit{supra} note 13, at 429. More specifically, Sander states:

In other words, the collectively poor performance of black students at elite schools does not seem to be due to their being “black” (or any other individual characteristic, like weaker educational background, that might be correlated with race). The poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools’ use of heavy racial preferences. It is only a slight oversimplification to say that the performance gap in Table 5.1 is a by-product of affirmative action.

\textit{Id.}

\item See \textit{supra} note 36 and accompanying text; \textit{see also infra} Part VII.B (describing the admissions process undertaken at most American law schools).

\item Sander, \textit{supra} note 13, at 432 n.178. Concentrating solely on the indicator average disparity, Sander claims:

The size of the black-white gap in law school performance closely matches the size of the gap at highly selective undergraduate colleges, as reported by Bowen and Bok in \textit{The Shape of the River}. They observed that the college grades of black students “present a . . . sobering picture.” [Bowen & Bok] report that the average class rank of black matriculants was at the twenty-third percentile. I find that the black average percentile at the most elite law schools was at the twenty-first percentile. Of course, averages are raised disproportionately by a few students with very high grades – hence my general reliance on distributions and medians in reporting grade data. The implication of the statistic reported by Bowen and Bok is that the “typical” or “median” black student at elite American colleges has a class rank close to the tenth percentile and is outperformed by 94-95\% of the white students.

\textit{Id.} (citations omitted).

\item See \textit{supra} notes 37-40 and accompanying text.
\end{enumerate}
\end{footnotesize}
American students at most U.S. law schools are summarily “mismatched” (meaning overmatched), overwhelmed and in over their heads.\footnote{Sander, supra note 13, at 453-54. Sander states: Research on the “academic mismatch” phenomenon has not settled on an exact causal mechanism, but there is a growing consensus that the mismatch problem is real and that it is exacerbated by large racial preferences in admissions. . . . The analysis I report here takes advantage of the fact that affirmative action policies place similar blacks and whites at very different institutions. These policies create an opportunity for a natural experiment on the effects of academic mismatch – an experiment that shows that it has large and devastating effects on blacks’ chances of passing the bar. It is clear enough that going to a school where one’s academic credentials are well below average has powerful effects on performance in law school and on the bar.} Because of this “mismatch,” Sander makes several startling predictions and conclusions in his Systemic Analysis. Perhaps the most surprising is his claim that if affirmative action were to be eliminated from law school admissions decisions, more black lawyers would eventually end up practicing law, not less.\footnote{Id. at 372 (“Perhaps most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system.”). Sander posits that: If all preferences were abolished, the data in Part VIII suggests that the number of black attorneys emerging from the class of 2004 would be 7% larger than it is. The number of black attorneys passing the bar on their first attempt would be 20% larger. These numbers are simply estimates, resting on the assumptions I have detailed; but even if the attrition effects of the current system were much smaller than I have estimated, we would still be producing approximately the same number – and much better trained – black attorneys under a race-blind system.} Sander concludes that if racial preferences were abolished, then African American law students would naturally “cascade” to the law school they are more academically qualified to attend.\footnote{Id. at 373-74. Sander states: Because the cascade effect principally reshuffles black applicants among law schools rather than expanding the pool, about 86% of blacks currently admitted to some law school would still gain admission to the system without racial preferences. Those who would not be admitted at all have, under current practices, very small chances of finishing school and passing the bar.} The problem of “mismatch” would no longer be in play as black law applicants would matriculate to the law school to which their indicator numbers comfortably place them.\footnote{Id. at 441-42. Sander writes that:} Based on this
downward flow to law schools where the indicator numbers match up better, Sander guesses that African American law students would perform dramatically better and get significantly stronger grades, causing a net increase in practicing black lawyers of 8%. Sander professes to prove all of this empirically, through examining numbers, comparing statistics, performing regression analysis, and finding "beyond any doubt that a race-blind system would not have severe effects on the production of black lawyers, and that the black lawyers emerging from such a system would be stronger attorneys as measured by bar performance."

Sander rightly anticipates that one of the many criticisms of his study is that even if African American law students at elite schools finish in the lower part of their class, they would still be better situated for the job market and better prepared for bar examination performance. Finishing in the bottom part of

[A]ffirmative action has two separate negative effects on black graduation rates. The first result – our main focus in this discussion – is the boosting of blacks from schools where they would have had average grades (and graduated) to schools where they often have very poor grades. For blacks as a whole, this phenomenon adds four to five points to the black attrition rate. The second result follows from the cascade effect. Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences. These are the students with very low index scores (low 400s and below), who have very high attrition rates (33% to 40% in Table 5.7).

Id. at 441.

Id. at 372 n.8 ("See infra Table 8.2 and accompanying text (showing how race-blind admissions would produce an 8% increase in the number of blacks passing the bar each year, even though the legal education system would matriculate 14% fewer black students). Like any simulation, my analysis is subject to debatable assumptions."). Sander continues that:

If it is true, as I have argued in Parts V and VI, that large racial preferences place blacks in schools where they will generally perform badly, and that this leads to both lower graduation rates and lower bar passage rates for blacks than for academically similar whites, then race-blind policies will moderately increase black graduation rates and will dramatically improve their performance on the bar.

Id. at 472-73.

Id. at 374.

Id. at 467-68. In connection with law school prestige, Sander opines:

One of the basic premises of affirmative action in law schools is that for blacks to have reasonable prospects in the job market, they need the extra "prestige" boost that preferential admissions provide. The visibility of attending and graduating from a more upscale school, a better brand name, will help overcome the intrinsic reluctance of employers to give good jobs to black candidates. Our analysis shows that the assumptions underlying this premise are fundamentally flawed. Even "prestige" employers apparently scan a much broader range of law schools for strong students than has commonly been thought. And the strong positive coefficient associated with black lawyers in our regression shows that the legal market as a whole is more willing, not less willing, to hire blacks into good jobs. Since employers are already
the class at an elite law school is preferable to finishing in the middle or top part of the class at a lower ranked first tier school or a second or even third tier school, the argument goes. However, Sander concludes, with little support, that the job market benefits which African American students receive by attending an elite law school are “substantially overrated” and that black lawyers with better grades at lower prestige schools are more likely to have success in the job market than are black students who attained average or below average grades at elite law schools. I am no doubt joined by others in recognizing the irony of the above statement: several elite law schools do not even rank or officially assign grades to their law students. Thus, African

Looking closely at lower-tier schools to find and hire blacks with good grades, it seems obvious that they would do this even more without preferential law school admissions. And the absence of preferences would greatly increase the supply of blacks with high grades – the students both elite and ordinary employers are obviously seeking out most vigorously.

Id.; but see Amanda Yarnell, Grad School: Does It Matter Where You Go?, 81 CHEMICAL & ENGINEERING NEWS 39, 42, 44 (Sept. 29, 2003), available at http://pubs.acs.org/ecn/education/8139/8139education1.html (last visited May 7, 2006). Yarnell writes: “Our analyses suggest that students who are interested in an academic career should be advised that the selection of a reputable, high-ranking graduate school with high ‘impact factor’ is practically a sine qua non for obtaining high-ranking professorships and probably professorships in general.” Id. See also Lori A. Reifschneider, The Rankings Game: An Ethical Dilemma in Legal Recruitment, eJournal of Education Policy, Fall 2004, http://jep.csus.edu/journalfall2004/loriareifschneider.pdf (last visited May 7, 2006) (“Many large law firms typically recruit from only some of the top 15 law schools as ranked by the yearly U.S. News and World Report’s America’s Best Graduate Schools (2005) along with a few regional law schools that are ranked at least in the top 50.”). Further, Sander ignores recent studies that chronicle the still debilitating hiring discrimination that exists in the U.S. solely based on race. See Richard Morin, Talking the Walk, WASH. POST, Aug. 28, 2005, at B05 (“Whites without records were about twice as likely to be hired over similarly qualified blacks with spotless pasts.”).

60 See Sander, supra note 13, at 454. But see Dauber, supra note 22, at 1903-08; Yarnell, supra note 59; Reifschneider, supra note 59.

61 See Sander, supra note 18.

American law students at a few of the elite law schools do not even “qualify” for Sander’s premise as far as law school grades are concerned. Further, it appears that Sander must never have worked at a large elite law firm or, if he had, was never involved in hiring decisions. At the large international law firms where I have worked and been involved in recruiting and hiring, never, and I mean never, would those firms, or others similarly situated, turn down an elite law school candidate and hire a second or third tier candidate based on better grades. I just cannot imagine a real-world scenario where that would be true.

Additionally, no doubt anticipating other major criticisms, Sander asserts that academic predictor indexes are not biased and are generally excellent predictors of a student’s success in law school. Many scholars believe and have written that academic predictor standardized tests, such as the SAT, the ACT, the LSAT, and the MCAT, are extremely weak predictors of academic success, are severely biased indicators of potential and intelligence, and unilaterally discriminate against students of color, particularly African American students. Sander goes to great lengths to debunk this notion and accepts the value of academic indices as almost wholly valid.


63 See id.

64 Having spent three years in Chicago working primarily at Kirkland & Ellis (1998-2001) and having been intimately involved in the law student recruiting process and the summer associate program, Sander’s claim that law firms are more interested in law school grade performance than prestige of law school seems genuinely naive. Most of my colleagues that worked at K&E were graduates of Chicago, Northwestern, Harvard, Yale and Michigan. If my colleagues were graduates of regional schools, such as Indiana, Illinois, Chicago Kent or University of Utah, these associates were unfailingly amongst the top two or three ranked students in their respective classes.

65 Sander, supra note 13, at 419, 425.


67 See Sander, supra note 13, at 421-22. Sander claims that:
Notwithstanding Sander's "beyond any doubt" rhetoric, his conclusions and claims are not only "irresponsible," but they are dangerous and shortsighted for the following reasons. First, as pointed out by several of the data "replicators" of Sander's study, Sander manipulated his data and "mismatched" datasets to reach his conclusions. This singular manipulation throws grave doubt on Sander's conclusions and self-described sympathetic white liberal casting. If Sander mismatched datasets to support a certain conclusion, as Chambers, Clydesdale, Kidder, Lempert, and Dauber claim, then suspicion is shed on the motivations that led to Sander's conclusions.

Second, Sander's conclusions, if accepted and adopted, would lead to a "whitewashing" of the elite law schools in the United States. African American attendance at the top twenty-five (or fifty) law schools would be reduced to 1% matriculation of black law students (and presumably of Latino and American Indian applicants as well). The consequence of this whitewashing, meaning all white classes at the nation's elite law schools, would have damaging effects on black leadership in the United States, on the minority law and academic

Although we did not set out to study predictors of academic performance, I was nonetheless struck that the simple LSAT/UGPA index was several times stronger at predicting first-semester grades than direct information on how much students said they were studying, participating in class, completing the reading, or attending study groups.

_id.\textsuperscript{68} See supra notes 57-59 and accompanying text.

_id.\textsuperscript{69} See Harris & Kidder, supra note 17, at 103-104. Harris and Kidder write that: However, the 2001 admissions cycle upon which Sander relies had an atypically high ratio of black to white applicants; the soft job market for college graduates has since driven many more whites to apply to law school. Thus, calculating the same "grid model" estimate that Sander relies upon, but with 2003 and 2004 national data, reveals that ending affirmative action would slash African-American law school admissions by 24 percent and 33 percent, respectively. . . . Sander argues at great length that LSAT and GPA explain "well over 35 percent" of the variation in bar performance. Yet his claim does not come from the Law School Admission Council's Bar Passage Study, of 27,000 students in 163 law schools -- a dataset he relies on throughout the article. Rather, Sander shifts to a study of the California bar exam -- one which is arguably unrepresentative because California has the most difficult bar exam in the country, and California also allows graduates of unaccredited schools to sit for the exam.

_id.\textsuperscript{70} See infra Part VI.

_id.\textsuperscript{71} See Harris & Kidder, supra note 17, at 104; see also supra note 22 and accompanying text.

_id.\textsuperscript{72} See Harris & Kidder, supra note 17, at 104; see also supra note 22 and accompanying text.

_id.\textsuperscript{73} See supra note 22.
professoriate, and on the tepid inroads that minorities have made into the boardrooms of corporate America. In addition, white law students would have a far less valuable experience in the classroom where the important perspective brought by law students of color would be systematically eradicated.

Third, if in fact racial preferences were eliminated or significantly reduced, and Sander's affirmative action scapegoat sacrificed, then efforts to study and eliminate the testing gap and performance gap might no longer be seriously pursued. When the serious testing and performance gap problems persist, as they likely would, because of Sander's simplistic approach to the problem

---

74 See id.
76 See infra Part VII.A and accompanying text; see also Cheryl I. Harris, Critical Race Studies: An Introduction, 49 UCLA L. REV. 1215, 1225-26 (2002) [hereinafter "Harris, Critical Race Studies"]; Cheryl I. Harris, What the Supreme Court Did Not Hear In Grutter and Gratz, 51 DRAKE L. REV. 697, 706 (2003) [hereinafter “Harris, What the Supreme Court Did Not Hear”].
77 Performance gaps are likely to continue unless stereotype threat is challenged: [Claude Steele] maintained that stereotype threat would continue as the “default setting” until steps are taken to counteract it. Above all, he urged that, at an institutional level, we must promote “identity safety,” implicit efforts to establish that diverse social identities add integral value to a setting.

Steele Discusses “Stereotype Threat”, C. STREET J., Sept. 24, 2004, http://www.mtholyoke.edu/offices/comm/csj/092404/steele.shtml (last visited May 7, 2006) (reporting on a speech given by Steele at Mount Holyoke); see also supra note 37; infra note 229. Stereotype threat is not sociological jargon, but a far-reaching societal condition which infiltrates national systems from education to the economy. Economic performance (success) of individuals is also put at risk with stereotype threat:
[Psychologists have identified and demonstrated the operation of stereotype threat. Stereotype threat results in subpar performance on high-stakes tests. African-American college students will perform worse on an exam if they are told it is an intelligence test than they will if they are told that the same test is a problem-solving test. At some levels, stereotype threat resembles racial stigma, internalized by the individual. From an economic point of view, it has all of the deleterious economic effect that racial stigma has: a massive distortion of resources, insofar as individual performance is compromised by high-stakes testing that has the potential of stereotype threat. Obviously, self-confirming stereotypes, racial stigma, and stereotype threat are highly disruptive to economic activity.

