

**After the Gold Rush?: Grutter, Sander and ‘Affirmative Action’ “on the run...”
in the Twenty-First Century¹**

by
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A. Introduction: “a system of racial preferences...”²

“What I find and describe... is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries....”³

To tag ‘affirmative action’ efforts in higher education with the adjectives “factious,” “choleric” or “inflammatory” is to court no controversy whatsoever among the many interested sub-communities focusing on the matter in 21st century America. Developed in the fertile, turbulent 1960’s directly in consequence of the American Civil Rights revolution touched off the decade before, ‘affirmative action’ has proven controversial in each of its forms and for every moment of its existence since inception.⁴

¹ With apologies to legendary – and, with regard to the particular creative work sampled here, prescient – singer/song writer/performer, Neil Young.

² From Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN.L.REV. 367, 371 (2004).

³ *Id.*

⁴ I should take a moment at the outset to explain my preference for quotation marks highlighting the operative term here. As an African-American who has become intimately connected with the impetus of the project since the early 1970’s at least, I applaud its timeliness and its direction, though I share with many others decidedly less enthusiasm about its ultimate outcomes. Indeed, given the kinds of rhetoric surrounding it over the last generation or so, I have an increasingly difficult time endorsing the ‘affirmativeness’ of ‘affirmative action’ in its broadest and most energetic sense. My reasons for moving in this direction are discrete, though not directly within the ambit of this project, and so I will do no more here than to signal my dis-ease with the internal workings of the American ‘affirmative action’ push in this

It has commanded inordinate political attention, involving both houses of the federal government and each of the 50+ state/territorial houses in hours of debate, pages of testimony and reams of written recordation across its lifespan.⁵ It has invaded political campaigns across the face of American electoral democracy – from local ward plebiscites to federal Presidential elections and all in-between – for the last third of the 20th century at least. It has received an intensity of treatment, consideration and review by the federal government’s ‘least dangerous branch’ which that body has reserved for few such issues in its most recent history,⁶ with no clear end to the trend anticipated any time soon.⁷

The deep controversy engendered by the ‘affirmative action’ experiment has spread across the entire face of American culture as well. Majority culture analysis⁸ in its liberal form has supported the appropriateness of the effort as a necessary and natural

particular way and move on. Indeed, some of my reasons will be alluded to at least in the later stages of this paper, and in any event ought to be intuitive throughout, to the careful reader.

⁵ This is not too strong a statement at all. Following closely and remedially on the heels of American hyper-focus on matters of race and racial politics, the remedy has proven to be every bit as ubiquitous as the problem it is designed to address.

⁶ Without intending to be facetious, and well known to even the most casual of Court observers, the ‘race cases’ in question read like a ‘greatest hits’ of the United States Supreme Court, including most notoriously in their rank *Brown v. Board of Education*, 347 U.S. 483 (1954); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. Texas*, 861 F.Supp. 551 (W.D. Tex. 1994), *rev’d*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, *Texas v. Hopwood*, 518 U.S. 1033 (1996); and, most recently, *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003).

⁷ With her famous and portentous “25 year” dicta, Madame Justice Sandra Day O’Connor assured that ‘affirmative action’ and its ancillary policies and programs will be within the consciousness of that Court – and therefore this nation, in some form – for that period of time at least:

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

Grutter, id. at 343.

⁸ Here I mean simply to form a contrast between this and ‘minority culture’ response in the American context, a contrast I will reference and maintain throughout the body of this paper, as useful and necessary.

antecedent to the spirit of American civil rights reform, though it's more conservative stripe has decried the discriminatory engine at its heart.⁹ Similar disharmony is found in the minority culture also, particularly African-America, where the 'party line' defends the unbridled necessity of 'affirmative action' against all comers while deliberately isolating its own dissenting voices as contentious outliers.¹⁰ Academicians and social scientists struggle to give deeper meaning to American 'affirmative action' initiatives, obliquely reflecting their sponsoring institutions' bland endorsements as 'necessary evils,' emphasis falling on the first of the two-word defensive. Buried deep within the nether regions of the vibrant and important American controversy has been the one question most naturally at the core of its self-commending character as *the* palliatory prescriptive for the American tragedy of race: does it work?

A clear answer for the critical question has proven frustratingly elusive, and the reasons for this are by no means difficult to appreciate. First and foremost is the daunting task of imagining appropriate meaning for and measurable significance of the concept *works* within the particular context with which it is referenced. By 'works' ought we to focus on sheer numbers of minorities entering historically dammed professional streams, or individuals gaining access to previously restricted vocational avenues, or cultural areas enhanced by 'affirmative action' beneficiaries, or all of these, or something else? And how ought 'works' to be rightly measured beyond definition: by socio-economic data or

⁹ There is an antipathetic irony in the passionate reference to the term 'reverse discrimination' by individuals who, in too many instances, were disinclined to any involvement when it was presented in its original manifestation. Nevertheless, this particular reference/argument forms one of the key tension points in the 'affirmative action' debate in the 21st century.

¹⁰ Included among the more notorious of these 'outliers' are Mr. Justice Clarence Thomas and the famous Californian Mr. Ward Connerly, though in point of fact, and for a host of complex reasons, 'affirmative action' skeptics and anti-apologists among African-Americans are growing significantly in number as the years go by.

by ‘quality of life’ indicators or by theories of majority culture ‘value added’ through exposure to the ‘minority experience,’ or something different than any of these? Intransigent difficulties aside, with each year of ‘affirmative action’s’ tendentious life in the warp and woof of the American body-politic, the question gains vitality while its answer grows more elusive, hanging just beyond reach of its variously motivated seekers.

That is, until Professor Richard H. Sander came along. Sporting the right political pedigree,¹¹ from the right sort of academic institution,¹² publishing in the right kind of journal with the right pair of institutional contestants in his crosshairs,¹³ and wielding an impressive array of charts and graphs,¹⁴ the sum of the Professor’s immense, work is this:

¹¹ If one is to undertake a thorough critique of ‘affirmative action,’ one’s credibility in both synthesizing and broadcasting definitive conclusions – especially where those conclusions are not entirely supportive of the initiative – is enhanced in the academic community by mild liberal leanings, I would think. Support for this supposition lies in common sense: when someone who ‘ought’ to be in favor of something is not, the reasons for their perceived deviance would be expected to commend more attention. From his interesting opening prose outlining his background and related experiences, Professor Sander would appear to fill this bill, if only with regard to issues related to ‘affirmative action’ alone.

¹² In our business, it is difficult to deny that credibility often follows pedigree; in this case, Sander is writing from the rarified perch of one of the most ‘elite’ law schools in America, to coin a term and concept prominently featured in his own work, and publishing in an even more prestigious academic journal.

¹³ Nothing sinister is meant by this particular comment, and Sander’s explication of the reasons for the ‘battle lines’ chosen do not ring untrue:

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

Supra note 2, at 370. Still, even if only by happenstance, for sheer drama and notoriety in terms of public attention and response to a work in the American context, it is unarguably fortunate when the protagonists in a compelling story are two in number, pitted in contradistinction one against the other, ‘black’ v. ‘white.’ That is to say there is something uniquely – and very – American about this.