Steven Ramirez, What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics, 54 J. LEGAL EDUC. 365, 370 (2004); see also Claude Steele, Understanding
(i.e., eliminating affirmative action), the diversity in the legal academy would be in critical condition. The training of bright, capable, and influential African American and minority lawyers at the nation's best law schools would, for all intents and purposes, end.\textsuperscript{78}

Fourth, Sander's study and conclusions, because of the claimed manipulations and biases therein, will provide little help to the legal academy or the academic debate, but will provide much to the Charles Murray/Dinesh D'Souza\textsuperscript{79} crowd that have tried to prove that academic and intellectual inferiority is the reason behind the testing gap and performance gap of minority students in the United States.\textsuperscript{80} Sander had to know that his study would provide fodder to this crew. Most assuredly, Sander does not posit, nor do I think he gives any credence to the intellectual inferiority nonsense forwarded by Murray and D'Souza, but he irresponsibly provides his study anyway, complete with the claimed biases and manipulations therein.\textsuperscript{81}

Fifth, by refusing the hard work that would have been required to break down, analyze and understand the testing gap, performance gap, stereotype threat, and hostile law school environments and instead blaming affirmative action for all law school disparities, Sander sends an unmistakable message to law students of color: "You are not academically qualified to attend the elite law schools of this country."\textsuperscript{82} For these reasons, and a number of others, Sander has been censured by an ever growing collection of leading academics in the legal academy.

\textit{the Performance Gap}, in \textsc{Who's Qualified} 60-61 (Guinier and Sturm eds., 2001). In discussing his own research, Steele states:

My own research, and that of my colleagues over the last twelve years, has shown that there are effects of race on test performance that go beyond any effects of socioeconomic disadvantage, affecting even the best-prepared, most-invested students from these groups who often come from middle-class backgrounds.

\textit{Id.}

\textsuperscript{78} See supra note 22.

\textsuperscript{79} See infra notes 221-229 and accompanying text.

\textsuperscript{80} See infra notes 221-229 and accompanying text.

\textsuperscript{81} See infra notes 221-229 and accompanying text.

\textsuperscript{82} See Sander, supra note 13, at 467. More specifically, Sander states:

Of course, when we discuss actual cases, we toss aside the elaborate controls of the regressions. The comparisons are cruder. But they probably do make the general point more forcefully: for most students, GPA is more important than law school prestige. And affirmative action by law schools, as we have seen, tends to lower the GPAs of black students systematically and substantially.

\textit{Id.}
III. REBUKING SANDER

A host of commentators have taken Sander to task after either carefully replicating his study and coming to far different conclusions or examining the implications of his study and coming to much different forecasts of the future. Sander seems genuinely enthusiastic that his theory has engendered such attention and academic response and appears to attach some sort of weird validation to his study based on the chorus of voices that now reverberate in dissent.

A. Chambers, Clydesdale, Kidder and Lempert

One of the first rebukes appeared in the Stanford Law Review from Michigan Law Professor David L. Chambers, College of New Jersey Professor Timothy T. Clydesdale, Equal Justice Society Director William Kidder, and Michigan Law Professor Richard Lempert. These authors replicated Sander's numbers, regressions, and compressions and came to very different conclusions. Sander blames affirmative action for a host of performance

---

83 See Posting of Richard Sander to http://volokh.com/archives/archive_2005_06_05-2005_06_11.shtml (June 8, 2005, 20:30 EST). On Eugene Volokh's webblog, Sander writes: Although my article on affirmative action appeared in the Stanford Law Review less than five months ago, a legion of critics has sprung into print, publishing rebuttals with very non-ivory-tower speed. By my (probably incomplete) count, eleven articles entirely devoted to "debunking" Systemic Analysis have been published or accepted for publication in legal or education journals, and dozens of more informal critiques have appeared in the media and a variety of websites.

Id. To this, my WVU Law colleagues Professors Kevin Outterson and Joyce McConnell point out that if an individual wishes to make a splash in the legal academy, generally considered a bastion of liberal thought and liberal thinkers, one need only take an extreme, perhaps even radical, conservative position (i.e., eliminating affirmative action will lead to a greater number of practicing black attorneys) and just wait for the fallout and printed backlash. See College Faculties Mostly Liberal, Study Finds, RICHMOND TIMES-DISPATCH, Mar. 30, 2005, at A14. A study by Robert Lichter, Stanley Rothman, and Neil Nevitte found that "72 percent of those teaching at American universities and colleges are liberal and 15 percent are conservative . . . ."

Id. Furthermore, "[t]he disparity is even more pronounced at the most elite schools, where, according to the study, 87 percent of faculty are liberal and 13 percent are conservative." Id. Sander has certainly plugged into this method of attention grab.

84 See Chambers et al., supra note 22, at 1855.

85 Id. at 1856-59. In the 2004 draft of their article, Chambers et al. write: The four of us have drafted this response because we believe that Sander's forecasts are irresponsible. We believe that an even-handed assessment of available data on law school admission, law school performance, and bar exam performance will show that Sander's article is premised upon a series of statistical errors, oversights, and implausible (and at times internally contradictory) assumptions.
disparities between white and African American students that the data simply does not support.\(^6\)

In my mind, one of the most damning of these replications is the revelation that Sander made comparisons from “mismatched” datasets without alerting readers, which tended to show greater support for his desired conclusions, rather than datasets that logically matched students, geographic location and graduating years.\(^7\) If, in fact, Sander chose to analyze datasets and make

---


\(^6\) See Chambers et al., 2004 draft, supra note 85, at 3; see generally Chambers et al., supra note 22.

\(^7\) See Chambers et al., supra note 22, at 1877-80. Chambers, Clydesdale, Kidder and Lempert criticize Sander’s mismatching dataset choice as contrary to the majority of research done measuring minority performance in law school:

[Sander’s] discussion of law school performance and graduation is the strangest part of his article. He begins this section by leading the reader to believe that his analysis will rest entirely on the Law School Admission Council’s Bar Passage Study (the BPS), extolling the BPS as a “uniquely comprehensive resource for examining law school performance.” The first table in the section . . . draws upon the BPS to show the much lower grades of African American than white students at elite law schools (Table 5.1). Then, immediately after this Table, without any explanation in the text, Sander switches from the BPS to an entirely different dataset that he himself assembled in the mid-1990s and calls the National Survey of Law Student Performance (NSLSP). This second dataset contains first-semester first year grades from twenty schools and a very limited range of other information for each student. Using the NSLSP, Sander finds . . . that once undergraduate grades and LSAT scores are controlled, race is no longer significantly related to performance and African American students do as well as whites. This becomes the foundation for his prediction that runs through the rest of his article . . . .

Contrary to Sander, we believe that the rich data in the BPS remains the better dataset to use for understanding law school performance and that, to the extent that its use poses limitations, Sander’s own National Survey is even more problematic as a basis for his conclusions.

See Chambers et al., 2004 draft, supra note 85, at 19; see also Harris & Kidder, supra note 17, at 104. On the same point of mismatching datasets, Harris and Kidder point out:

A key premise underlying Sander’s mismatch theory is that entering credentials (LSAT scores and college grades) are powerful determinants of bar passage. Sander
comparisons that favored his theory, rather than reporting the facts that a more logical data comparison reveal, then his conclusions are unquestionably questionable.

Further, in reaching his conclusions, particularly his conclusion that predicts a 14% decline in African American matriculation to law school in the absence of affirmative action, Sander relies on research conducted by Linda Wightman, formerly of the Law School Admission Council ("LSAC"). When Chambers, Clydesdale, Kidder, and Lempert recreated the analysis that Sander conducted, using current LSAC data, they came up with remarkably different numbers and projections. As he does throughout his work, Sander discards the dataset showing the most damage to his theory (the logistic regression model decline of 38%) and adopts wholesale the dataset showing the most support for his desired conclusions (the grid model decline of 14%).

Additionally, Sander bases his statistical analysis and final conclusion regarding the decline in African American matriculation on an anomalous year. In 2001, fewer white applicants applied to law school and a steady

argues at great length that LSAT and GPA explain "well over 35 percent" of the variation in bar performance. Yet his claim does not come from the Law School Admission Council's Bar Passage Study, of 27,000 students in 163 law schools -- a dataset that he relies on throughout the article. Rather, Sander shifts to a study of the California bar exam -- one which is arguably unrepresentative because California has the most difficult bar exam in the country, and California allows graduates of unaccredited schools to sit for the exam.

Id. Sander clearly manipulates datasets and mismatches data comparisons in order to come to the conclusions that he wants, not what the data reveals. See Lempert et al., supra note 26, at 5-6.


89 See Chambers et al., supra note 22, at 1889. Chambers et al. find that: Sander rests his conclusion that ending affirmative action will produce only a 14 percent decline in African American matriculation to law school entirely on the research of Linda Wightman, then of the Law School Admission Council (LSAC). We have done the same computations using more recent LSAC data and found that Sander's projection is far too low.

See Chambers et al., 2004 draft, supra note 85, at 7. Essentially, Wightman created two different models in 2001 that analyzed the consequences of ending affirmative action. See Wightman, supra note 88, at 232-34. Both models showed serious collateral consequences in eliminating affirmative action with her "grid model" showing a decline of 14% fewer African American applicants being admitted to law school and her "logistic regression model" projecting a decline of 38% fewer black applicants receiving admissions offers. Id.


91 Id. at 1860. Chambers et al. point out:
number of African American students applied producing the highest ratio of black to white applicants ever. With a finite number of law school seats available, 2001 produced the lowest number of white applicants in years, skewing the numbers of black applicants admitted to law schools across the country. White applicant levels have steadily risen since 2001 making the black to white applicant ratio significantly more difficult for African American students to matriculate than in 2001. Chambers argues "while Sander treats 2001 as representative of what would happen if affirmative action ended at law schools today, no single year can serve that function."

Additionally, Chambers et al. carefully describe the unpredictable nature of Sander's logical leaps, predictions and forecasts, in such a way that makes clear that each gloomy prediction upon stormy forecast upon dreary assumption shows that Sander's entire grand conclusion is built upon unlikely assumptions and guesses. Chambers et al. conclude that Sander has no adequate foundation for his conclusion that if affirmative action were ended the performance gap and the bar passage gap for black law students would be eradicated. This is one crux of Sander's article. If only it were this effortless. Sander simply does not and cannot support this hope, at least not with the data that he presents.

B. Ayres and Brooks

A second stern retort appeared in the form of a reply from Yale Law School Professors Ian Ayres and Richard Brooks in the Stanford Law Review. Ayres and Brooks found "no persuasive evidence that current levels of affirmative

Sander's estimate of a 14 percent decline is deeply flawed. First, the year 2001, which was the most recent year available to Wightman when she wrote her article, was quite atypical. More recent data strongly suggest that the decline in numbers of black students who could get into any law school without affirmative action would be much higher than 14 percent. Sander's 2001 projections must be placed into proper context.

See Chambers et al., 2004 draft, supra note 85, at 7-8.
92 See Chambers et al., supra note 22, at 1860.
93 Id. at 1860-61.
94 Id. at 1860.
95 Id. at 1858, 1890-91. Chambers et al. describe the inconsistent and unlikely forecasts employed by Sander: "Sander makes insupportable (and invariably rosy) predictions about the effects of ending affirmative action on every stage that law students pass through on their way to becoming practitioners - in particular, on application levels, matriculation and passage of the bar." See Chambers et al., 2004 draft, supra note 85, at 3.
96 See Chambers et al., supra note 22, at 1858, 1868.
97 See id. at 1872-73.
98 See Ayres & Brooks, supra note 22.
action have reduced the probability that black law students will become lawyers," and they further "estimate that the elimination of affirmative action would reduce the number of [African American] lawyers."99 Ayres and Brooks conclude contrary to Sander's findings that ending affirmative action would increase black attorneys and state that actually escalating affirmative action would increase the number of African American lawyers by 27%.100 They asserted: "Indeed, some of our results suggest an equally plausible 'reverse mismatch effect,' where the probability of black law students becoming lawyers would be maximized under a system involving an affirmative action program with larger racial preferences than those presently in place."101

Ayres and Brooks are extremely critical of Sander's simplistic approach to determining eventual success of black law students. In a world devoid of affirmative action, Sander posits that black students will have the same entering credentials as white students, and because Sander eliminates all factors other than LSAT and UGPA as determinant of legal success (i.e., good grades and passing the bar exam), Sander does not need to account for any other fact and actually considers nothing else.102 Ayres and Brooks are "extremely skeptical" of this use of the LSAT and UGPA as the sole determinant of a student eventually becoming a lawyer.103 They stated that "if other factors (including a student’s own race or family income or the race of her classmates) determine the probability that a student will become a lawyer, then this approach would not be accurate because it fails to account for any factor other than the student’s index score."104 Any casual law school observer has to acknowledge the error

99 Id. at 1809.
100 Id. at 1843. Ayres and Brooks, after replicating Sander's numbers and data conclude: The impact of increasing the net amount of affirmative action (sending black students to their probability maximizing tier) would be to increase the number of black attorneys by a whopping 27%. Roughly half, or 13.9% of this is due to moving blacks toward higher quality tiers; 5.8% is due to moving black to historically black schools (movements that are equally consistent with non-mismatch theories), and only 2.6% of this increase is due to movements downward to tiers other than tier 1. In fact, we estimate that only 9.8% of black students would have done better if they had attended schools at lower non-historically black tiers.

Id. But see Sander, A Reply to Critics, supra note 22, at 1986-95.
101 Ayres & Brooks, supra note 22, at 1809.
102 See id. at 1809-10.
103 See id. at 1810.
104 Id. at 1811.
of relying solely on indicator scores to predict the ultimate question of whether a student will become an attorney.105

Further, Ayres and Brooks state outright that contrary to Sander's article, black and white students very often attend law school with the same entering credentials.106 Sander would have readers believe that black students always attend law school at an institution that is at least one quality tier above what their entering credentials show and a law school tier above white students with the same index averages.107 Ayres and Brooks show that there is "substantial overlap" in the law school tiers attended by black and white students "with the same entering credentials."108 This important point underscores the performance gap and the bar passage gap that exists for minority and non-traditional law students. Ayres and Brooks remind that Sander's simplistic forecast was that "in a world without affirmative action blacks would start going to lower-quality law schools and would consequently have a higher chance of becoming lawyers."109 Sander's conclusions simply do not address the real difficulties experienced by minority law students in the law school admissions process, the law school years or the bar examination challenges that they face.

Ayres and Brooks acknowledge, as all must, that law school is a risky proposition for African American students.110 Indeed, law school is an arduous and risky proposition for a host of individuals, including most students of color and non-traditional students,111 as well as a host of white students.112 This is an

105 See Harris, Critical Race Studies, supra note 76, at 1224 (describing the burgeoning academic articles critiquing the LSAT and other predictor indicators); see also Peter Sacks, Pseudo-Meritocracy, in WHO'S QUALIFIED 84 (Guinier and Sturm eds., 2001). Sacks denounces the validity of merit being tied to test scores:

Americans harbor the collective deceit that most of the necessary academic attributes of schools, schoolchildren, applicants to college and universities and even prospective employees can be neatly summed up with a single number - a test score. Defenders of this system call it meritocracy. More likely, it's a pseudo-meritocracy, governed by a cult of measurement and the triumph of technocratic thinking.

Id.