¹⁴ For the scores of us who are not ‘quant’ types and who struggle to give real meaning to concepts presented in the symbology of mathematics, the ‘law and econ.’ crowd always seem to have an unfair advantage in these sorts of debates!

no, it doesn't work, by any number of precise and relatively easily distilled indicators. Whether via the 'cascading effect'¹⁵ or by the various consequences of his interesting 'mismatch hypothesis'¹⁶ – mean end-of-law school GPA, numbers of black graduates, bar passers and/or practitioners – 'affirmative action' for its most needy target groups amounts to something nearing a complete 'zero,' or worse. Leaving the 'good hearted' motivation behind the "massive social experiment" unchallenged, he nevertheless is categorical and well-nigh apocalyptic regarding their ultimate, unintended and even unanticipated results: "Taken as a whole, racial preferences in law schools lower black academic performance and place individual blacks at a substantially higher risk of not graduating from law school and of not passing the bar."¹⁷ The storm of controversy naturally anticipated to follow his well-conceived work and tense outcomes has thrown

¹⁵ As Sander, I am here referencing the phrase prognosticated if not coined by Clyde Summers in *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377; Sander lays out this important concept in clear and transparent terms:

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

Supra note 2, at 416-17.

¹⁶ In Professor Sander's own words:

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

Richard H. Sander, *Reply: A Reply to Critics*, 57 STANFORD LAW REVIEW 1963, 1966 (2005)

¹⁷ *Supra* note 2, at 454.

the interested academy into a necessary, difficult re-view of the controversial impetus in the context of American education and, indeed, American life.

Interestingly enough, the question at the heart of the intense and necessary review following his study's publication has been as elegantly simple as the one at the center of his own ambitious and important academic agenda: does Sander 'work?'¹⁸ It was a question the accomplished scholar and ambitious author had to anticipate, and one that has occupied the legal academy and the host of other interested social scientists in a steady stream since. Predictably, 'affirmative action' apologists have come at his daunting numbers and startling, categorical results with greater or lesser intensity, seeking thereby to rescue the pith of the social strategy from its growing army of detractors. Empiricists on both sides of the divide have refuged in their own multiple regressions and standard deviations, alternately bolstering or attacking his work with the energy and passion the study both elicits and deserves. But even as the smoke begins to clear and the implications of his categorical conclusions on the future of 'affirmative action' begin to be anticipated and imagined, the critical question remains, and does not easily go away: does Sander 'work?'¹⁹

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

¹⁹ The ineluctability and importance of this simple question should naturally be impressed on all students of this aspect of Sander's work. Beyond the numbers, his conclusions are so categorically conceived and forcefully presented, and their implications are so dramatically clear, that the Academy must of necessity be very, very certain about each and every aspect of it before taking even the first step in the 'direction' clearly implicated.

While I am neither an empiricist nor particularly professionally committed to the question occupying Professor Sander and the many other sympathetic academics taken by various aspects of his inquiry,²⁰ it is one I am simply unable to escape. As a law professor of color in a school deeply enmeshed in the struggle of defining, creating and nurturing a spirit of diversity against majority culture rip-currents, decency and professionalism all but require my vocational interest in the topic at least. Further, my own students of color have required it of me, focusing on the Sander piece and its out-workings with an intensity which I suspect is ubiquitous among similarly situated African-American law students, and which seems inappropriate, and worrisome.²¹ Resonating as it does with the deeper and more visceral general considerations of race in American cultural context, I maintain an interest in the question in its broader implications as a concerned, post-civil rights movement African-American. And so, for the next few pages at least, the question occupying empiricists, policy managers and social scientists in and out of the legal academy has been adopted as my own: does Sander ‘work?’

It is my intention here to offer a brief qualitative pass at Richard Sander’s work, and the results he references following from it. In doing so, I will leave all the raw

²⁰ Indeed, my scholarly interest is in American legal history, focusing very much on the root of the problem of race in the American context, the base of the matter about which Professor Sander is concerned, regarding the effectiveness of the solution presently in use.

²¹ While the response was not immediately intuitive to me, I was initially drawn to the Sander piece by one of my students of color who had carefully digested each of its many lines and had been left profoundly troubled and even shaken by its prose, process and direction. Having taken the opportunity to encourage her, I thought thereafter about those implications for the present generation of African-Americans currently involved in legal study, imagining a similar response in a good number of them. Such a response within this community does not undercut the appropriateness or validity of Sander’s work, though it does require attention to it, I believe. This essay represents the out-workings of the attention which his scholarly work product has demanded of me, as a colleague and a teacher of this generation of African-American students, among others.

numbers data results of his study unchallenged, and, indeed, effectively untouched.²² Instead, I want to focus on his causative conclusions, passing at several background factors inherent in his work which might implicate his view of the results of his analysis and directly challenge the linearity of the conclusions at which he arrives. In doing so I hope to reference qualitative considerations rather than purely quantitative, suggesting different conclusions than to those Sander offers – even from his own numbers – and creating thereby implications for the future of ‘affirmative action’ in America alternative to his own. In conclusion I will suggest appropriate alternative remedies to those so naturally following from Sander’s results, remedies which might be constructively and even therapeutically significant in fully contemplating the difficult situation highlighted by his work.

²² The particular direction of my response requires nothing of me regarding the ‘numbers’ aspect of Sander’s story, and even allows me to accept their essential veracity *carte blanche* without detracting from the thrust of my observations and conclusions in any appreciable way, I both hope and believe.

B. The Inner Landscape of ‘Bias’: “a massive social experiment...”²³

“For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society.”²⁴

Before commencing a constructive review of Professor Sander’s important work, I begin by stating my own strong intellectual tendency: where human beings are at ‘ground zero’ in any statistical review, numbers (of any kind, no matter how definitive or thorough) never ever (ever) tell the ‘whole story’ (creating one set of inescapable conclusions, and one set only) about anything (anything), period (period). While I am no empiricist, I have just enough experience with ‘numbers’ to have arrived at the above-stated position honestly,²⁵ and to have extensively tested it over the last 30 years of my personal and professional life. The simple fact is that *all* numbers under-girding social observations and related public policies, however well grounded in pristine logic, pass through the most illogical ‘inner landscape’ in existence in achieving their goals of education and action: the human mind. There, external logic meets internal *bias*: the individualistic internal topography of human illogic influencing even the most erudite empiricism, from the conception of the hypotheses addressed by the data to the subjective outcomes derived from the quantitative pictures. The data-monger who does not fully

²³ *Supra* note 2, at 368.

²⁴ *Id.*

²⁵ My undergraduate work in public policy sciences brought me into rudimentary contact with the tools of the econometrician – macro and micro economics, statistics, stats based policy analysis and decision-making, *etc.* – allowing me some literacy with the symbolic language of ‘numbers’; nevertheless, my strengths in these matters, if any at all, clearly lie on the qualitative side of policy analysis, and not on the quantitative side. Those who operate out of similar gift/skill areas will not be surprised to know that for this I feel no ‘second class’ citizenry, nor offer any apology.

appreciate this truth severely hampers the ultimate effectiveness of her work; she believes too strongly in the single ‘story’ her inner biases prefer, and thereby appreciates too vaguely and even too little the full potential of the empirical data disclosed.

Sander seems at least cognizant of this reality, and candidly goes about the useful exercise of “disclos[ing]... my own peculiar mix [of biases]...”²⁶ at the outset of his work. However, upon even semi-careful review, his disclosed ‘biases’ at this point are not really biases at all, as I mean the term; aside from outlining his credentials as a socially active person likely cast in the ‘liberal’ mode of American politics,²⁷ he gives no real attention to the sorts of things of which fully engaged empiricism must be self-aware. By ‘bias’ I mean the subjective lenses reflexively preferred by researchers, the subtle ‘inner landscape’ which, though resisting easy human exposure, resides in every human being and influences the most logical of human reasoning in seeking to define outcome. These things deeply influence the individual in question, and have profound sway over the way in which the empiricist *sees* the breadth of the number story before her, and forms the subjective qualitative conclusions at which she arrives. While Sander’s own admissions yield nothing of these important sorts of biases, the ease and honesty with which he writes and presents his work conveniently leaves their evidence strewn across its face, for the critical reviewer to both consider and appreciate.

²⁶ *Supra* note 2, at 370.

²⁷ In this capacity he talks about ‘heartland’ Midwestern American roots, community organizing in South Side Chicago, and liberal agenda research related to housing in his graduate work. He marks his continued activist housing work in his post-graduate life and his own special attention to racial issues deriving from his parenting, a race consciousness which he naturally carried into his professional life.

Sander conveniently provides the first glimpse of the contours of his own ‘inner landscape’ in the very opening statement of his substantial work, when he innocently avers:

For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society.²⁸

What an interesting, telling way of summarizing the pith, substance and impetus of the ‘affirmative action’ movement over the length of its history, coming as it does at the very outset of his work. Many reviewers would conceive that impetus in very different terms, stressing equality of opportunity or reparative response to historical injustice beyond the almost epithetical ‘full integration’ thesis he references,²⁹ and Sander would disavow none of these. Yet the language he has self-consciously selected through which to frame the debate may tip his hand as a ‘top-down-bottom-up’ person, imagining impetus, goal and success of American ‘affirmative action’ in narrow, *status quo* terms: welcoming African-America as a full member in what steadfastly remains the ‘majority culture’ fold. Not wrong in itself, this is nevertheless socially conservative and, as a *bias* – as a ‘lens’ through which the empirical yield is evaluated and given meaning – it implicates the way in which the researcher will determine ‘success’ from the raw numbers used. We must keep this uppermost in mind in assessing – and, as necessary, challenging – the

²⁸ *Supra* note 2, at 368.

²⁹ Here I mean only to tip my hat to the not insubstantial argument among some race theorists which challenges the values of the ‘integration’ heuristic when it is couched in ‘majority culture’ terms, as is too often and perhaps even inevitably the case. In this way, ‘integration’ may mean injection into the ‘majority culture’ paradigm *as it is*, necessarily shedding as many of the things as possible not valued by that culture as an ‘entrance fee’ of sorts. This ‘whitening’ effect among the various minority culture integrators is the cost of integration at this level, rendering it ultimately suspect on these grounds. I do not mean here to suggest this as Sander’s meaning by use of the term, but simply instead to point out the problem deriving from its unalloyed preference.

conclusions at which Professor Sander too confidently and conveniently arrives from the information his careful work has produced.³⁰

More problematic for present purposes is the remarkably clear and uncontested *elitism* with which Professor Sander seems to imagine the world he is studying and African-America's place within it. He directly references the term three separate times in the first two paragraphs alone of his study – “in giving non-whites in America access to higher education, entrée to the national elite...”³¹; “beneficiaries of affirmative action at the most elite universities...”³²; “And how do these preferences play out across the entire spectrum of education, from the most elite institutions to the local night schools?”³³ –

³⁰ I do not intend any slight to Professor Sander in these comments and I trust there will be none received or taken. I mean only to underscore the extremely conservative parameters with which he purposefully frames the ‘affirmative action’ story – the ‘whiteness’ of his perspective, in the American context – and to highlight the undoubted effect that posture will have on his assessment of outcomes and policies following from his work, in the end.

³¹ *Supra* note 2, at 368. This reference is especially unfortunate, in my view – or perhaps telling – in that it initially frames the debate in highly troubling and problematic dichotomous terms: “Few of *us* would enthusiastically support *preferential* admissions policies if *we* did not believe they played a powerful and irreplaceable role in giving *nonwhites* in America access to higher education, entrée to the national elite, and a chance of correcting historic under-representations in the leading professions.” (emphasis my own) Sander conveniently names the ‘them’ in his dichotomy: nonwhites. While it is not immediately apparent who the ‘us’ is in the calculus, three things are troublingly clear: 1.) he is writing to – or for – the ‘us’; 2.) that the ‘us’ seem to be at the center of the power of change; and 3.) that the dynamic flow in question is from the ‘them’ to the ‘us’ or, if you will, ‘them’ eventually becoming ‘us’, with our help (‘preferential’). I may be over reading matters here, or I may be pointing to clear evidence of unintended bias on the part of the author, through his own self-selected and telling prose. In any event, from this African-American’s perspective, on its face at least, the passage above-quote is problematic in a not small number of ways, ‘coloring’ the breadth of his work following.

³² *Id.*

³³ This is my personal favorite. Running squarely into one of my own irrational biases – an almost iconoclastic suspicion of hierarchy in all its forms – this last example of his is particularly frustrating to me. I can illustrate my point here by referencing a conversation I had recently with a prospective law student, who asked me to name “the best law school to attend in North Carolina...” his State of preference for both study and practice. I responded with a definitive “It depends...” “While you can get anywhere from anywhere, each law school arguably has its own definable mission, and the answer to your question thus depends directly on the needs driving you as a prospective student. If you see yourself in a national/international practice setting, the very best North Carolina law school would likely be Duke or, as an alternative, Chapel Hill. If you see yourself in high profile state/regional practice or high level state political administration or judicial office, Chapel Hill would likely stand out, and not Duke. If you want to be part of a reasonably close-knit alumnus network, in practice in the large North Carolina demographic

riddling it with alarming ease throughout the rest of the piece thereafter. While each of us in the academy knows exactly what Sander means here, my point in this is significant and urgent: this constant reference in his work reflects pristine personal bias, bias which must affect his framing of ultimate outcomes. For purposes of this study at least, Sander accepts unqualifiedly the paradigm of elitism defining today's legal academy³⁴ – the pure notion that 'elite' in this regard neatly equates with 'better' – and applies this paradigm derivatively to his data results. To the extent that the problems fueling the crisis outlined by Sander's numbers *lie somewhere within the construct of the academy itself*, it will take a critical, even skeptical eye to locate them; by his repeated reference to elitism itself, and the bias underlying that reference, from his own self-selected and self-reflexive prose, Sander simply is not that person.³⁵

A third area of 'inner bias' operating in the shadowy ethos of Sander's work lies in his own self-limiting expectations – “[t]he results in this Article are not intended to be

markets, Wake Forest would be worth a close look. If you envision yourself in small practice in 'small town' North Carolina, or 'solo' practice, Campbell would seem your best bet. If you are hoping to transition into a legal career from another active career over a period of time, N.C. Central is the place, as they have both a program and a special expertise in this area for these kinds of students. Thus, the 'best' (the 'most elite' in a more serviceable rendering of that term, I would suggest) North Carolina law school would depend entirely on the student asking the question.” In this view 'hierarchy' is subjective rather than systemic, as it ought to be, in my opinion.