106 Ayres & Brooks, supra note 22, at 1811-12.

107 Id. at 1811.

108 Id. at 1812.

109 Id. at 1813.

110 Id. at 1809.

111 See Timothy Clydesdale, A Forked River Runs Through the Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage, 29 LAW & SOC. INQUIRY 711 (2004); see also Celestial S.D. Cassman & Lisa R. Pruitt, A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall, 38
important concern and one that must be addressed, debated, researched, examined and challenged. Ayres and Brooks give Sander credit for bringing this difficulty to the forefront and challenging law schools as well as academic administrators to deal with the very real issues that face students of color as they encounter law school in the United States. Ultimately, however, Ayres and Brooks reject Sander’s conclusion that affirmative action is to blame for the testing gap, the performance gap and the bar exam passage gap. This conclusion is just not a realistic solution.

C. Moran, Harris, Kidder, Wilkins, Crenshaw, Tienda, Bazelon, Ho and Dauber

A large number of highly respected law professors and academics have authored articles, newspaper editorials and shorter responses that have materialized in magazines, periodicals and appeared opposite Sander on leading news programs. For instance, Vanderbilt Law Professor Beverly I. Moran authored a taut reply to Sander. Moran worries that Sander not only misses the mark in analyzing the performance gap and the bar passage gap, but that he makes the case for “black inferiority.” UCLA Law Professor Cheryl Harris and William Kidder responded in the Journal of Black Education. Professor David Wilkins criticized Sander’s study on National Public Radio and in a

U.C. DAVIS L. REV. 1209, 1224, 1268-72 (2005) (describing the law school challenges that face all students of color as well as non-traditional students). Cassman and Pruitt write that “[r]esponses to an array of survey questions related to emotional well-being and contentment suggest that law school is clearly a greater emotional challenge for ethnic minorities and women.” Id. at 1268.


113 See Ayres & Brooks, supra note 22, at 1807-08, 1853.

114 See id. at 1853-54.

115 See Moran, supra note 22.

116 See id. at 41. Moran argues that to take Sander seriously, a reader must believe that the indicator scores championed by Sander are “remarkably powerful predictor[s]” of both law school grades and bar performance and “is not culturally biased” in any form or fashion, a redoubtable and dangerous notion indeed. See id. at 48; see also Harris, Critical Race Studies, supra note 76, at 1224 (describing the mounting number of academic articles critiquing the LSAT and other predictor indicators); see also Sacks, supra note 105, at 85-88.

117 See generally Harris & Kidder, supra note 17.

118 See Interview by Renée Montagne with Richard Sander and David Wilkins, supra note 25, at 3. In an NPR interview, Professor Wilkins criticizes Sander’s study by noting that “[e]very study that has been of the beneficiaries of affirmative action has shown them to be very successful . . . . There is absolutely no question that this improvement is due substantially to the
Stanford Law Review response; Professor Kimberlé Crenshaw has taken Sander to task on PBS; Dr. Marta Tienda sharply criticized Sander and his study at the 2005 Association of American Law Schools law professor convention in San Francisco; Soros Justice Fellow Emily Bazelon published a retort in Slate, an online journal dedicated to criticism of conservative positions; and Yale law student Daniel E. Ho has replicated Sander's data and conclusions and written a rebuke in the Yale Law Journal. Each has pointedly critiqued Sander and his conclusions.

Sander has been condemned by these academics for (a) making the same tired arguments offering nothing new; (b) misunderstanding the attractiveness of lower tier law schools to African American students; (c) ignoring the phenomenon of "underperformance" and stereotype threat; (d) seeking to resolve complex issues and difficulties with simplistic solutions; (e) presuming to know what is best for black students and what their choices would be in the absence of affirmative action; (f) failing to question or effect of affirmative action."

Id. at 103. Harris and Kidder strongly disagree with Sander's assumption that African American students would routinely "cascade" down to the next tier law school were affirmative action eliminated:

Sander's model also combines admission decisions from 185 law schools into a single pool. The underlying assumption is that law schools are fungible in terms of attractiveness to black applicants. Yet dozens and dozens of the lower ranked law schools where Sander assumes African Americans would 'cascade' are in regions of the country with small African-American populations and law school enrollments, including the Great Plains, Southwest, Pacific Northwest, Rocky Mountains and rural New England.
examine the utility and/or fairness of the bar examination itself;\(^{129}\) (g) ignoring the host of other problems and issues that impact the performance and testing gap;\(^{130}\) (h) misapplying “basic principles of causal inference, which enjoy virtually universal acceptance in the scientific community” and drawing “internally inconsistent and empirically invalid conclusions”;\(^{131}\) (i) refusing to consider or weigh the “sea of racial preferences” in which whites swim;\(^{132}\) (j)

Sander is vulnerable on other fronts. He assumes that in a world without law-school affirmative action, lots of black students would still choose to study law, even though they'd be reduced on many campuses from 8 percent of the student population to 1 or maybe 2 percent. Assuming that other professional schools continued to admit higher numbers of black students, it's hard to see why many wouldn't begin choosing medicine or business over law . . . .

*Id.*; see also Interview by Renée Montagne with Richard Sander and David Wilkins, *supra* note 25, at 3.

\(^{129}\) See Interview by Renée Montagne with Richard Sander and David Wilkins, *supra* note 25, at 3 (“the strength or the importance of the point that Rick makes hinges on an assumption about the importance of entering credentials for ultimate success and that is the area where I think the issue is most critical”); see also Bazelon, *supra* note 122.

\(^{130}\) See Moran, *supra* note 22. Moran lists the “other” compelling issues as “social class, failure to take review courses, weaker educational preparation, stigma or stereotype threat, race discrimination, the pressure of times examinations, course selection or economic hardship.” *Id.* at 51-52.

\(^{131}\) Ho, *supra* note 22, at 2003 (after correcting Sander's internal inconsistencies, Ho ran the same analysis and found that “[s]tudents with the same LSAT score, undergraduate GPA, and gender perform similarly on the bar irrespective of the law school tier”).

\(^{132}\) Harris, *What the Supreme Court Did Not Hear*, *supra* note 76, at 708. Harris, citing Tim Wise, reports that white students are literally awash in preferences that are accorded them based on their status as whites:

As Wise points out, the plaintiffs in [*Gratz v. Bollinger*] attack the 20 points that are awarded to blacks, Latinos, and American Indians as clear evidence of racial preference. What do we call the 20 points awarded to students from a low income background regardless of race? Under the Michigan policy, the 20 points awarded for socio-economic disadvantage cannot be added to the points awarded for minority status. That is, a poor black person could not get 40 points. You can only get 20 points for race or 20 points for economic preference. So what does the 20 points for economic preference amount to? A preference for poor whites. I don't hear that being attacked. And then of course we have the 16 points awarded for students who reside in the Upper Peninsula of Michigan. Guess who lives in the upper Peninsula of Michigan? We also have 10 points for students who attend excellent high schools. We also have 8 points for those who take AP courses. We actually have a lawsuit now going in the State of California about the fact that AP courses are not available at predominantly minority high schools. They simply are not there. So it is impossible for children attending those schools to attain the kind of academic record that is deemed essential for being admitted to elite universities. You have 4 points, of course, if your parent was an alum.
misunderstanding how to appropriately test the mismatch hypothesis; and the criticisms will undoubtedly continue to flow.

Still, for all of the aforementioned ills associated with Sander's study, article, data and conclusions, the following criticisms I make hereafter have not yet been levied. Mine are perhaps the most difficult to make, yet they are important critiques that must be brought to light to ensure that Sander's conclusions do not do significant damage to the goal of diversity in the law school classroom and diversity in the national legal community. Namely, I conclude that Sander through his study has engaged in objectionable paternalism, has acted as the historically abhorrent Great White Father, has manipulated the media by using his family and his "liberal" politics to give credence to his conclusions and has tabbed affirmative action as the scapegoat for all of the challenges African American law students face.

IV. PATERNALISM BARED

Paternalism has been defined as attempting to exercise control over another individual that purports to be implemented in the best interests of that individual, either overriding or filling in for unreliable individual choices. Further, paternalism has been labeled as the "interference of a state or individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm." The concept of paternalism is interwoven into the very fabric of U.S. law and policy, since the inception of the country and the implementation of judicial review. However, the dangers of paternalism have long been debated and

The net effect, Wise tells us, is that there are varying combinations of points, up to 58, awarded for ostensibly race neutral criteria that in effect overwhelmingly benefit whites. We don't call them white preferences, but that is what they are. Now, of course, not all whites will benefit from all the points awarded for the various categories. That is absolutely true. But even if they do not, the criteria are defined in such a way as to confer a preference based on one's racial background.

Id. See generally Tienda & Alon, supra note 27.


135 See Thomas Jefferson, Notes on the State of Virginia, The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/jevifram.htm (last visited May 7, 2006) ("I advance it...as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind.").
“[i]n the twentieth century, liberals and conservatives, formalists and realists have shared the idea that the paternal model of power was a dangerous and degenerate feature to be exposed and eradicated from the legal system.”137 Suffice it to say that at this point in time in American history, some forms of paternalism are tolerated, while other forms are battled against with indignation.138 Paternalism at its controversial root derives from the John Locke/Sir Robert Filmer debates regarding the Filmer notion that “The King is the Father of the Nation” versus Locke’s “Treatises of Government.”139 Of course, objectionable paternalism easily spills into the “father of the nation” concept and the “Great White Father” construct.140 U.S. history books and law school case books are replete with examples of objectionable legal paternalism.141

Founding Father Thomas Jefferson continued in his paternalistic comparison of whites and blacks:

They seem to require less sleep. A black, after hard labour through the day, will be induced by the slightest amusements to sit up till midnight, or later, though knowing he must be out with the first dawn of the morning. They are at least as brave, and more adventurous. But this may perhaps proceed from a want of forethought, which prevents their seeing a danger till it be present. . . . In general, their existence appears to participate more of sensation than reflection.

Id. 137 Simon, supra note 134, at 1375.
138 See id. at 1375-76.

Sir Robert Filmer’s great Position is, that men are not naturally free. This is the Foundation on which his absolute monarchy stands, and from which it erects itself to an height, that its Power is above every, Power, caput inter nubila, so high above all Earthly and Human Things, that thought can scarce reach it; that promises and oaths, which the infinite Deity, cannot confine it.

Id.; see also Sir Robert Filmer, Patriarcha or The Natural Power of Kings (Johann P. Sommerville ed., 1991) (“That the First Kings Were Fathers of Families.”).
140 See Simon, supra note 134, at 1375-76; see also infra Part V (describing the concept of the Great White Father).
141 See Dred Scott v. Sandford, 60 U.S. 393, 404 (1856). In Dred Scott, the Supreme Court stated:

The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

Id.; see also Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (“If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”);
Sander's Systemic Analysis engages in a paternalistic exercise that infuriates not only those he purports to protect, the African American lawyer and law student, but many leading non-black academics as well. The Supreme Court has deemed affirmative action constitutional.\textsuperscript{142} Law schools across the United States engage in varying forms of constitutional affirmative action.\textsuperscript{143} Sander decides, through suspect empiricism, that affirmative action "inflicts disparate harm on blacks"\textsuperscript{144} and proposes the radical restructuring of law school admissions policies by significantly reducing or eliminating affirmative action.\textsuperscript{145} Sander decides that African Americans will be better off if affirmative action did not place them at elite law schools or at law schools that are overbearing or overwhelming to them.\textsuperscript{146} Sander tells African Americans that they should rely on his empirical results and that they should reject the only remedial governmental outreach that has ever been afforded them.\textsuperscript{147} Sander urges that African American students should – in Pied Piper fashion – follow him to the promised land of bar passage, stronger law school grades and better pay in the practice of law.\textsuperscript{148} How offensive. No wonder the response to Sander and his Systemic Analysis has been vitriolic and voluminous.\textsuperscript{149} Sander has, perhaps unwittingly, engaged in the very kind of paternalism that has injured people of color throughout U.S. history.\textsuperscript{150}

Korematsu v. U.S., 323 U.S. 214, 216 (1944). In Korematsu, the Supreme Court noted:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

\textit{Id.}


\textsuperscript{143} See Sander, supra note 13, at 385-88.

\textsuperscript{144} See Richard H. Sander, Mismeasuring the Mismatch: A Response to Ho, 114 YALE L.J. 2005, 2010 (2005) ("Criticism is vital, but critics who wish to reject the mismatch theory outright have a responsibility to offer their own explanation and cures for the disparate harm our current system inflicts on blacks.").

\textsuperscript{145} Sander, supra note 13, at 417.

\textsuperscript{146} \textit{Id.} at 440.

\textsuperscript{147} \textit{Id.} at 479-80.

\textsuperscript{148} \textit{Id.} at 468.

\textsuperscript{149} See supra note 22 (listing all of Sander's critics who have responded en force up to this point in time).

\textsuperscript{150} See supra note 141 and accompanying text; see also Katherine S. Mangan, supra note 24, at A35. Mangan quotes Richard Geiger, Dean of Admissions at Cornell Law School and Chairman of the Law School Admissions Council, as stating that Sander's study looks to be "a dazzling light show of statistics that in the end doesn't tell us much new or offer much in terms of a solution" and that strikes him as "kind of paternalistic." \textit{Id.}
Perhaps the most troubling aspect of Sander’s paternalism is exemplified by considering the following: undoubtedly, African American students that apply to law school are acutely aware of the U.S. News and World Report rankings of the school and the range of admissions criteria the school advertises. Most, if not all, law schools publish tables or averages that indicate to prospective students the range of LSAT scores and UGPAs that the student must attain to be competitive in the admissions process at that particular school. An African American student that scores a 163 on the LSAT and is admitted to an elite school that advertises an average LSAT score of 172 knows full well that he or she has been admitted on indicator numbers and scores well below the average student at that elite school. Presumably, the African American (Latino, Asian, or Caucasian) student who was admitted with the significantly lower indicator score also knows full well that he or she will be competing and striving to excel in a pool of “more qualified” paper candidates. Yet and still, thousands of African American students, secure in this knowledge, choose to attend the more elite or prestigious law school, rather than choosing to go to a school where their indicator numbers fall comfortably within the school’s average. Certainly, this is a decision that is best made by the candidate. These candidates are no doubt confident in their ability to excel despite the lower indicator numbers. The critical point here is that this

153 See id.
154 See Peter C. Alexander, From Brown to Topeka to the Future, 96 LAW LIBR. J. 219 (2004). Alexander, a Dean and Professor of Law at South Illinois University School of Law, in discussing the impact of Brown v. Board of Education, proclaims:
To put it bluntly, White America must stop trying to legislate and to educate me on how it feels to be a person of color in society. The majority culture must stop deciding for me what it means to have equal opportunity and to be equal under the law. Let me tell you what I want for myself.
Id. at 223 (emphasis in original).
decision belongs in the hands of the candidate, even if it leads to discomfort or failure. More likely, the decision will lead to profound successes.

Sander seeks to impute his judgment and his decision upon the African American student. This stands as the very essence of objectionable paternalism: seeking to make a decision for another, based on the inclination that the paternal figure's thoughts or processes are more enlightened, better informed or more intellectually palatable. The current system of affirmative action allows some black law school candidates a choice: do they attend the elite school (or the higher ranked school) where their indicator numbers are below average, or do they choose to go to the school where their indicator numbers fit comfortably within the averages? Sander would take this choice away. Sander seeks to substitute his judgment for the very students that are making that decision for themselves. This is paternalism in its starkest form.

As a white academic, Sander seeks to educate African American students (as well as the legal academy) with his challenged conclusions from a study that singularly highlights black law students. Sander instructs African American law students they are better off following his advice rather than their own intuition and decision making ability by going to a lower ranked school or less prestigious institution in order to get a higher law school grade point average.

Can Sander seriously believe that his own judgment and findings should serve as a better indicator than the judgment of the African American law school applicants themselves? At what point does a white privileged law professor decide that he knows better than the students of color that are living through the law school admissions process themselves? And not only are they living through the admissions process, but they are living through an education system that disrespects them intellectually and discriminates against them?

155 See id.


almost every day. Ultimately, Sander, despite the fact that he is the father of a "biracial son," can never genuinely know – he may appreciate but not personally experience – the difficulties, discrimination, intellectual disrespect and outright racism that inform the lives and decisions of African American law school applicants. Yet, he seeks to tell them how to make their law school matriculation decision. Sander is in plentiful company in engaging in this type of systematic paternalism and arrogance.

158 At the 2005 West Virginia Law Review Symposium commemorating the 50th anniversary of Brown v. Board of Education, Professor Joseph Grant during a panel presentation on the advances African Americans have made since 1954 chronicled in heart-rending fashion the abject racism that he has encountered as a black male and overcome in every step of his progression from childhood to law school professor. See Joseph Grant, In the Shadow of Brown: On African American Perspectives and Diversity in the Legal Profession, in AFRICALOGICAL PERSPECTIVES: HISTORICAL AND CONTEMPORARY ANALYSIS OF RACE AND AFRICANA STUDIES 35 (Sept./Oct. 2005). Grant described his white high school counselors strongly advising him to apply to community college rather than Ivy League schools such as Princeton and Brown (he graduated from Brown in 1995). Id. at 39-40. Grant described his white undergraduate counselors at Brown discouraging him from applying to elite law schools, instead directing him to apply to Case Western and Capital (he graduated from Duke Law School in 1998). Grant described his experiences at large law firms in Cleveland, where he was directed by his white practice group leaders to focus his practice on labor law rather than his chosen corporate and securities law areas (he stayed with securities and corporate law practice). Id. at 40-41. This demonstrates that obstacles are still thrown up in the face of African American students today and every day.

159 See Tavis Smiley Show (NPR television broadcast Dec. 15, 2004) (transcript on file with author). Tavis Smiley, while interviewing Professor Kimberlé Crenshaw, asks her about Sander's Stanford Law Review article:

SMILEY: Tell me how you think this (Sander's article) is going to impact the affirmative action debate?

CRENSHAW: Well, you know, I think this is an old argument, but what’s also interesting about it is it’s wrapped in what appears to be a man-bites-dog story. Unlike most empirical research, Tavis, this one begins with a long essay about how Rick Sander is the father of a biracial child. He’s a former liberal. So a lot of people think, "Well this is an argument we have to stand up and pay attention to." I want to remind people that being the father of a biracial child doesn’t tell us anything about one’s commitment to racial equality. Our history tells us that, if nothing else.

Id.

160 See Linda Seebach, Admitting the Facts About Law School Admissions, ROCKY MOUNTAIN NEWS, Nov. 13, 2004, at 13C. Seebach, reporting on Sander’s Stanford Law Review article agrees with Sander, to wit:

The Bar Passage Study conducted by the Law School Admission Council for students starting law school in 1991 found that 19.2 percent of black students failed to complete their studies within six years, compared with 8.2 percent of white students.
V. THE "GREAT WHITE FATHER"

In his *Systemic Analysis*, Sander figuratively casts himself as the "Great White Father." He has perpetuated a centuries old myth and participated in the worst kind of clandestine racism — that of deciding as a member of the majority race what is appropriate for a minority race. Sander, as a white elite law professor, propagates the pattern of racism and discrimination that has existed in the United States since its inception—he develops a statistical analysis and through his study decides what is best for African Americans and then lectures African Americans as to what is best for them. By doing this,

Among students who took the bar exam up to five times, all but 3.3 percent of white students eventually passed it, but 22.4 percent of black students never did.

That's a tragic waste of talent, not to mention time and money. Shouldn't law schools at least try to warn students before they enroll of what their chances of success are? Id. Seebach, perhaps unwittingly, engages in the same type of paternalism that Sander exercises: Who says that failing the bar exam is a "tragic waste of talent" and "time and money"? Is it the 22.4% of black law graduates that did not pass the bar saying that their law training was a "tragic waste"? Seebach and Sander fail to examine whether the black students are working in related legal fields, or are working jobs where their law training assists them tremendously but where bar passage is unnecessary. Again, Seebach, substituting her own judgment, decides for the black law graduates that they have wasted their time and money based on the fact that they had not passed the bar exam.

The Great White Father allusion, a term I borrow from Professor Adrien Wing as referenced by her at the Mid-Atlantic People of Color Scholarship Conference in February 2005, describes the historical embodiment of the white male making global determinations historically for all non-white races, including indigenous peoples and black Africans enslaved by white men. Throughout history, white males have placed themselves squarely in the position of the supreme authority figure and have repeatedly forced circumstances upon people of color that have mortally injured such people. Narratives of the Great White Father abound in the law. See *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1018 (8th Cir. 1999). In *Yankton Sioux Tribe*, the Eight Circuit stated:

Commissioner Cole outlined the Commission’s mission to the tribal representatives at the first council meeting. He explained that "The Great White father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands . . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever.” Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. Later in the negotiations, Commissioner Cole also encouraged the Tribe to adapt to western influences.

Id.

See *Sander*, *supra* note 13, at 372 ("Affirmative action as currently practiced by nation’s law schools does not, therefore, pass even the easiest test one can set. In systematic, objective terms, it hurts the group it is most designed to help.").

Id. at 482 ("[B]y every means I have been able to qualify, blacks as a whole would be unambiguously better off in a system without any preferences at all than they are under the current regime.").
Sander ignores the autonomy, independence and individualism of each member of the race.164

The United States Government historically cast itself as the “Great White Father” most notably in the instances of black slavery in the South and in its interactions with the American Indians.165 And, as noted in 1996 by the Chief Justice of the Navajo Nation Supreme Court, “[A]s is so often true, the Great White Father lie[s].”166 Some older U.S. Supreme Court cases are breathtakingly offensive when subsuming the Great White Father role:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it power.167

From the very origins of white European society in the Americas, both North and South, the European conquerors dictated to the native populations what was best for them.168 Up through slavery in the United States, white slave

---

164 Id. at 371 (“Even if the costs and benefits to minorities are roughly a wash, I am inclined to think that the enormous social and political capital spent to sustain affirmative action would be better spent elsewhere.”).


166 See The Honorable Robert Yazzie, “Hozho Nahasdlil” – We are Now in Good Relations: Navajo Restorative Justice, 9 ST. THOMAS L. REV. 117, 117 (1996). Justice Yazzie, referring to the United States as the Great White Father remarks:

America is in a state of crisis with high crime areas, urban violence, and gang warfare.

. . . Not surprisingly, there are also severe problems in Indian country. The United States Congress stated that it would support programs to combat child abuse and family violence, and that it would increase financial support of Indian nation justice systems. However, as is so often true, the Great White Father lied. Congress did not keep its promises to combat modern social problems in Indian country.

Id.


The black codes enacted immediately after the American Civil War, though varying from state to state, were all intended to secure a steady supply of cheap labour, and all continued to assume the inferiority of the freed slaves. There were vagrancy laws that
owners and white male legislators and judges were determining what to do with the Native American and African American populations without any consideration of what was actually best for those populations or what the affected parties considered was best for themselves.\textsuperscript{169} Stark historical examples include the U.S. Founding Fathers writing slavery into the U.S.

\textit{declared a black to be vagrant if unemployed and without permanent residence; a person so defined could be arrested, fined, and bound out for a term of labour if unable to pay the fine.}

\textit{Id.; see also Reconstruction, ENCYCLOPEDIA BRITANNICA'S GUIDE TO BLACK HISTORY, available at http://www.pbs.org/wnet/aa-world/reference/articles/reconstruction.html (last visited May 7, 2006).}

The Republican governments of the former Confederate states were seen by most Southern whites as artificial creations imposed from without, and the conservative element in the region remained hostile to them. Southerners particularly resented the activities of the Freedmen's Bureau (q.v.), which Congress had established to feed, protect, and help educate the newly emancipated blacks. This resentment led to formation of secret terrorist organizations, such as the Ku Klux Klan and the Knights of the White Camelia. The use of fraud, violence, and intimidation helped Southern conservatives regain control of their state governments, and, by the time the last Federal troops had been withdrawn in 1877, the Democratic Party was back in power.

\textit{Id.; see also Jim Crow Law, ENCYCLOPEDIA BRITANNICA'S GUIDE TO BLACK HISTORY, available at http://www.pbs.org/wnet/aa-world/reference/articles/jim_crow.html (last visited May 7, 2006).}

From the late 1870s, Southern state legislatures, no longer controlled by carpetbaggers and freedmen, passed laws requiring the separation of whites from "persons of colour" in public transportation and schools. Generally, anyone of ascertainable or strongly suspected black ancestry in any degree was for this purpose a "person of colour"; the pre-Civil War distinction favouring those whose ancestry was known to be mixed - particularly the half-French "free persons of colour" in Louisiana - was abandoned.

\textit{Id.}


\textit{Fears of cooperation between blacks and Indians fueled many attempts by whites to drive wedges between these groups and to create an atmosphere of suspicion that would prevent future alliances. For example, whites urged southeastern Indians to accept their views of slaveholding. Earlier forms of Indian slavery, both of Indians and of blacks, often served to replace tribal members lost in wars or epidemics. . . . On the other hand, the federal government as the arbitrator of Indian affairs has dictated that some tribal benefits be allocated only to those individuals at least one-fourth of whose ancestors are descended from a single federally recognized tribe. Thus Indians must struggle to prove their tribal affiliation, whereas blacks are arbitrarily and often superficially designated as African Americans.}

\textit{Id.}
Constitution, and white male judges from the Revolutionary War until today mandating what minority populations in our country must or must not do.

Sander fits squarely into this Great White Father role in several distinct ways. First, despite the much publicized paternity of his "part black" son, no matter how much love and devotion he has for that son, Sander is still a white male who has enjoyed white privilege his entire life. Sander will never know the trials, difficulties, triumphs, discriminations, microaggressions, tribulations, joys and sorrows that being black in America brings, as no white person will. He may witness it from up close, but he will never experience it. Sander can never really know what is best for that individual African American student.

---

170 See U.S. CONST. art. I, § 2, cl. 3.
Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.

Id.; see also U.S. CONST. art. I, § 9, cl. 1.
The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars per each person.

Id.; see also Thurgood Marshall, We the People: A Celebration of the Bicentennial of the United States Constitution, 1987 How. L.J. 623, 623-27 (describing clearly that the "Framers' of the Constitution" did not intend for the inalienable rights bestowed by the Constitution and Declaration of Independence to apply to all people, just free white men); HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875 (1982).

171 See Dred Scott v. Sandford, 60 U.S. 393 (1856); Plessy v. Ferguson, 163 U.S. 537 (1896); Korematsu v. U.S., 323 U.S. 214 (1944); see also andre douglas pond cummings, "Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on McBride v. Utah State Tax Commission, Political Correctness and the Reasonable Person, 36 CAL. W. L. REV. 11, 26-33 (1999) (reviewing the history of the reasonable person standard as the reasonable straight white male standard); Ceci Conoley, Native Americans Criticize Bush's Silence: Response to School Shooting is Contrasted with President's Intervention in Schiavo Case, WASH. POST, Mar. 25, 2005, at A6 (discussing Native American's reactions to President Bush ignoring the second deadliest school shooting in the country at Red Lake reservation).

172 See infra Part VI.

As bell hooks explains, liberal whites do not see themselves as prejudiced or interested in domination through coercion, yet "they cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated." The perpetuation of white supremacy is racist.

Id.
who brings his or her lifetime of challenges and victories into Sander’s law school classroom. Nor can I. Just because Sander has fathered a “biracial” son, he is still no more an authority on what is best for African Americans than is Strom Thurmond\textsuperscript{174} or Thomas Jefferson,\textsuperscript{175} both fathers of biracial children. History is replete with examples of white men, who have fathered black children, yet never had their children’s best interest at heart.\textsuperscript{176} Sander may be qualified to speak as to what he feels is best for his son from the perspective of a privileged white male and a concerned father, but that cannot and never will qualify Sander to speak for what is best for any other black person.

Second, Sander’s arrogance in perpetuating his study and conclusions, evidenced by his stark disrespect for those criticizing him, by his refusal to engage the Critical Race Studies scholars at his own school prior to promulgating his conclusions and by his own glib retorts to earnest critique, places him once again comfortably in the role of the Great White Father, knowing everything and retreating on nothing.\textsuperscript{177} Perhaps most egregious in this arrogant tour de force is his dismissal of genuine and achingly-careful research by legal academics into the realm of biased exams, unfair LSAT tests,

\textsuperscript{174} See Essie Mae Washington-Williams & William Stadiem, Dear Senator: A Memoir by the Daughter of Strom Thurmond 36-41 (2005). Senator Strom Thurmond’s paternity of an African American daughter is described as follows:

In Dear Senator, Essie Mae Washington-Williams – daughter of the late Senator Strom Thurmond – breaks her lifelong silence and tells the story of her life. Hers is a story of seven decades in the making, yet one whose unique historical importance has only recently been revealed. Until the age of sixteen, Washington-Williams assumed that the aunt and uncle who raised her in Pennsylvania were her parents. The revelation of her true parents’ identities was a shock that changed the course of her life. Her father, the longtime senator from South Carolina, was once the nation’s leading voice for racial segregation; he ran for president on a segregationist ticket in 1948 and once mounted a twenty-four-hour filibuster against the Civil Rights Act of 1957 – in the name of saving the South from “mongrelization.” Her mother was Carrie Butler, a black teenager who worked as a maid on the Thurmond family’s South Carolina plantation.

\textit{Id.} at front flap.


\textsuperscript{176} See \textit{supra} notes 174-175.