³⁴ I have opted for the verb 'defining' over the personally preferred 'plaguing' here, in the interests of decorum and propriety. Of course, here I am referencing what I will genteelly denominate the 'U.S. News' phenomenon still strangling legal education. In my short time in the academy I have marveled at the 'lemming-esque' response of its institutional members to what seems to me to have been little more than the transparent attempt of a 'third tier' news magazine to draw notoriety to itself and to push more product. That this particular beat continues to go on as it does in the legal academy remains a matter of great puzzlement – and some distress – for me.

³⁵ Again, I mean no disrespect to Professor Sander here. As I will reference qualitative consideration over quantitative review herein, and suggest other reasonable problem areas from the data different than the single one Sander repeats – academic 'mismatch' – I mean here only that it is his self-reflected status as a "child of the system" which may have blurred his vision to other sources of the problem his data at least suggests.

definitive...”³⁶ – contrasting with the striking definitude of his final conclusions. His above-quoted caveat is the correct one, of course, amounting to a boilerplate disclaimer necessary in any thoughtful empirically based presentation. However, on page 371, just four pages into the one-hundred-fifty page article and but six paragraphs removed from his above-referenced caveat, we learn, categorically, “What I find and describe in this Article is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries.”³⁷ Later in the paragraph Sander does employ the modifier “a strong case can be made” to properly couch his results, but he then closes that very paragraph in the following uncompromising fashion: “Affirmative action as currently practiced by the nation’s law schools does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.”³⁸ This unadulterated causative definitude is repeated by Sander over and over, in unblushing terms, throughout the length of his not insubstantial piece.³⁹

The bias I am implicating here is the one to which quantitative analysts are most susceptible and the one of which they are usually most aware and most wary: the sirenic

³⁶ *Supra* note 2, at 369.

³⁷ *Id.* at 371; the problem in this context, of course, is the linear use of the unalloyed verb ‘produces...’ without out any modifying, meditative language.

³⁸ *Id.* at 372

³⁹ With regard to the definitude of his results, Professor Sander becomes even more uncompromising as he progresses. Thus, “Because of low grades, blacks complete law school less often than they would if law schools ignored race in their admissions progress...”: *id.* at 373. Sander speaks of “the low grades that are a by-product of affirmative action...” (*id.* at 432), directly connects “[t]he weakness in black (law school) performance...” to “large admissions preferences based on race...” (*id.* at 436), and notes that “black attrition rates are substantially higher than white rates, simply because racial preferences advance students into schools where they will get lower grades.” (*id.* at 441). Each and every one of the connections Sander makes could do with qualitative information providing needed and valuable underpinning, though Sander proves completely averse to this throughout his entire article. Under the circumstances, and repeated often across the entire face of his prose, the lack of modifying language accompanying the stark recitation of his results is striking, and deeply troubling.

seduction of numbers. There is a significant difference between *correlation* and *causation*, of course; the thorough econometrician keeps a very close eye on the two, holding them in artful balance throughout the creative process of giving real meaning to quantitative information. The failure to maintain that vigilance and that balance may indicate bias in that regard on the part of the researcher, a bias which would have its most potent negative impact on the outcomes derived from data and the policy implications naturally following. In summarizing his striking statistical information, it is statements like the following that raise in Sander's work the issue being addressed here:

This data tells a powerful story: racial preferences in law school admissions significantly worsen blacks' individual chances of passing the bar by moving them up to schools at which they will frequently perform badly. I cannot think of an alternative, plausible explanation.⁴⁰

Lacking even the most benign ameliorating pejoratives – *e.g.*, “would seem to”; “is strongly suggestive of”; or “seems positively correlated to” – we are forced to consider a telling reality from the above: Sander's view of causation in such uncompromising terms may evidence the bias in question, implicating all of the results he presents in conclusion.

In summary, this quick review of possible biases implicating Sander's valuable work should not be marginalized to the trifling category of “scholarly ‘nit-picking’.” Far from the case: because empirically grounded presentations tend to bear particular weight in any academic community receiving them, the empiricist bears particular responsibility with regard to possible existing bias influencing her work. Because the end result of effective empiricism is often policy decisions and practical programs following – programs impacting human lives – the responsibility is incumbent with the empiricist to

⁴⁰ *Id.* at 447. In its naked definitude and veiled if no doubt unintended hubris, this strikes me still as a startling, most remarkable statement. Thankfully, that Professor Sander cannot think of meanings alternative to his own almost apocalyptic vision does not foreclose their possible existence.

address bias and to carefully craft causation conclusions. Given the heft of his work and the delicate subject at its heart, Sander's responsibilities in this regard are great indeed. It is in this context that the above review of possible biases affecting the messenger's message is offered, in the spirit of scholarly caution and thorough consideration of the quality of the ultimate outcomes of his work.

C. A Quantitative Quandary: “short shrift for the most part...”⁴¹

*The “costs” to blacks that flow from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters... that might result from differential admissions standards. These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough and objective enough for my purposes.*⁴²

Beyond their uncontested utility, numbers can be slippery, tricky, worrisome things. To begin with, they feed our concrete, rational side like nothing else: conceptually constant and apparently solid, they allow us to enforce order and to add predictive measurability to the vast subjectivity and irrationality of human life. However, at their very real center, frustratingly but undeniably, they are very much like Satchel Paige’s anecdotally famous beard: they are air.⁴³ They are valuable when quantifying tendencies that seem to highlight consistent human outcomes or patterns of behavior – correlatives – but must always be held in a weightless, skeptical hand if they are to retain

⁴¹ *Supra* note 2, at 369.