\textsuperscript{177} See Sander, \textit{supra} note 13, at 429 n.175; see also Sander, A Reply to Critics, \textit{supra} note 22.
and slanted predictor indexes, as well as his wave of the hand dismissal of these scholars as merely "glib" retaliators to his "ground breaking" study.\textsuperscript{178}

Third, as one of the architects of UCLA's post-Proposition 209 admissions formula, Sander promised to devise a methodology to maintain the rich racial diversity that existed at UCLA Law.\textsuperscript{179} Sander failed to deliver on that promise.\textsuperscript{180} During the first year in which Sander's new class-based formula was used at UCLA Law (1997) there was a 73 percent decline in African American enrollment, a 27 percent decline in Latina/o enrollment and an 80 percent decline in American Indian enrollment.\textsuperscript{181} In 1998, eight black students enrolled at UCLA Law and, in 1999, only two African American students matriculated in a law school class of 300 students.\textsuperscript{182} UCLA Law Professor Cheryl Harris, aghast at this enormous decline in minority enrollment, wrote that "[t]he precipitous and wrenching effect of this decline cannot be overstated; it has fundamentally changed the character of the institution. By way of example, in 1995 when I arrived at UCLAW... there were nearly ninety Black students and over 130 Latina/os in the school."\textsuperscript{183} Despite these devastating numbers, Sander, still presumably proud of his class-based formula, arrogantly touted his then new system as effective and worthy of national emulation.\textsuperscript{184}

\textsuperscript{178} See Sander, supra note 13, at 429 n.175.
\textsuperscript{179} See Richard H. Sander, Experimenting with Class-Based Affirmative Action, 47 J. LEGAL EDUC. 472 (1997).
\textsuperscript{180} See Harris, Critical Race Studies, supra note 76, at 1236; see also Harris, What the Supreme Court Did Not Hear, supra note 76, at 706. Harris describes the enrollment of students of color following adoption of Sander's class-based affirmative action as follows:
Contrast this with the class of 1999 several years after the adoption of Proposition 209, which banned all racial "preferences" in government decision making. This was also the year, I might add, just to speak to the question of race-neutral alternatives, that the Law School enacted a policy in which economic disadvantage was specifically taken into account. This was an experiment on whether or not class disadvantage can in fact be a substitute for race. Let me tell you what happened. There were 234 black applicants, 19 admitted, and 2 enrolled. Two out of a class of 300. There were 437 Latino applicants, 58 admissions and 18 enrolled. There were thus 2 black students and 18 Latino students out of 300 in the most racially diverse state, in the most populated part of the state, at a public institution in the year 1999.

\textit{Id.}
\textsuperscript{181} Harris, Critical Race Studies, supra note 76, at 1224-25.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.} at 1225.
\textsuperscript{184} See Sander, supra note 179, at 473.
Sander's sterile world of LSAT scores and UGPA s, when stripped bare of real life, hardships, discrimination, stereotype threat, charges of intellectual inferiority, inadequate educational facilities at K-12 and hostile law school environments, steps into the vacuum and boldly pronounces "The Answer": eliminate affirmative action and the woes of the black law student will dissipate. Sander, in so readily selecting affirmative action as his scapegoat, eerily replicates the thousands of white males before him that stripped U.S. citizens of color of rights and respect. The historical Great White Father made and cavalierly broke treaties with American Indians and bought and sold African human beings as slave chattel, while always comforted with the thought that "this slave is better off being taken care of by me, than out in that cold, cruel world." In his way, Sander posits that African Americans are "better off being taken care of by me (and my Stanford study) than out in that cold, cruel world."

This is not to say that Sander is racist (in fact in meeting and talking with him, he seems to be a genuinely nice person), nor is it to say that he should be equated with slaveholders in the antebellum South. What this is to say, is that Sander has joined the long parade of white men that position themselves as the protector, the Great White Father, that knows best and, with fancy figures and bouncy numbers, attempts to prove that his way is the way. My position is that Sander is in no position to make that call. Neither am I. This call, whether or not to take advantage of the boost that affirmative action may provide, belongs to the African American individuals who must decide whether matriculating at a law school where their indicator indexes are below average is the best decision for them.185

VI. ILL-ADVISED AUTHENTICATION

Sander casts himself as a concerned father of a "part black" son and as a reluctant liberal that has established data that he offers up as genuinely problematic which he came to almost by accident.186 Unfortunately, the reality

---

Our class preference system dramatically increased the socioeconomic diversity of the student body. . . . The law school's first-year class is almost certainly the only group of students at any "national" school that reasonably reflects the economic diversity of the general population. . . . UCLA's class-based preferences had only mixed success in preserving racial diversity at the law school. See Harris, Critical Race Studies, supra note 76, at 1224-26.

185 See Alexander, supra note 154, at 223.

186 See supra notes 34-35 and accompanying text; see also Sander, supra note 13, at 370-71.
of Sander’s study, conclusions and objectives belie his machinations to the contrary.

Sander begins his assault on affirmative action by disclosing what he calls some of his own “peculiar” biases. He first describes his background and portrays himself as a white social liberal that has spent much of his career working in the field of racial equality:

I am white and I grew up in the conservative rural Midwest. But much of my adult career has revolved around issues of racial justice. Immediately after college, I worked as a community organizer on Chicago’s South Side. As a graduate student, I studied housing segregation and concluded that selective race-conscious strategies were critical, in most cities, to breaking up patterns of housing resegregation. In the 1990s, I cofounded a civil rights group that evolved into the principal enforcer (through litigation) of fair housing rights in Southern California.

I therefore consider myself to be someone who favors race-conscious strategies in principle, if they can be pragmatically justified. Racial admissions preferences are arguably worth the obvious disadvantages – the sacrifice of the principle of colorblindness, the political costs – if the benefits to minorities substantially exceed the costs to minorities.

In describing his personal biography this way, Sander seeks to establish his credentials as a white liberal committed to the cause of social justice. In so doing, Sander sets himself up as a sympathetic liberal, who has genuinely come to his conclusions and findings reluctantly, perhaps even sorrowfully. This incarnation seems no longer the case.

Despite Sander’s early career commitment to social justice and racial equality, his more recent career arc has demonstrated something altogether

---

187 See Sander, supra note 13, at 370.

188 Sander, supra note 13, at 370-71.

189 See id. at 478.

Although I started this project with serious doubts about some things law schools were doing, the answer to the big question turned out to be far less ambiguous than I would have imagined possible. Law school admission preferences impose enormous costs on blacks and create relatively minor benefits.

Id.
different. Passage of California’s Proposition 209 ("Prop. 209") in 1995 cast Sander in a critical role as a member of the UCLA Law School faculty. With a Ph.D. in economics, Sander was selected to devise the UCLA Law School admissions formula and lead a team in devising a workable admissions standard that would promote racial diversity, but that would work within the parameters of Prop. 209. Prop. 209 essentially eradicated the use of race (i.e., affirmative action) in any California educational body and governmental entity as far as university admissions or job applications were concerned.

Sander developed a complex admissions formula which purported to promote diversity in the UCLA Law School classroom using class and socioeconomic status as a means of matriculating diverse students. Unfortunately, as has been widely documented, the number of minority law students that enrolled at UCLA (and all California State law schools) following Proposition 209 decreased dramatically. UCLA’s formula failed badly to ensure that racial diversity was maintained at UCLA Law School. Based on the failure of the class-based formula to ensure racial diversity at UCLA’s Law

190 See André Douglas Pond Cummings, "Never Let Me Slip, 'Cause if I Slip Then I'm Slippin': California's Paranoid Slide from Bakke to Proposition 209, 8 B.U. PUB. INT. L.J. 95, 64-70 (1998).
191 See Harris, Critical Race Studies, supra note 76, at 1223-25.
192 See id.
193 See Cummings, supra note 190, at 65 (reporting the text of the California Civil Rights Initiative which became Proposition 209).
194 See Sander, supra note 179, at 472 n.1 ("I am most in debt to Davis Sklansky, who codeveloped with me the mechanics of SES [socioeconomic status] affirmative action and effectively advocated on its behalf."); see also Harris, Critical Race Studies, supra note 76, at 1223-26.
195 See Harris & Kidder, supra note 17, at 102.
196 See also Michael Kelly, Proposition 209 Survives Scrutiny, YALE POL. Q., Oct. 1997 ("There was a significant decline in the number of Black and Hispanic students enrolled in the University of California at Berkeley Law School and the University of Texas Law School this fall in comparison to other years."); Daily Bruin Online, Proposition 209 Has Nationwide Domino Effect, Nov. 18, 1998, http://www.dailybruin.ucla.edu/DB/issues/98/11.18/view.editorial.html (last visited May 7, 2006) ("Proposition 209 resulted in a devastating 42.6 percent drop in African American Students admitted to UCLA’s 1998 freshman class. The number of Chicano and Latino students decreased by 33 percent.").
School, the faculty voted to discard Sander's admissions formula and to devise a new, fairer admissions standard. Apparently, Sander did not take the elimination of his class-based admissions formula well. Sander claimed that if UCLA used a different admissions formula than his class-based formula, then the school would be illegally circumventing the law. His antipathy toward affirmative action has crystallized since that time resulting in his "brazen," "biased," "irresponsible," "internally inconsistent," "flawed and ultimately misleading" analysis of datasets and bar passage rates that he submits in his Systemic Analysis.

An individual's support for or opposition to affirmative action is not, and in my mind, should not be a litmus test for whether someone is "down" for the cause of social justice. Standing alone, Sander's opposition to affirmative action and his nationwide campaign against it does not obviate Sander's career as a concerned contributor to the cause of equality. However, as far as I am concerned, whenever an individual touts the elimination of affirmative action, with no other plan to replace it or makes little to no mention of the deep inequities that still remain in the United States, then my suspicions rise as to whether an individual is still truly committed to social justice and racial equality. Certainly, it cannot be understated, that if true racial equality is to ever be found in the United States, it must be found first in its lawyers and professionals of color. Further, for the reasons that I identify herein, an inquiry into Sander's commitment to social justice and diversity seems in order. After all, at one time Clarence Thomas professed to have been influenced by the Black Panther movement and the speeches of Malcolm X—a concept that is downright uproarious today, if not so discouraging.

Beyond the presentation of himself as a reluctant white liberal sorrowfully presenting hard data who seeks to torpedo affirmative action, Sander commits a further even more egregious transgression in my mind by stating:

---

197 See id. at 1224-25.
198 See id.
199 See Chambers et al., supra note 22, at 1857, 1898.
200 See Chambers et al., supra note 22, at 1888; see also Chambers et al., 2004 draft, supra note 85; Harris & Kidder, supra note 17; Bazelon, supra note 122.
201 See Chambers et al., 2004 draft, supra note 85, at 3.
202 See Ho, supra note 22, at 1997.
203 See Dauber, supra note 22, at 1902.
204 See Cummings, supra note 3, at 9 (discussing the background of Clarence Thomas and his professing being influenced by radical black leaders in the 1960s, before making a sharp "right" turn in law school).
My son is biracial, part black and part white, and so the question of how nonwhites are treated and how they fare in higher education gives rise in me to all the doubts and worries of a parent. As a young member of the UCLA School of Law faculty, I was deeply impressed by the remarkable diversity and sense of community the school fostered.

By identifying his son as "biracial" and "part black and part white," Sander has used his own family to authenticate and present himself as "not racist" before divulging his data analysis. Further, Sander seems to have facilitated his own publicity and notoriety by putting his biracial son at the forefront of the controversy sparked by his article in order to gain traction with the popular press. The press has run with Sander's study in part because Sander has offered himself as the antithesis of the harping conservative - that of a sympathetic liberal father of a part black son. To me, using a biracial child to gain media traction, if in fact Sander has done so, is simply appalling.

Sander is not alone in his use of family racial identity to authenticate himself and dodge the charge of being racially insensitive or just flat racist.

205 See Sander, supra note 13, at 370.
206 See supra notes 86-93 and accompanying text.
208 See Harris & Kidder, supra note 17, at 103.

I think that while policy is important, it is this sense that African-Americans have that Clinton is truly comfortable with them and understands their concerns that is the overriding factor in his popularity. If you read the introduction to the book, you realize that the list of former presidents that black Americans felt any kind of real kinship with is quite short, while those who were hostile is quite long.
U.S. history is littered with examples of white elites taking positions against the best interests of people of color and then claiming that they are not individually racially insensitive because of their close association with minority populations. The common phrase dropped by many racially insensitive individuals who make objectionable comments is: "I am no racist, some of my best friends are black." I am confident that most readers of this Article can readily identify situations where they have heard white individuals justify racist remarks with claims of "it's o.k., my girlfriend is black" or "it's o.k., my sister has a half black or half Latino" child. While Sander’s empirical research and


The other side has to perceive you as a friend as well. If Ronald Reagan were to say, "I have black friends," he'd have to enumerate them and, more importantly, he'd have to give them a call to let them know they're on the list. If Bill Clinton gave you that list, you could make cold calls to these people and they would in fact acknowledge having that kind of relationship with Clinton.


The cliché about race relations in America is that Northerners love the black race and hate black people, while Southerners hate the black race but get along fine with their black neighbors. There is some truth to this. Strom Thurmond's later career was the political incarnation of the "I've got black friends" argument used by white Southerners to cushion their prejudices.

Id.; see also Ken Cummins, Strom's Secret, http://www.scpronet.com/point/9610/p04.html (last visited May 7, 2006) ("At the same time he was preaching segregation now and forever, Thurmond discreetly was financing the education of a black coed business administration major at all-black South Carolina State College in Orangeburg."); Laura B. Randolph, Thomas Jefferson's Black and White Descendants Debate His Lineage and Legacy, EBONY, July 1993, available at http://www.findarticles.com/p/articles/mi_m1077/isn9_v48/ai_13947838/print (last visited May 7, 2006).

The story of the relationship between Jefferson and Sally Hemings – the relationship . . . call[ed] “one of the most talked-about non-talked-about events in American history” – is not . . . fable, fantasy or fiction. It is fact – fact backed up by almost 200 years of oral history passed down through generation[s] . . . of Jefferson’s and Hemings’ first-born son, Thomas Woodson.

Id. 211 See Graham, supra note 210 ("Strom Thurmond’s later career was the political incarnation of the ‘I’ve got black friends’ argument used by white Southerners to cushion their prejudices."); see also David N. Mayer, The Thomas Jefferson-Sally Hemings Myth and the Politization of American History, Ashbrook Center, Apr. 9, 2001, http://www.ashbrook.org/articles/mayer-hemings.html (last visited May 7, 2006). One episode of "Seinfeld" was dedicated to the question as to whether any of George's best friends were black in order to cushion him from criticism for saying that his African American boss looked like a black celebrity. Seinfeld: The Diplomat's Club (NBC television broadcast May 4, 1995).
conclusions are different from and far more sophisticated than a plain "racist remark," they are ultimately more damaging, and in so many ways.

First, critics worry that Sander’s “irresponsible” presentation of skewed data will have a chilling effect on young African American university students who are contemplating undertaking the law school application process. Sander speculates that his article will have such widespread appeal that African American students applying to law school will have read or at least heard of his research and will gain confidence in their ability to be successful in a less prestigious law school based on his findings. It is difficult to ascertain where Sander is able to garner this hope.