⁴² *Id.*

⁴³ Among the many rich, colorful stories associated with legendary Negro League baseball pitcher, showman and legitimate icon and artifact of 20th century Americana – Leroy ‘Satchel’ Paige – is one related both to pitching – of which he was the acknowledged master among his peers – and beards. Competing in the barn-storming circuits crisscrossing America throughout the Great Depression years, he one day faced as opponents a baseball team made up entirely of orthodox Jews, touring under the provocative team name *The House of David*. Known for their unique uniforms and long, majestic beards worn consistently with their cultural and religious customs, Paige was reputed to have been utterly taken with this barbate display from the moment he saw it. As batter after batter came to the plate to face him, Paige’s fascination continued to grow until at last he could resist it no longer. Uncorking one of his famous fastballs, and relying upon his legendary pitching accuracy, his toss ran precisely where he had intended it to upon release: right through the very long beard of the surprised batter standing before him. When the umpire managing the game rightly applied the “hit batsman” rule and awarded the startled batter first base, Paige was reportedly incensed: charging home plate, he exclaimed for the benefit of both the offending umpire and any other interested by-stander, “A beard ain’t no part of a man. A beard are air!” Among the many touring baseball teams for which he played over the length of his storied career thereafter, Paige – an African-American – was reported to have donned a long, obviously fake beard on occasion, and gleefully pitch for the *House of David*.

that value and descriptive power. And sometimes their best value lies not in their light – what they seem to say and to aver and to predict with consistent accuracy – but rather instead in their *shadows*: what they allude to and hint at, even in their own internal and inevitable inconsistencies.

As stated at the outset, I am here neither capable of nor interested in ‘attacking the numbers’ under girding Professor Sander’s vast work. Indeed, for purposes of this response, I am prepared to join the many other interested commentators in conceding their internal accuracy (a matter about which there is no real doubt)⁴⁴ with regard to the key points they address. However, in assigning ultimate meaning to the information Sander has uncovered, in adding depth and clarity – and even accuracy – to the story it tells, much must be made of the *shadows* in his work: those numbers that quietly, pointedly ‘belie the numbers.’ Small but nevertheless significant, these are the ‘echoes’ in Sander’s data, the places that do not follow the general sweep and tide of the numbers before the researcher, and even deny them in some not insubstantial way. In these places, “something else is going on...”⁴⁵ – something *qualitative* I suggest, with explication to follow – shadows putting into sharp relief Sander’s quantitative work, allowing us to consider – and even to recover, if it is there – the ‘rest of the story.’⁴⁶

⁴⁴ Sander is correct, of course, when he candidly notes “Most of the contributors concede (and none dispute) the basic facts that frame *Systemic Analysis*: blacks are nearly two-and-a-half times more likely than whites not to graduate from law school, are four times more likely to fail the bar on their first attempt, and are six times more likely to fail after multiple attempts.”: *supra* note 16, at 1964-65. This is really no concession at all, to be sure. While it is impossible to assail the raw numbers referred to above, contrapuntal commentators instead struggle with Sander’s take on the seminal matter of *causation*, which, in my view even at the close of his ambitious work, remains very much ‘up for debate.’

⁴⁵ Here I coin one of the few handfuls of phrases in his otherwise sprawling prose which Sander himself uses reflecting even a hint of the “qualitative story” no doubt lying beneath his avalanche of numbers: *supra* note 2, at 449.

⁴⁶ Here I must offer appropriate apologies to news broadcaster *par excellence* Paul Harvey.

The first of these ‘shadows’ is not really a shadow at all, but rather a simple statement in Sander’s history introducing his topic, true on its face, but nevertheless raising the most cynical of ‘conspiracy theory’ scenarios in the diligent skeptic’s hand. In laying out the chronology of events presaging and implementing the integration of American law schools in the 1960’s, Sander notes, “Ironically, during the same period when law schools were eliminating the last vestiges of discrimination and finally reaching out to blacks, the schools were also being transformed into more selective institutions.”⁴⁷ Even in the face of the effective reality that, “The rise of more competitive admissions placed a new hurdle in the path of blacks just getting a foothold in mainstream American education....”⁴⁸, in the *status quo* hands of Sander and the like this matter is merely ‘ironic.’ However, even Sander must acknowledge the convenience of the ‘irony’ when considering this troubling fact: it is the out-workings of that very selectivity trend by which African-American success is presently measured and found wanting. While this is not to say that the academy has been complicit here,⁴⁹ it may suggest this at least: that the source of some the African-American ‘numbers deficit’ struggle may lie within the deliberately changed structure of the academy itself.⁵⁰

⁴⁷*Supra* note 2, at 377.

⁴⁸ *Id.*

⁴⁹ I simply cannot leave this point without highlighting the unfortunate equivocal evidence in this regard: that it was that academy that resisted African-American full access and inclusion for as long as it was politically possible to do so.

⁵⁰ Recognizing the potential irresponsibility of this statement, let me be very clear about what I mean – and do not mean – to say here. Sander rightly puts the integration of the American law school academy and its lurch toward selectivity and all that has followed at roughly the same place on the relevant time line. And, if his own work is to be both understood and accepted, it is that very trend toward selectivity – hierarchical disposition and elitism – that is the means by which African-American academic success is conceived, measured and, in the present case, found lacking. He denominates that connection ‘ironic,’ and that may be all that it reasonably could be. However, given the full history of the academy regarding race over that time, some of its number – and many among its African-American members – would be excused for seeing

A second ‘shadow’ in Sander’s numbers edifice would appear to lie in his presentation of the decile distribution of “*First-Year Grade Performance of Black Students* (Table 5.3)”⁵¹ where he notes:

Since, as we have seen, large racial preferences at the top of the law school hierarchy reproduce themselves at the vast majority of other law schools, we would expect to see similar patterns of black performance across most of the spectrum of legal education. Table 5.3 confirms that this is so.... Generally, around fifty percent of black students are in the bottom of the class, and around two-thirds of blacks are in the bottom fifth.... *Only in Group 6, made up of the seven historically minority law schools, is the credentials gap, and the performance gap, much smaller.*⁵²

That is to say, in comparison with majority culture colleagues, black students ‘under perform’ in all law school settings – ‘elite’ national schools, midrange public schools, lower range private schools – with the exception of the ‘historically black’ law programs. Adding the ‘index gap’ figures to the discussion, this notable anomaly would seem to have only two possible explanations: either black students in these programs are outperforming their counterparts in all other law school environments (decile distinction) or white students are underachieving at these ‘black’ law schools (‘index gap’ treatments), or some combination of these. Perhaps because the statistical fact lay outside his ‘mismatch theory’ – or because a suitable explanation could only be found in murkier ‘qualitative review,’ – Sander makes no attempt at harmonization whatsoever, other than to note it in reviewing the area. Given the definitude with which he cites ‘mismatch’ *sola* as the culprit in the numbers crisis, this is a blind spot in his work, one

a bit more in the marriage in question than irony alone. In any event, my simple point here is this: if the heuristic numbers selectivity trend originated at precisely the time African-Americans were finally admitted to broader American legal education, and if African-American success (or its lack) is measured by that very standard, it is irresponsible not to look beyond the numbers *simpliciter* to seek all of the possible sources of the current problem.

⁵¹ *Supra* note 2, at 431.