Second, opponents of affirmative action, particularly those that are administrators in universities or occupational fields, will undoubtedly latch onto Sander’s article and conclusions and continue to use them as a basis for ending affirmative action.

\[212\] See Mangan, supra note 24, at A35. Mangan reports that:

Critics say Mr. Sander’s data do not support his findings, and they have accused him of leaping to unfounded and inflammatory conclusions. Some critics worry that legislators who oppose affirmative action will seize the report to support efforts to end racial preferences. And they are concerned that it could discourage black students from applying to law school.

\[Id.; see also Chambers et. al., 2004 draft, supra note 85, at 6. Chambers opines:

Indeed, because Sander’s conclusion – that “blacks as a whole would be unambiguously better off” without affirmative action – is based upon such a weak chain of untenable estimated and assumptions, we are concerned that if left unchallenged in the legal academy and elsewhere, Sander’s article may improperly discourage many African Americans from applying to law school, thus irresponsibly contributing to the very problem Sander purports to remedy.

\[Id.\]

\[213\] See Sander, supra note 13, at 476-77. Sander indicates that:

In a world where 74% - rather than - 45% of black law students graduate and pass the bar on their first attempt, law school might be a far more appealing prospect. Moreover, the findings of this Article and a growing body of other research are chipping away at the conventional wisdom that elite schools are the only path to coveted jobs. As those prejudices weaken, blacks may be less perturbed by the prospect of attending a less elite school.

\[Id.\]

\[214\] See Chambers et al, supra note 22, at 1863 (“He nonetheless concludes that there would be no decline in applications because black applicants will learn of his findings and recognize that they will, in general, have a better chance of getting into the bar by going to the fortieth ranked school.”).
or curtailing affirmative action with no alternative plan in place.\textsuperscript{215} One would hope that if a study was presented that might facilitate the demise of a system that has made positive progress (i.e., affirmative action),\textsuperscript{216} that the study would be careful, accurate and honest.\textsuperscript{217} Unfortunately, many argue that Sander's study possesses none of these qualities.\textsuperscript{218} In addition, energized affirmative action opponents are unlikely to read the candelabra of responses that have demoralized Sander's conclusions.\textsuperscript{219} And why should they? Sander has provided the necessary ammunition to pressure tepid supporters into ending a successful, albeit short-lived, program.\textsuperscript{220}


Examining data from 1986 through 2003 . . . found that the proportion of public four-year colleges that considered minority status in admissions fell from more than 60 percent to about 35 percent. For private institutions, the drop during those years was from 57 percent to 45 percent. . . . It seems clear that many colleges abandoned affirmative action in admissions even though they were not forced to do so.

\textit{Id.}

\textsuperscript{216} See Stephen Steinberg, Mending Affirmative Action, in WHO'S QUALIFIED 37 (Guinier & Sturm eds., 2001). Professor Steinberg reports that:

The purpose of affirmative action is to break down the wall of occupational segregation that excluded racial minorities and women from entire occupational sectors throughout American history. Whatever else one might want to say about affirmative action, it has achieved its policy objective: substantial desegregation of the American workplace, for women and minorities alike. This is true not only in the professions and in corporate management, but also in major blue-collar industries and in the public sector where nearly one out of every three black workers is employed.

\textit{Id.} Steinberg concludes that "[t]he crusade against affirmative action may well be on the verge of achieving its nefarious objective. But this is all the more reason to remain steadfast in defense of a policy that has not only advanced the cause of justice for women and minorities, but in doing so, has enhanced American democracy." \textit{Id.} at 40-41.

\textsuperscript{217} See Michael Heise, The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism, 2002 U. Ill. L. Rev. 819, 849 ("While reasonable scholars can -- and do -- differ on the precise application of necessary rules of inference, strong consensus exists on the more general and important point that empirical work needs to adhere to appropriate scholarly rules and norms.").

\textsuperscript{218} See supra note 22.

\textsuperscript{219} See supra note 22.

\textsuperscript{220} See Scott Jaschik, Dwindling Support, insidehighered.com, May 26, 2005, http://insidehighered.com/news/2005/05/26/minority (last visited May 7, 2006) ("A need-based model implies that low minority representation in doctoral programs results solely from economic deprivation, with no consideration of social and cultural factors that may make minority students less likely to enroll or persist in doctoral programs."); see also Jaschik, supra note 215 ("Starting around 1995, the percentage of colleges that considered students' minority
Third, white racist opponents of affirmative action will seize onto Sander’s study and use it as a tool to perpetuate the evil and demoralizing myth that African Americans are simply not intellectually capable of success in law school or are less intelligent than their white colleagues. In fact, affirmative action opponents have done just this. Thinly veiled under the guise of “less qualified” or “underqualified,” commentator after writer after pundit have used Sander’s study to support their own particular brand of racism by describing Sander’s conclusion as evidence that less capable and intellectually inferior black students are being admitted to elite law schools in the place of “more

status in admissions decisions fell dramatically – so dramatically that it appears to have gone beyond those states where court rulings or constitutional amendments barred the use of racial preferences.”); Borgna Brunner, Bakke and Beyond: A History and Timeline of Affirmative Action, infoplease.com, http://www.infoplease.com/spot/affirmative1.html (last visited May 7, 2006) (“In its tumultuous 40-year history, affirmative action has been both praised and pilloried as an answer to racial inequality.”); Answers.com, Affirmative Action, http://www.answers.com/affirmative%20action (last visited May 7, 2006).

[Affirmative action, in the United States, programs to overcome the effects of past societal discrimination by allocating jobs and resources to members of specific groups, such as minorities and women. The policy was implemented by federal agencies enforcing the Civil Rights Act of 1964 and two executive orders, which provided that government contractors and educational institutions receiving federal funds develop such programs.

Id.


qualified,” more capable and superior white students. In his study, Sander makes the same mistake that opponents of affirmative action make in their articles and commentaries: he proceeds as if the LSAT and UGPA are the only criteria that law school admissions committees use in admitting students. This is simply not true. Moreover, Sander’s mistake is less forgivable because he should know better. Thus, he is even more culpable for the perpetuation of the “inferior” myth because he failed to explain in his study that other criteria are used in making admissions offers and that it is foolhardy to use only the LSAT and the UGPA alone in making admissions decisions. Further, unless Sander has sat in on the admissions committee decisions of every ABA-accredited law school in the United States, he has no idea, not even a clue, as to how much emphasis is placed on “other factors” aside from race which enable the admittance of students of color and white students with lower indicator numbers.

223 See Arrah Nielsen, Affirmative Action Not Fair, It’s Racist, UNIVERSITY DAILY KANSAN, Nov. 16, 2004, available at LEXIS, News & Business, Combined Sources, All News (“Sander argues that the poor performance of black students at elite law schools is not due to race but to a mismatch between their academic ability and the caliber of their institution.”). Nielsen continues that “[t]he point isn’t that black students can’t or shouldn’t be admitted to law school, but that they are being admitted to law schools they are underqualified to attend.” Id. (emphasis added); see also Taylor, supra note 207. Taylor writes:

Lately, some critics of racial preferences (including me) have also speculated that many of the supposed beneficiaries might be better off without preferences. They are so much less qualified academically than their white and Asian classmates, this argument goes, that they end up near the bottom of their classes and drop out in disproportionate numbers.

Id. (emphasis added).

224 See infra Part VII (describing the multitude of factors, other than race, that law school admissions committees take into account when comparing candidates and making matriculation determinations, including quality of undergraduate institution, grade trends in undergrad, socioeconomic circumstances, public service and activism, personal statement, LSAT writing sample, state of residence, etc.). The LSAT is harshly criticized for its limited ability to predict law school success. See Richard Delgado, Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit), 34 U.C. DAVIS L. REV. 593, 598 (2001) (asserting that the LSAT does not test all relevant skills and also measures some that are irrelevant); see also Dennis J. Shields, A View from the Files: Law School Admissions and Affirmative Action, 51 DRAKE L. REV. 731, 740 (2003) (“LSAT scores and grades are not by themselves the only consideration in judging merit.”); James B. Raskin, Affirmative Action and Racial Reaction, 38 HOW. L.J. 521, 553 (1995) (stating that even those schools which rely most heavily on the LSAT do not rely on it exclusively); Portia Y.T. Hamlar, Minority Tokenism in American Law Schools, 26 HOW. L.J. 443, 495 (1983) (“[T]he LSAT was not designed nor was it intended to be used as the ultimate criterion of who should gain admission to law school.”).
The tired argument, used repeatedly by opponents of affirmative action, that based solely on the LSAT and the UGPA indicator indexes black applicants are "less qualified" than white or Asian applicants for law school matriculation, is particularly egregious when one considers the LSAC warning that the LSAT is of limited ability to accurately predict law school success. Until the LSAT is conclusively found not to be racially biased as a standardized exam, stereotype threat is carefully considered, and undergraduate grades are normalized across the U.S., it is just irresponsible to place any significant emphasis on LSAT scores and UPGA as sole indicators of law school admittance and law school success.

Sander's study allows those predisposed to find black inferiority to make racially offensive arguments in national publications that support that myth.

Fourth, Sander's study and conclusions discount (né ignore) sophisticated and important studies that have genuinely attempted to quantify and understand many of the very real problems that exist in black and white achievement gaps in the law school setting. Sander barrels ahead by correlating indicators with grades in law school, while neglecting proven analytical explanations such as "stereotype threat," racially hostile environments that exist in most U.S. law schools, and the inexplicable grade gap between black and white law

---

225 See supra note 223 and accompanying text.
226 See supra notes 221-223 and accompanying text.
227 See supra notes 221-223 and accompanying text.
228 See supra notes 37-39, 77 and accompanying text.
229 See supra notes 37-39, 77 and accompanying text. As defined by Claude Steele, stereotype threat is "the event of a negative stereotype about a group to which one belongs becoming self-relevant, usually as a plausible interpretation for something one is doing, for an experience one is having, or for a situation one is in, that has relevance to one's self-definition." Steele, supra note 37, at 616. Stereotype threat is not just applicable to minority groups: Steele made clear that stereotype threat is not limited to historically disadvantaged groups, and that every person suffers stereotype threat in certain contexts. For example, he cited a study testing stereotype threat among white engineering students. When the white students took a test after being told that Asians typically outperformed whites on that test, the whites performed significantly worse than they would have otherwise. . . .

He said that while racism exists, stereotype threat is a far more pervasive barrier to a truly integrated society. According to Steele, a person's fear of being negatively stereotyped according to race — whites as racist, blacks as intellectually inferior, for example — creates a general level of discomfort in racially mixed settings.

Id. See Steele Discusses "Stereotype Threat", supra note 77.
students who enter with essentially the same indicator numbers. Each of these documented problems cry out for further examination and research, yet Sander is content to ignore each as valid and, enormously pertinent, chooses instead to blame affirmative action and mismatch, using severely criticized correlating evidence.

In looking closely at the media attention garnered by Sander and his affirmative action conclusions and in examining closely some of the positions taken by Sander in order to garner such attention, it is difficult not to conclude that:

In addition, although a majority of white students did not think that race mattered in the classroom, the majority of African Americans disagreed. They believed that there were not enough professors of their own race to serve as role models and that race influenced the way that students were treated in class.


Of great significance, a student of color can experience intellectual inhibition when he or she is surrounded by people who believe he or she is intellectually unqualified to be in law school and make that belief known in various ways. Overt and subtle racial insults and exclusion are experienced by students of color on a regular basis at many, if not most, American law schools.


Students at all levels of education tend to perform at the level of the expectations of authority figures around them, especially teachers. Unfortunately, in law schools, all too many law school professors tend to have low academic expectations for students of color and tend to communicate those expectations to both minority and white students in myriad of subtle, and not so subtle, ways.

Id.

See supra notes 37-39, 77; see also infra notes 283, 285.

Sander, supra note 13, at 369-70. Sander admits:

The “costs” to blacks that flow from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters, such as the stigma and stereotypes 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 or objective enough for my purposes. The principal “cost” I focus on is the lower actual performance that usually results from preferential admissions. A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a “legacy” admit.

Id.
that Sander is using his son and purported position as a reluctant liberal to gain traction within the mass media. While these positions appear objectionable, Sander’s study further fails to account for several additional issues that impact his outcomes.

VII. CRUCIAL NEGLECTED ISSUES

Sander fails to carefully consider the critically important element of diversity in the law school classroom in his analysis. Further, Sander essentially analyzes the affirmative action question as if the only important indicators for success in law school are LSAT and GPA indicator numbers. As a member of an admissions committee, I cannot think of anything further from the actual reality of law school matriculation consideration. I suspect that Sander, in his long career as a law professor, has served as a member of an admissions committee at one point or another.

---

233 See supra notes 23-25 and accompanying text.
234 Sander, supra note 13, at 483. Sander writes that:

The most obvious disadvantage of such a solution is that the most elite law schools would have very few black students – probably in the range of 1% to 2% of overall student bodies. Many observers would view this as an enormous cost, for at least two reasons: the diversity at elite schools is thought to be critical in shaping the attitudes of future national leaders, and the sheer numbers of blacks at top schools are thought to be a vital source for future black judges, public intellectuals, and political leaders. I have not explored these specific issues here, and I agree they merit serious consideration.

Id.

235 See Sander, supra note 13, at 411-12.

American higher education relies heavily on quantifiable indicators of academic achievement, and probably nowhere in higher education is this reliance more complete and obvious than in law school. . . . The principal good reason is that academic indices based on the LSAT and undergraduate grades can be shown to be far more effective in predicating law school performance (and for that matter, success on bar examinations) than any other factor that has been systematically tested.

Id.

236 See supra note 36 and accompanying text.
A. Diversity in the Law School Classroom

As has been established countless times, part of the crucial importance of diversity in the classroom, particularly racial diversity, is that student experiences and discussions are enhanced remarkably when differing perspectives and experiences are portrayed. Justice Powell in *Bakke*

---


- Racial and ethnic diversity may promote a broad range of educational outcomes, but we focus on two general categories. Learning outcomes include active thinking skills, intellectual engagement and motivation, and a variety of academic skills. Democracy outcomes include perspective-taking, citizenship engagement, racial and cultural understanding, and judgment of the compatibility among different groups in a democracy. The impact of diversity on learning and democracy outcomes is believed to be especially important during the college years because students are at a critical development stage, which takes place in institutions explicitly constituted to promote late adolescent development.


- First, there is an ethical and moral issue at stake. If we believe in equal opportunity for our citizens then, perforce, we ought to have an educational environment in which some reasonable proportion of the segments of society should be able to participate in higher education, have the opportunity to gain the advantages provided, and equally welcomed, valued, and heard.

Id.


- First, the education of all our students is enhanced in a diverse learning environment. If students come to a campus that includes people who are different from themselves - people from different backgrounds and experiences, with different values and reasons for being here - then all the students benefit. Each of these students brings to the learning environment understandings and perspectives born of who she is and where he comes from. Everyone gets a better education.


Students are both recipients and providers of the learning that takes place at universities, and [universities] have a vital interest in what students bring to the task
describes this importance as the "robust exchange of ideas" that is enhanced by diversity in the classroom.\textsuperscript{239} Not only is affirmative action important for the of educating each other. . . . Diversity helps students confront perspectives other than their own and thus to think more vigorously and imaginatively; it helps students learn to relate better to persons from different backgrounds; it helps students become better citizens. The educational benefits of student diversity include the discovery that there is a broad range of viewpoint and experience within any given minority community – as well as learning that certain imagined differences at times turn out to be only skin deep.

\textit{Id.} (alterations in original); see also Richard L. McCormick, \textit{Diversity @ Rutgers: Making Diversity a Way of Life}, http://diversityweb.rutgers.edu/statement.php (last visited May 7, 2006).

We are determined to maintain . . . diversity for two essential reasons. First, social justice requires that educational opportunity must be afforded to students regardless of their economic status, background, or heritage. Second, academic excellence depends on a diverse learning environment because everyone gets a better education when they study with people who are not just like themselves. Our stated mission at Rutgers is to achieve excellence in teaching, discovery, and service – all of which are done best in a diverse, multicultural setting that is characterized by mutual respect and the free exchange of ideas.

\textit{Id.}; see also Regents of University of California v. Bakke, 438 U.S. 265, 313 (1978). In \textit{Bakke}, the Supreme Court stated:

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.

\textit{Id.}; see also Grutter v. Bollinger, 539 U.S. 306, 330 (2003). In \textit{Grutter}, the Supreme Court stated:

The Law School's claim of a compelling interest is further bolstered by its amici, who point to educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes and "better prepares students for an increasingly diverse work force, for society, and for the legal profession."

\textit{Id.}; see also infra note 237.

\textit{Bakke}, 438 U.S. at 313.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission. . . . But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.

\textit{Id.}; see also \textit{Grutter}, 539 U.S. at 324.

In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." Both "tradition and experience lend support to the view that the contribution of diversity is substantial."
students who have been historically discriminated against in the education system of the United States, but it is crucial for the white students who have never been historically discriminated against, based solely on the critical perspective and perceptions that students of color bring into the classroom and into the consciousness of the majority students.

Sander attempts to dismiss this most important concept by suggesting that his experience led him to discover that even when affirmative action was applied aggressively at UCLA, the students of color that were admitted were not the downtrodden or the urban poor, but were instead the “upper crust” socioeconomic minority students. To Sander, this apparently proves his point that affirmative action is not reaching its intended class, and that “upper crust” minority students are not bringing a different or important perspective to the law school table. I could not disagree more. Presumably, Professor Derrick Bell, Professor Patricia Williams, Professor John Calmore,

Id.  

240 See generally Steinberg, supra note 216, at 37.  
241 Angela Onwuachi-Willig, For Whom Does the Bell Toll: The Bell Tolls for Brown?, 103 MICH. L. REV. 1507, 1517-23 (2005); Juan F. Perea, Buscando America: Why Integration and Equal Protection Fail to Protect Latinos, 117 HARV. L. REV. 1420, 1452-53 (2004) (“Affirmative action yields clear benefits for Whites — the possibility of less racial stereotyping, better-trained and better-informed future national leaders, enhanced understanding of non-White races, economic benefits in a global economy, and a more demographically representative military and civilian leadership.”).  
242 Sander, supra note 13, at 370-71 (“Yet as I began my studies of legal education in the early 1990s, I found myself troubled by much of what I found. The first student survey I conducted suggested that UCLA’s diversity programs had produced little socioeconomic variety; students of all races were predominantly upper crust.”).  
243 See id.  
244 See Derrick Bell, The Price and Pain of Racial Perspective, STAN. L. SCH. J., May 9, 1986, at 5 (describing Bell’s experience teaching constitutional law at Stanford Law School, where his constitutional law colleagues established a supplemental lecture series to quietly ensure that Bell’s students received what his colleagues considered was adequate and appropriate course coverage).  
245 See PATRICIA J. WILLIAMS, ALCHEMY OF RACE AND RIGHTS (1992); see also Clark Freshman, Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “ISMS” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research, 55 STAN. L. REV. 2293, 2344 n.242 (2003) (“In one of the most famous and widely discussed ‘narratives’ associated with critical race theory, Patricia Williams wrote of waiting to be buzzed into a Benetton store while a white employee just mouthed, ‘We’re closed.’”); see also Neil Gotanda, Chen the Chosen: Reflections on Unloving, 81 IOWA L. REV. 1585, 1586 n.10 (1996) (“Patricia Williams’s story involved being kept out of a New York Benetton store after a young white clerk looked her over and told her that the store was closed when another white customer was inside shopping.”).  
246 See John O. Calmore, Airing Dirty Laundry: Disputes Among Privileged Blacks – From Clarence Thomas to the “Law School Five”, 46 HOW. L.J. 175, 181 (2003) (detailing the brutal
Professor Adrien Wing and Professor Reginald Robinson would disagree with Sander that being African American and "upper crust" (assuming that law professors can be considered "upper crust") ever insulates a black American from being discriminated against, intellectually disrespected, brutalized, battered by students or downright "spirit injur[ed]." African American law students, regardless of their socioeconomic status, bring significant and distinctive perspectives to the law school classroom, as do African American

and racist criticism levied against him and four of his African American law professor colleagues by the popular press when all five protested by boycott a visit by Supreme Court Justice Clarence Thomas to the University of North Carolina College of Law).


See Reginald Leamon Robinson, Teaching from the Margins: Race as a Pedagogical Subtext, A Critical Essay, 19 W. NEW ENG. L. REV. 151, 169 (1997) (detailing the harsh student evaluations received by him when he attempted to bring issues of social justice to his students' attention in a property law class at a majority white law school).

See Williams, supra note 245; see also Bell, supra note 244, at 5; Calmore, supra note 246, at 181-91.

See Bell, supra note 244, at 5; see also Robinson, supra note 248, at 173.

See Wing & Merchans, supra note 247, at 26-27; see also Calmore, supra note 246, at 186-89; Jerome McCristal Culp, Jr, Toward a Black Legal Scholarship: Race and Original Understandings, 1991 DUKE L.J. 39, 45-62 (detailing the brutalities and travails faced by African American law professors at their respective institutions).

See Robinson, supra note 248, at 172; see also Culp, supra note 251, at 45-62.

See Wing & Merchans, supra note 247, at 1-2. Wing and Merchans detail spirit injury as follows:

The combination of the physical and psychological effects of rape inflicts a "spirit injury" upon the victim. Professor Patricia Williams of Columbia Law School defines spirit injury as the "disregard for others whose lives qualitatively depend on our regard." On an individual level, spirit injury is a consequence of the victim's loss of self-esteem due to the racially or ethnically motivated sexual assault. It leads to the slow death of the psyche, of the soul, and of the identity of the individual. Spirit injury on a group level is the cumulative effect of individual spirit injuries, which leads to the devaluation and destruction of a way of life or of an entire culture. Spirit injury is "as devastating, as costly, and as psychically obliterating to the victim as robbery or assault; indeed they are often the same."

Id.

See Regents of University of California v. Bakke, 438 U.S. 265, 312-13 (1978). The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in Keyishian, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Id.; see also Alfred B. Gordon, When the Classroom Speaks: A Public University's First Amendment Right to a Race-Conscious Policy, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 57, 81 (2000). Gordon reports that:
law professors. In general, disadvantaged minority students bring essential and uncommon perspectives to the law school classroom. U.S. law schools should be aggressively seeking to bring both "upper crust" and disadvantaged students of color into its classrooms.

And, despite Sander's and Clarence Thomas's protestations to the contrary, my Howard Law School class of 1997 was filled with not only "upper crust" African American students, but with reformed gangsters, former athletes, rappers, artists, poets and visionaries. Some were "upper crust," but most were not. Most had been recruited by "higher ranked" schools, some by the very elite -- if one buys into the U.S. News and World Report rankings, which Howard Law School necessarily does not. All of my classmates brought uniquely different and vibrant experiences to the law school table. Many of my

University classrooms play a special role in fostering students' understanding of racial and societal differences and diversity within the classroom is an invaluable tool for introducing students to these varied cultural values. To fulfill this goal, university classrooms depend upon the interaction of students with unique perspectives. To some extent, race molds the perspectives that students bring to the classroom. Therefore, through a racially diverse student body, these different life experiences and viewpoints contribute to the education that universities afford all students.

Id.; see also Patricia Gurin, Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education, 5 Mich. J. Race & L. 363, 385 (1999). Gurin discusses the diversity rationale as:

Structural diversity had significant positive effects on classroom diversity and interactional diversity among all students. Attending a diverse college also resulted in more diverse friends, neighbors, and work associates nine years after college entry. This is strong evidence that structural diversity creates conditions that lead students to experience diversity in ways that would not occur in a more homogeneous student body.

255 See Harris & Kidder, supra note 17, at 105. Harris and Kidder caution:

The leadership echelons of the legal profession are dominated by graduates of the top 20 or so elite law schools. Ending affirmative action at elite law schools would have profound long-range consequences for America. Take, for example, federal appellate and Supreme Court law clerks, often the professors, judges, and law firm partners of tomorrow. Over half of these prestigious clerkships in 2002 went to graduates of the top 13 schools, less than half went to graduates of the other 170 ABA law schools. Likewise, a majority of all current African American partners in major corporate law firms went to elite schools, 47 percent from Yale and Harvard alone.

256 See Robinson, supra note 248, at 172.

257 See Sander, supra note 13, at 370-71 (classifying UCLA's minority students as "upper crust"); see also Cummings, supra note 3, at 39 (criticizing Thomas's characterization of affirmative action recipients as being made up mostly of students that are not "disadvantaged"); Grutter, 539 U.S. at 355-56.
law review colleagues at Howard shared experiences of being aggressively recruited by the likes of Stanford, Harvard, Columbia, Georgetown, NYU and the like, and each classmate for varying reasons chose Howard Law School.\footnote{Many times, while editing articles or cite-checking footnotes late at night, a number of us on law review would begin swapping stories of job interviews, recruiting tactics, inappropriate or racially motivated questions being asked on “call backs” and the law schools that recruited us prior to our matriculating at Howard Law School. I always loved listening to the stories of personal and aggressive recruitment of my friends and colleagues by Stanford, Harvard, Northwestern, University of Southern California and the like. The caliber of my classmates always impressed me from the first day of law school, and their stories encouraged me and allowed me to compare my own story and know that I too had chosen wisely.}

This is another point that escapes Sander and his study, and surely turns on its head Sander’s prediction that African American students will select the most “prestigious” school that selects them, in the absence of affirmative action.\footnote{See Chambers et al., supra note 22, at 1862-68. But see Posting of Richard Sander to http://volokh.com/archives/archive_2005_06_05-2005_06_11.shtml (June 8, 2005, 20:30 EST) (addressing the criticism that students will not always choose their first choice school, or certainly not the best ranked school that admitted them).}

I cannot even begin to describe the importance that students of color play in my own law school classrooms at West Virginia University College of Law. The following narratives attempt to describe exactly why a minority student’s perspective is critical in the law school environment:

Sports Law, Spring 2005: Our discussion centers on the power of the Commissioner in the professional sports leagues to unilaterally impose discipline upon the athletes of each of the major sports leagues, including the National Football League ("NFL"), the National Basketball Association ("NBA"), Major League Baseball ("MLB") and the National Hockey League ("NHL"). The issue crystallizes as students rightly point out that the owners of the professional sports leagues contractually select a Commissioner and give over to the Commissioner unilateral control over discipline of the athletes. The athletes agree to function under this system through Collective Bargaining and the various permutations of the existing CBAs in each league.

comes up in the conversation related to discipline and it is brought out that O'Neal believes strongly that Commissioner Stern singled him out for significant punishment based, in part, on his being a "member" of the "hip hop generation" and that O'Neal believes that Commissioner Stern is aghast with the tattoos, cornrows, rap records and entourages that accompany so many of the NBA athletes these days.\textsuperscript{261}

Quickly the discussion narrowed to whether Commissioner Stern, a sixty-something year-old white male, does in fact hold a serious disinclination toward the young hip hop stars of the current NBA. The discussion further led to questions regarding the specific constitution of the hip hop generation. This short class discussion turned into an animated examination of the current state of affairs in the NBA. Students rightly prompted that NBA stars such as Allen Iverson, Shaquille O'Neal, Kobe Bryant and Ron Artest had each released rap records in the recent past. It occurred to me about fifteen minutes into this conversation that each one of the students that had volunteered to speak during this open discussion had been white male students. This seventy-person Sports Law class was about one-third female, but had just one African American student enrolled. I remember thinking that the conversation was somewhat peculiar, as many of my white male students was earnestly addressing the question as to what qualified an individual to be a member of the hip hop generation and sincerely answering the question as to whether Commissioner Stern was biased against the hip hop generation in the NBA. But I also remember really hoping my single African American student would weigh in on these important issues of race and power, remembering that Warren Sapp, an NFL star, had recently compared the power of the Commissioner of the NFL to the slave masters of the antebellum period. And, as he usually did, my African American student did weigh in, bringing important perspective and authenticity to our very intriguing discussion. This African American student reminded the class that Commissioner Stern had essentially shut down Allen Iverson when Iverson was ready to release a hip hop record several years ago. He also led the class in an interesting critique of the ability, talent and "flow" of each of the NBA stars who had released hip hop singles (as an audio aid for class, I had played short clips of the hip hop records released by Shaquille O'Neal, Artest, Iverson and Bryant). This student also reminded the class that Sapp, currently playing for the Oakland Raiders, had recently equated the power of the Commissioner's office in the NFL to that of the slave owners in the

\textsuperscript{261} See S.L. Price, What Would You Do?, SPORTS ILLUSTRATED, Jan. 31, 2005, at 56 (reporting on Jermaine O'Neal's reaction to the brawl in Detroit and the punishment meted out by Commissioner Stern).
What a dynamic and intriguing class period that turned out to be.

Several crucial points must be drawn from this narrative. First, the critical perspective delivered from the single African American student in that Sports Law class was phenomenal and could not have been delivered from any other single person in that classroom. The perspective, experience and genuine authenticity of the comments were irreplaceable.

Second, as the only African American in that class, this student was constantly placed in the position of having to “represent his race” to the rest of the class. Despite my best efforts to never single this student out and wait for his voluntary involvement, particularly when we were engaged in issues of race, power and prestige, he confided in me the weight of the responsibility to represent and share his perspective, a black male perspective, even though he felt that the environment in the class was safe and supportive.