⁵² *Id.* at 430 (emphasis my own).

which holds great potential for those seeking ‘depth’ beyond ‘breadth’ in addressing the mystery behind the statistical puzzle.⁵³

A third ‘shadow’ across the face of Sander’s ‘mismatch’ tableau – if only a slight one – is found in the one-word concept looking askance at every hard-and-fast statistical rule, and which presents a ‘bug’ in Sander’s own numbers machine: *outliers*. Sander notes their existence in his statistical horizon through but a handful of words alone, making not even the merest attempt at harmonization with his own categorical meta-theory:

Other black students (about 10%) will significantly outperform predictions based on their credentials and will also be in the middle of the class or higher. Some white students... who significantly underperform their credentials, will fall into the bottom quarter of the distribution.⁵⁴

Indeed, the LSAC notes similar statistical results: up to 15% of all students entering law school with ‘bottom quartile’ statistical predictors will graduate in the top quartile, with an equivalent distribution for those entering law schools with top quartile predictors.⁵⁵

These are Sander’s *outliers* in the purest employment of that term, and they are of

⁵³ I would take great issue with any of the ‘numbers’ types who might put off Sander’s failure to address this statistical anomaly as due to the relatively minor numbers profile involved. To begin with, the number points in something of the spiritually opposite direction from his ‘mismatch’ declaration; as such, the depth of his work *requires* him to directly address and explain this aberration if he can – or to candidly admit the fact if he cannot – to add necessary support for his categorical conclusion. The second point should be intuitively obvious to any interested observer. We are not suggesting that the anomalies to the numbers story are showing up at Midwestern Jesuit law schools, for example. The one place where black students are moving away from the ‘mismatch’ morass is in schools that share the one characteristic most at issue in and at the heart of Sander’s own study: *race*, or, if you will, *racial diversity* at a unique quality and level within the American legal academy. *Black students are resisting ‘mismatch’ in statistically significant numbers at black law schools and at black law school only*. Absent a credible and persuasive harmonizing of this ‘shadow’ fact with the remainder of his ‘mismatch’ panacea, that explanatory theory is done measurable harm. That harm is only increased – and markedly so – when the author uncovering the statistical anomaly offers no explanation for it whatsoever.

⁵⁴ *Supra* note 2, at 431-32.

⁵⁵ This statistical profile was shared during presentations at *Dreamkeeping: Empowering Minority Faculty – a Dialogue* (November, 2003), a conference sponsored by the Law School Admissions Council in Seattle, Washington.

particular importance in the face of a study recovering its conclusions in the following uncompromising language: “It is only a slight oversimplification to say that the performance gap (between white and black law students)... is a by-product of affirmative action.”⁵⁶ These individuals challenge his bald conclusions – oppose and deny them, in fact – and in not insignificant numbers; if they did not succeed in warning Sander that the ‘black and white’ story he confidently recovers may be qualitatively nuanced in ways his quantitative empiricism has not disclosed to him, they must not be consigned to a similar fate by others of us.⁵⁷

In summary, it is very important to understand the two terms at the heart of all econometric analysis, engaging econometricians at the deepest level of their work – *correlation* and *causation* – and, further, to appreciate their complex interaction.

⁵⁶ *Supra* note 2, at 429. In seeking a suitable reference for the point here, Sander’s work presented a veritable host of possible choices.

⁵⁷ Disturbingly, this is not the only place where ‘outliers’ challenge Sander’s neat statistical picture, nor even its most significant challenge. On the other end of the quantitative spectrum, Sander’s numbers define another group of outliers moving in the opposite direction, the *negative outliers* that present their own discrete challenges to the quantitative analysts determined to do things ‘by the numbers’ only. These are the “black students with good numbers...” (*id.* at 448), who ought to perform well according to the very quantitative story Sander presents and relies upon, but whose actual performance seems unmoored from the numbers and dependent instead on *the ‘eliteness’ of the school to which they matriculate*. Sander sets out this statistical reality (“The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school... will have a significantly lower chance of passing the bar than the same student would have if she had attended a [less ‘elite’]... school... (*id.*)), dutifully presenting the important question following: “But why exactly should the same student have a lower chance of passing the bar [because of this]...? (*id.* at 449) Why indeed.

Interestingly enough – and tellingly – it is here that Sander first and finally moves out of his quantitative haven, referencing rudimentary qualitative considerations to explain a dilemma resisting quantitative explanation. Waxing somewhat lyrical about his own earlier challenges when an undergraduate at Harvard, he spins this qualitative experience into his own intellectually interesting ‘mismatch hypothesis,’ settling the matter quantitatively thereafter. But his qualitative foray is *not broad* and therefore it is *not strong*: there may be *many* more things qualitatively at work in these students than ‘mismatch’ alone (or even ‘at all’), giving rise to these important and troubling outcomes. However, as it is the one qualitative theory most consistent and easily harmonized with his previously developed and preferred quantitative thrust, it assumes first place in ‘explaining’ this critically important counter-trend. I will address Sander’s qualitative debilities in more detail in the following section of this paper, but I must not leave this discussion without highlighting this significant ‘negative outlier’ story nor suggesting the ultimate inadequacy of Sander’s qualitative attempts at categorical explanation.

Numbers can establish correlations between discrete factors – say, ‘African-American students’ and ‘law school ‘success’’ – to a great degree of definitude, and correlations can allow reasonable connection to *causation*, depending on the level of their strength. However, causation is always a matter of guesswork from correlation, no matter how strong the ‘numbers story’: results can be connected to particular factors to a significant statistical level, but numbers alone should *never* blind a researcher to the complexity of any problem involving human beings, nor to the vast vagaries of their possible ‘causes.’ The fact remains that there is *always* a margin of error between ‘correlation’ and ‘causation,’ however slim, and that ought to remain uppermost in the mind of the econometrician, and plainly disclosed in her final presentation. This would appear to be a place of strength and self-same weakness in Sanders work here, when taken as a whole.

These ‘shadows’ are made more significant by two internal, interactive tendencies in Sander’s work focusing the pith of his outcomes and ultimately challenging their reliability: 1.) his failure to address them in any satisfactory way; and 2.) the utter definitude of his conclusions despite this failure. If Sander declares for us categorically how things *are* through his world of numbers (and he does this in spades), his ‘shadows’ insistently whisper a more subtle but perhaps even more important counter-message: “not so fast...” If Sander is confident enough in his numbers to measure out their ‘truths’ with algebraic precision, his ‘shadows’ remind us of the intense *humanity* of his subject of study, and the inevitable truth following with its own internal precision: no human story can *ever* be fully understood through numbers alone, no matter how precise. Simply put, there is a gloriously irrational aspect to every rational human story,⁵⁸ lying so

⁵⁸ I prefer the adverb ‘gloriously’ here quite deliberately, and by its preference effectively come ‘out of the closet’ as an unapologetic ‘qualitativist’ in all that I do. Understanding the relative comfort in rational

far outside the reach of ‘numbers’ that their inabilities – or their *disabilities*, more precisely – are substantial when seeking to fully uncover a human story. To assay these critical ‘shadows’ and determine the substance, if any, behind their significance, we must bolster empiricism with *qualitative* review, for it is in the *quality* of a matter, and not in its quantity alone, that any truly human story gains sharp focus.

consistency and the objective universe it seems to create, for the life of me I have never completely grasped the concomitant resistance by rationalists at acknowledging and even embracing the reality of the irrational and the subjective in each individual human story. Indeed, as an historian who must necessarily ply his trade in the world of the subjective, its acknowledgement seems to me inevitable, and its avoidance completely undesirable, even if such was possible. While rationality gives our lives necessary rhythm and pace, form and structure, and even substance, it is *irrationality* which gives them their color and life, and makes them uniquely *human*. While much of our human actions are grounded in the rational, some of the most important of our motivations are not, and this whole reality cannot be clearly captured with quantitative tools alone. The implications of this truth against the backdrop of Sander’s work will be carefully considered and fully explored *infra*.

D. Some “Qualitative” Truths: “[l]et us ponder this a little....”⁵⁹

*“But it may not be obvious to many readers why it should be that black students with good credentials should lower their chances of passing the bar simply by attending a better school. Let us ponder this a little.”*⁶⁰

Among the many students greeting me several years ago at the small, private, conservative institution to which I had just moved to teach were four African-American males bunched together at the front of the classroom auditorium, right before my podium. Each arrived from historically black universities, very different from the law school at which they had arrived and, though I had no actual knowledge, each likely benefited from admissions preferences of the kind at the heart of Professor Sander’s study. They impressed me as being ‘at ease’ in my classroom, maintaining punctuality and diligence in class attendance, remaining prepared enough to voluntarily engage in group discussion throughout the semester, and forming a valuable support group for one another. Each weathered what came to be known as an horrific examination at semester’s close, actually outperforming on my examination their other final examination grades, I came to understand afterward.⁶¹ And in a law program struggling to add African-Americans to the legal profession in just the ways Sander’s work has highlighted, each graduated, each ‘passed the bar,’ and each will be a great addition to the profession in whatever capacity they find themselves.

⁵⁹ *Supra* note 2, at 448.

⁶⁰ *Id.*

⁶¹ Indeed, one of that group of four, about whom I had harbored some real reservations based on classroom performance, performed very well, and another wrote what remains the very best examination paper I have read from a first year student in the years I have been teaching.

When a colleague good-naturedly questioned the relative over-performance of these students in the only African-American professor's class, I chuckled along, but thought extensively thereafter about the interesting aberration.⁶² As these students had received no appreciably different treatment than any of their other classmates, in my class or in that of any of their other professors, what might explain this 'statistical anomaly?' Qualitatively, might it depend even somewhat on the 'statistical anomaly' of what they saw when they walked into my classroom, different than the others in which they were invited to learn? Might the clear portent of 'business not as usual' – signified by my simple presence at the point-end of their hierarchically designed classroom – have awakened in them unique dreams of their own concrete possibilities in consequence of my own apparent achievements?⁶³ Might the peculiar, unique environment in which they were called to learn in my classroom have had some spiritually ameliorating effect on what they learned and, indeed, on their very ability *to* learn, despite the 'mismatch' echoes all around them?⁶⁴

⁶² In the interest of full disclosure I must say that I do not have even anecdotal evidence that their experience is replicated by every African-American student whom I teach. Nevertheless, the value of the point being advanced here remains.

⁶³ I mean by this to be deliberately and transparently utopian, even to the point of naiveté, and I reference my own educational experiences in support. From my earliest education at an 'elite' private university through stints at two different 'elite' public programs, I typically took no great notice of the professors managing my classrooms, with one notable and consistent exception: the rare classroom experiences directed by people that 'looked like me' to put the matter concisely and familiarly. For them I took immediate and deliberate notice: I was extra-critical of their performances and extra-interested in their routes to 'success.' While I cannot say that my extra attention always translated into superior academic performances in those classes, I can definitively aver that their individual achievements always stimulated in me a sort of 'possibility thinking' that was encouraging all along my way.

⁶⁴ In support of this point, I recall – anecdotally and always with amusement – the first criminal law lecture I delivered in my then new law school, experienced by the four African-Americans in question along with their many other classmates. One of the four came up to me immediately afterward and, with a measure of wonder, excitement and, noticeably, to my mind at least, relief, proclaimed in almost reverential terms, "That was one of the most remarkable lectures I have ever heard..." I viscerally understood his feeling. Though I never felt similarly regarding any of my majority culture professors, I inevitably breathed out a reflexively subconscious prayer before my African-American professor's first lectures – "Please don't

In light of Sander’s important work, the legal academy must allow itself an unvarnished look at the ‘affirmativeness’ of the environments into which the “intended beneficiaries...”⁶⁵ are invited to learn and achieve – “from the most elite institutions to the local night schools...”⁶⁶ – and thus, the *affirmativeness* of ‘affirmative action.’ We might conveniently begin at the very foundational basis and deliberately articulated motivation of the action itself. Repetitively relying on such loaded rhetorical standards as “special admission[s]...”⁶⁷ “racial preferences...”⁶⁸ and their equally pernicious cousins – “preferential admissions policies...”⁶⁹ or, more tersely, “preferences...”⁷⁰ – the modus and message behind presently conceived ‘affirmative action’ initiatives is inescapable: “By present day strictures of the legal academy you are at a competitive disadvantage and do not really belong; you do not measure up to the standards of the community – majority culture standards, through and through – though you will be rigorously judged by them, and likely found wanting. Now that we have that out of the way, welcome to law school!”⁷¹

screw up...” – and a less subconscious sigh of relief when they did not. This strikes me as sad, interesting, and important.

⁶⁵ *Supra* note 2, at 368.

⁶⁶ *Id.*; the phrase is deliberately referenced ironically here.

⁶⁷ *Id.* at 370.

⁶⁸ *Id.* at 368.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ In a curriculum and program which has proven challenging for both African-Americans and transfer students, among others, an African-American transferee to my school was apparently greeted with that very information, followed by the comment “I wonder how long you will last?” It was a triumph of that student’s character that they did graduate, though it was a very unfortunate beginning at their new law school.

Sander waves a prosaic hand at these things, dutifully employing the vocabulary of the day – “stigma and stereotypes...”⁷² – “rather subtle matters...”⁷³ to his way of thinking, though not to the student coming directly under them, we should be assured.⁷⁴ Different individuals respond to these systemic, constructed challenges differently, to be sure,⁷⁵ though the question nevertheless remains thoroughly begged: “What, pray tell, is *affirmatory* in any way by such ‘affirmative action?’⁷⁶

⁷² *Id.* at 369.

⁷³ *Id.* These are the very things to which he gave “short shrift...” in setting the parameters of his study at the outset.