Third, a critical mass of African American students is absolutely fundamental, in my mind, in perpetuating an environment where African American students and other minority students can participate in class on an equal footing with their white majority classmates. Sander completely disregards in his analysis the hostile environment that law school can very realistically create for students of color, both intentionally and unintentionally. Absent a critical mass, students of color constantly have to be vigilant in either representing their race (i.e., tamping down racism in students and/or professors) or in choosing to quietly ignore such comments and just seethe inside. With a critical mass of minority classmates, students of color

---


263 See Chambers et al., supra note 22, at 1856.

264 See infra notes 265-267 and accompanying text.

265 See Jodie-Marie Masley, Testimony of Chrystal Blossom James, 12 LA RAZA L.J. 433, 433-43 (2001) (describing in rich detail the hostile law school environment that existed at UCLA Law School in 1999 and 2000); Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 329 (1987). Informal conversations conducted by the author with students of color from various law schools revealed that African American students were often (1) called by the name of one of the few other black students in the class; (2) addressed by their Professor in slang, jive or ebonics when called on in class; (3) called on significantly less often than their white counterparts during Socratic questioning in class; and (4) rarely recognized in class when raising their hand and wishing to engage in the classroom conversation. See id.
can either feel confident that their classmates will be vigilant for them on any given day or that they can speak out from their own perspective without the fear of alienating the entire class against them for their “different” view or perspective.266 West Virginia University College of Law makes a yearly Herculean effort to recruit students of color to join us in Morgantown, WV, and does a fairly good job of securing the matriculation of minority students and non-traditional students given our state’s minority population.267

When a critical mass is present, important steps can be taken to provide a supportive environment for students of color in the classroom:

Constitutional Law, Spring 2003: Teaching Constitutional Law as a first year professor proved to be an exciting, exhilarating and intimidating experience. Fortunately, my classroom of seventy students or so included at least six or seven African American students and several Latino, American Indian and Asian students. Spring 2003 was also the semester that Grutter and Gratz were being argued before the U.S. Supreme Court. What a terrific semester to teach the equal protection clause and the constitutionality of affirmative action. I assigned the students to supplement their case book reading with a variety of Grutter specific readings including newspaper articles, party briefs, amicus briefs and position papers relating to the litigation. We listened to audio of the arguments during and after class. We discussed and debated the merits of affirmative action repeatedly that semester. One particular day, when the young white conservative males were dominating the conversation, taking Michigan Law School to task for its use of race in admissions decisions and really getting frothy about “reverse discrimination,” unprompted, one of my African American female students boldly raised her hand. She sat in the middle of the room, surrounded by her friends, mostly minority, mostly black, and delivered an eloquent and powerful rebuttal. I will never forget her words (and I doubt the young Republican contingent will either). She spoke of unequal playing fields and discrimination; she talked about her rich ancestry marked by slavery and depravation; she likened life in the United States to a 400-meter race in track and field, describing the white male students as being given a 300-meter head start with the female students starting later and the black students starting last (along with the American

266 See Masley, supra note 265, at 440.
267 In the class of 2008, 13 African American students enrolled in a class of 153 (8.4%) and a total of 24 minority students enrolled out of that class of 153 (15.6%). The population figure of African Americans in the state of West Virginia is reported as 1.7% of the state population. Most of the credit for our ability to recruit and enroll African American students necessarily goes to Professor Judith Scully, who has worked tirelessly in this effort since her arrival in Morgantown, eight years ago.
Indian students); she talked of white privilege and stolen opportunities; and finished with a strong yet simple acknowledgment that she was not asking for unfair advantages or unearned step-ups, she simply desired an equal playing field and an opportunity to start the race at the same time as everybody else. The class sat silently for several beats following her comments.

Those five minutes may have been the most important of the semester - and not even delivered by the instructor.

At the conclusion of the course that semester, one of the most vocal young white male affirmative action opponents stopped by my office. I genuinely liked this student and occasionally squared off with him on the basketball court after classes. He thanked me for providing a unique perspective in Con Law and a perspective on affirmative action that he had never before considered. He acknowledged that he had not yet changed his position entirely on affirmative action, but that he was far more open now to debate and legitimately hearing what the other side had to say on important issues that affect our daily lives. He commented on the eloquence and bravery of the African American woman who spoke up in class that one day.

Again, several critical points can be drawn from this narrative. First, as she divulged to me later, this African American student felt comfortable speaking out in strong support of affirmative action partly because her physical environment in the classroom looked safer to her than other settings in which she had been before (seated directly around her were at least four or five students of color, including African American students to her direct right and left).

Second, I am confident that no other person could have replicated the brilliant response and intensity conveyed in this student’s passionate entreaty to the heated discussion that preceded her comments. She provided a singularly unique perspective, one that would have been entirely lost on the class had she not voluntarily spoken that day, or had she never been admitted to our law school.

Third, this black female student did not feel that she was speaking on behalf of her race, or on behalf of all black people. She was confident that had any of the young white male conservatives verbally attacked her she would find support in her colleagues of color. Further, she knew that if any of her colleagues of color disagreed with her comments, they could have, and most surely would have, spoken up and challenged her on the issues she presented. Because she was confident in the critical mass, and because she knew her colleagues of color, she understood that other voices were in place and could
speak up as well. The critical mass provided an incentive for her to speak and to do so with power and conviction.

B. Admissions Committee Decisions

Sander carries on in a Systemic Analysis as if each law school in the nation conducts its admissions decisions based solely on LSAT and UGPA indicator averages. Sander has worked only at UCLA Law School and has not served on any admissions committees at any other law schools in the United States. He makes a terrible assumption in claiming that every law school makes its matriculation decisions based solely on index averages and indicator predictors.

My limited experience teaches me much more than Sander will allow himself to admit. At WVU Law, after initially placing students in “categories” based on indicator averages, we carefully review each and every file that comes across our desks. We use at least ten or eleven categories of consideration in coming to our admissions decisions, while carefully following Justice O’Connor’s guidance in Grutter, making a holistic review of a candidate’s entire file. We consider residency, LSAT score, background, UGPA, letters of recommendation, undergraduate grade patterns, race, socioeconomic status, life experience, leadership, activist activities, etc.

If in fact our African American law students have lower indicator numbers than our averages, each of these students has distinguished himself or herself in numerous other measurable ways in order to earn an admission invitation to our law school. That is not to say our majority students are not extraordinary and full of potential in their own right. That is to say that any student, African American or otherwise, who is admitted on indicator numbers below our averages, has a tremendous record of achievement, activism, leadership, life experience, letters of recommendation and so forth.

I am confident we are not alone at WVU Law in the way we address our admissions decisions and matriculation process, i.e., with care and holistic review of an entire file. Certainly dozens of law schools practice this same kind of committee review.

---

270 See Johnson & Onuachi-Willig, supra note 22 (detailing the careful admissions committee processes undertaken at many law schools across the country).
VIII. Conclusion

After having carefully read Sander's Systemic Analysis several times, and after having carefully examined each of the critiques and responses that have been published thus far, including Sander's own defenses of those critiques, I am led to the simple conclusion that Sander set out in the recent past to discover a way to eviscerate affirmative action. Therefore, I reject Sander's posited good faith study that finds that affirmative action is ineffective and hurts African American students that he purportedly pushed forward into the legal academy as a blueprint to assist in the fight against racial injustice. I am led to this conclusion based on the internal history of the affirmative action permutations at UCLA Law since Prop. 209 by Sander's bewildering use of family and political leanings to gain traction with the popular press, by the fiercely challenged empirical research leading to wildly startling conclusions and his simplistic attachment of the complex problems faced by black law students onto affirmative action solely. Truthfully, I am deeply offended by Sander's article and research for each and every one of the reasons that I have previously indicated.

However, to the extent Sander continues in some form or fashion to be a social liberal who generally "favors race-conscious strategies in principle, if they can be pragmatically justified," then a few proposals come to mind for ways that Sander can better spend the enormous amount of time that he has poured into his anti-affirmative action crusade.

I posit that Sander has the affirmative action inquiry altogether backward. Sander cloaks his affirmative action critique in the guise of concern for his biracial child. In so doing, he engages in outright paternalism. United States

---

272 See Harris, Critical Race Studies, supra note 76, at 1223-25.
273 See supra Part VI.
274 See supra note 22.
275 See Sander, supra note 13, at 478-83. Sander seems to note with delight, that his Systemic Analysis has led to at least eleven responses or critiques in the legal scholarly literature, appearing to use this as some type of substantiation of his position. See Sander, supra note 83 ("By my ... count, eleven articles entirely devoted to 'debunking' Systemic Analysis have been published or accepted for publication in legal or education journals, and dozens of more informal critiques have appeared in the media and a variety of websites.").
276 See Sander, supra note 13, at 371.
history is sated with examples of "The Great White Father," i.e., white men who fathered black children and never considered the best interests of those children. Slave owners raped slave women to increase their assets; white men hid the paternity of their half black children in order to reach great political or economic potential. Merely fathering a black child does not equate to racial equality nor does it qualify the father to speak on behalf of a race.

In my mind, were Sander truly concerned about the future of his biracial son and African American law students generally, his time and talent surely could have been better spent. First, Sander should have found out whether the law firm hiring market is different for black lawyers versus white lawyers. Clear evidence exists that tends to show that elite law schools make the difference for African American lawyers when securing prestige positions. Surely Sander could not be advocating that America's most prestigious law firms and government positions hire no black lawyers.

Further, were Sander truly concerned about the future of his biracial son, he could have conducted a study determining whether law school classrooms are still hostile to students of color. Evidence suggests that African American law students still face hostility, stigma and outright racism in their law school classrooms. Sander could have evaluated whether these "microaggressions" led to the lower scholastic performance he reported.

If Sander were truly concerned about the future of African American law students, he could have focused on a different subset of black law students for his study: those that excel in law school. Sander paternalistically focused on the struggling students instead of studying the black students who excelled, learning how these students overcame the serious obstacles that faced them and the index scores that likely slotted them as future disappointments. Studies show that elite institutions of higher education have high expectations for all students and, by expecting more and receiving more, find that students of color meet those expectations. Sander should have studied the characteristics of those African American students in the top of their classes who easily

---

278 See Masley, supra note 265.
280 See Brian Fair, Address at the Southeastern Association of Law Schools ("SEALS") Annual Conference, Panel on Affirmative Action (July 22, 2005) (notes on file with author) (responding to Richard Sander).
graduated from the elite law schools across the country. Instead, Sander missed a golden opportunity to contribute to the legal academy by not only offering a wake up call but by providing a blueprint for success in the law school system.

Further, rather than choosing selected data, producing "unworkable" numerical comparisons, and aggressively seeking to end affirmative action nationally, Sander could have focused on the real problems that face African American and other law students of color. A genuine testing gap and law school grade gap afflict African American, minority and non-traditional law students. This unfortunate fact is borne out in recent studies that capture this reality. Further, evidence shows African American law graduates struggle in greater numbers in passing the bar exam than do white law graduates. Genuine and legitimate reasons exist for these disparities. Therefore, challenges and questions exist that yearn for legitimate answers and affirmative effort to resolve these difficulties. Sander, and all thoughtful law school professors, could and should spend valuable time engaged in the following:

282 See Vernellia R. Randall, Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools, 16 T.M. COOLEY L. REV. 201, 232-33 (1999) (correlation studies done with UGPA and LSAT revealed that in the second semester of their first year, African-American students with lower LSAT scores made better grades than African-American students with higher LSAT); see also Cross, supra note 38 (discussing the bar examination passage gap between black and white law graduates).


284 See Cross, supra note 38, at 64; see also Ho, supra note 22, at 2000.

285 Stereotype threat hurts those upon which the stereotype most directly effects. Even those stereotyped as "intelligent" or "great students" are likely to do poorly because they are expected to do well in school and the added pressure to live up to datasets and pundit claims can be their undoing. Claude M. Steele, Thin Ice: "Stereotype Threat" and Black College Students, ATLANTIC MONTHLY, Aug. 1999, at 44-54, 48 ("the most achievement oriented students, who were also the most skilled, motivated, and confident, were the most impaired by stereotype threat."); see also Jean-Claude Croizet, Michel Désert, Marion Dutrèvis & Jacques Philippe Leyens, Stereotype Threat, Social Class, Gender, and Academic Under-Achievement: When Our Reputation Catches Up to Us and Takes Us Over, 4 Soc. PSYCHOLOGY OF EDUC. 295-310 (2001). There are already ripple effects on the UCLA campus. See Cheryl I. Harris, ... Or Do They? Studies Show Otherwise, UCLA TODAY, Feb. 23, 2005, available at http://www.today.ucla.edu/2005/050223voices_ordothey.html (last visited May 7, 2006). Minority students are also placed in a hostile environment where success is difficult. Tonia Bui, Affirmative Action Study Generates Controversy, THE DAILY CALIFORNIAN, Feb. 17, 2005, available at http://www.dailycal.org/article.php?id=17663 (last visited May 7, 2006 (interview with a Boalt Hall student discussing the law school's hostile environment).

286 See supra notes 37-39, 77, 285 and accompanying text.
First, we should examine our own personal prejudices and stereotypes in order to fully eliminate any carryover effect that they may have in the law school classroom. Second, Sander could work diligently as part of the UCLA faculty, particularly with UCLA’s Critical Race Theory team, to initiate or effectuate a supportive environment for African American students and for all non-traditional students who historically struggle in law school, as we all should at our respective institutions. Third, we should spend time interviewing and working closely with African American students in order to discover why some face greater difficulty in law school coursework.

Sander admits he relies on new studies that are “just beginning to emerge” that allow a careful examination of bar passage comparisons between races and a serious analysis of relative costs and benefits of affirmative action in law school admissions. Sander describes “several large, longitudinal datasets” on law students and lawyers that now make it possible to undertake ambitious studies and ask hard questions about affirmative action and racial preferences in law school admissions programs. So, with these datasets within his reach for the first time, and with the ability to conduct ambitious studies and answer hard

---

287 See supra note 285 and accompanying text.
288 UCLA has established a Critical Race Studies ("CRS") concentration at its law school, the first and perhaps only concentration of its kind. See UCLA School of Law, The Concentration in Critical Race Studies, https://www.law.ucla.edu/home/index.asp?page=839 (last visited May 7, 2006). The UCLA Critical Legal Studies concentration lists Professors Devon Carbado, Kimberlé Crenshaw, Carole Goldberg, Laura E. Gómez, Cheryl Harris and Jerry Kang as the faculty instructors in this specialized concentration, an unquestionably luminous lineup. See UCLA School of Law, Critical Race Studies Brochure, https://www.law.ucla.edu/docs/crs brochure.pdf (last visited May 7, 2006). Undoubtedly, the CRS professors at UCLA could provide crucial feedback to Sander, were he to examine and study the real and legitimate causes for the LSAT testing gap and law school grades/performance gap as it relates to students of color.

As described by Claude Steele (1997), members of stereotyped groups such as African Americans are especially wary of situations in which their behavior can confirm the negative reputation that their group lacks a valued ability. The extra pressure caused by the fear of reinforcing the negative stereotype interferes with performance, resulting in lower scores.

Id. at 374; see also Clydesdale, supra note 111.
291 See Sander, supra note 13, at 425-54.
292 See Sander, supra note 18.
questions, rather than examine the LSAT testing gap or the law school performance gap and deliver useful data and conclusions, Sander uses these large longitudinal studies to conduct a study that strains to propagate a theory that affirmative action should be eradicated or at least deemphasized in higher education.\textsuperscript{293} I find this curious. And hugely disappointing.

\textsuperscript{293} See Sander, supra note 13, at 483. Sander concludes:

The most obvious solution is for schools to simply stop using racial preferences. As we have seen, this is not an unthinkable Armageddon; by every means I have been able to quantify, blacks as a whole would be unambiguously better off in a system without any racial preferences at all than they are under the current regime.

\textit{Id.}