⁷⁴ By use of the term ‘subtle’ to describe these things, Sander is likely only referring to their measurability using the traditional econometric tools of the day, though his characterization remains stark and uncomfortably spare. And wrong, I believe, at least where African-Americans are concerned. The net negative message of present ‘affirmative action’ initiatives, whether benignly or acerbically communicated and received, are by no means ‘subtle’ for the African-American. They do not speak their messages into an experiential vacuum, but rather against a deep backdrop of similar messages for the typical African-American, even one of ‘high achievement.’ Thus, the ‘affirmative action’ impetus becomes but one more ‘handout’ from the ‘majority culture’ downward to the minority individual, reinforcing ‘difference’ and ‘disability’ in the process, rather than reifying ‘competence’ and ‘ability.’ And all this occurs on terms created by and managed for the synthesizing culture, to the decided detriment of the minority ‘beneficiary.’ If this is not the direct communication, it is the subordinate message for the African-American: in receiving ‘affirmative action’ support, business is decidedly ‘as usual’ in every way for both the proponent and the recipient, with the usual results expected to be following.

⁷⁵ In the early days of ‘affirmative action’ the architects were not subtle about their message. In the early 1970’s my own oldest sibling surprisingly gained admission to an excellent public university on the strength of a thoroughly pedestrian secondary school record, through hard but uninspired work. In the days far prior to the politically correct era still to come, the admission process had no need to be coy: in deciding the matter, the university used raw data to project a final grade-point average in the 1.75 range, in circumstances where minimum graduation standards were institutionally set at 2.0. Yet admission was forthcoming for my sibling for one articulated reason alone: at that time the federal government had put a financial ‘bounty’ on the heads of African-American matriculates as an incentive favoring institutional desegregation. The motivational effect of that letter may simply be ‘family lore,’ but the results in the case of my stubborn and provoked sibling were remarkable: graduating from that institution “with honors” in a difficult ‘hard sciences’ program, he carried his record into medical school, and a productive medical career. My sibling’s actions represent a ‘right response’ to the unfortunate challenges placed before him, but a difficult and increasingly rare one across the breadth of today’s African-American culture, for complex reasons, I am sure.

⁷⁶ This challenge is by no means novel nor singular. Apart from the much-to-be-expected reactionary attacks on affirmative action as a conceptual whole, the numbers of thoughtful minority scholars challenging the ‘affirmativeness’ of present initiatives is by no means insubstantial. Derrick Bell has criticized presently conceived affirmative action initiatives as essentially giving “blacks the sense of equality while withholding its substance....”: Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO.WASH.L.REV.1595, 1598 (1989). In this way, “affirmative action remedies have flourished because

Neither is the liberal spirit of the action redeemed in any effective way by its amalgamation with more constructive and less attenuated notions of ‘diversity,’ the latest rallying point under-girding the necessity and appropriateness of ‘affirmative action.’ For the ‘student of color,’ lurking just behind the bright and inviting façade of the otherwise benign, positive notion of ‘diversity’ is the dual reality of how it actually looks and what it impliedly means for the parties in question. Unable to enter the arena through the ‘front door’ of competitive ability, ‘diversity’ hallmarks the academy’s willingness to forge an alternative entrance⁷⁷ for these individuals who bring something else with them that it independently recognizes, values and ‘needs.’ Whether for mere color alone,⁷⁸ or for the useful experiences with which diversity is stereotypically expected to enrich teaching environments and class discussions,⁷⁹ or some other anticipated ‘value added,’

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

⁷⁷ Dare we denominate this a ‘back door’?

⁷⁸ This enables the academy and its individual members to create a picture more sympathetic to its own practical and political convictions.

⁷⁹ One moment of real and lingering regret in my teaching experience came during a class discussion concerning aggressive policing tactics, occurring during a seminar I was leading on *Topics in American Justice*. Frustrated with the timid, theoretical nature of the discussion among the ten majority culture students in attendance, I deliberately broke my own self-imposed well conceived rule against “calling on” seminar students, inviting/requiring the one African-American student to weigh in on the topic. With a reluctance that was to be expected and which I ought to have respected, I pulled the student into the discussion, who obliged with the well-anticipated egregious stories of personally experienced excess, uncomfortably relived in the classroom retelling. His participation had the anticipated and intended effect of electrifying class discussion thereafter, but at a cost which left me decidedly dissatisfied, now as then. The simple fact was that I was using this young man’s experience for some shapeless, anticipated benefit of the other students who had no similar stories to tell, likely sacrificing his privacy and, in some way, his

the message is clear: having previously highlighted competitive disadvantage, law schools are then prepared to notoriously ignore it in seeking some other benefit on behalf of the broader community being served. This is a cynical perspective, of course, but it is not an unreasonable one; to the extent it accurately reflects the pith of ‘diversity’ in legal education, it is a potentially debilitating and even devastating one, for those depended upon and even expected to provide the diversity.

Separate from each of the above, though alluded to by both in combination, is the general atmosphere which greets the African-American student on ‘day one’ of their law school experience, and which continues for every day thereafter.⁸⁰ Law schools are their own unique worlds, to be sure, but to the extent that they are truly *foreign* cultural communities, their ‘foreignness’ tracks closer to majority culture values than minority, for most African-Americans. From the ‘minority’ student status greeting them, through the majority culture dominated faculties and administrations in visible authority positions to even the pseudo-Socratic classroom tones,⁸¹ these students see precious little of ‘themselves’ in the typical law schools. Here, then, is a ‘mismatch’ of a very real sort, though not of the quantitative, cognitive type Sander points to with such confidence in outlining the source of the ‘success’ problem. What might be the independent effect of

‘self,’ in the process. It struck me at the time and continues to impress me today that this was/is the *dark side* of ‘diversity’: the using of a human being’s hard gained experiences for some benefit in which that same human being cannot equally participate, and at some likely personal cost to that person. I am doubtful that any of the majority culture students received any deep thing from the experience other than the cheap chance to gawk at another person’s difficult experiences, with myself orchestrating the viewing as a kind of culpable ‘ringmaster.’ At its rawest level, is this what we mean to value by referencing ‘diversity of experiences’ in the classroom? Does this take even the merest step toward really addressing cultural injustice in America, or does it instead merely reference and highlight it to some ignoble and visceral end and this in the most cynical of ways?

⁸⁰ The only real exception to this for these students is the atmosphere in historically black law schools, the very exception to the ‘performance gap’ rule outlined by Sander in his own empirical profiles.

⁸¹ Its origins are western European in both form and effect, of course, and ‘after all.’

this mismatch on the ultimate outcomes to be expected of those coming directly under its discomfiting influence?⁸²

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

⁸² Here let me indulge my own qualitative story by way of example. Different than Professor Sander's foreign language woe (further referenced *infra*), my own undergraduate 'waterloo' came in the form of freshman calculus. Already reeling from the utter 'foreignness' of the frighteningly different place in which I had landed in my 'elite' private university, my undoing came in that first class of a subject I had reasonably expected to enjoy. Intimidated by the sheer size of the course's text, I had just attained a measure of calm and resolve in that first class meeting when a 'wise guy' (of the type I have since come to understand as a 'prep school all-star') called out, for all to hear, "Are you serious? This is the text we used in *high school*!" I heard. Though hours of fretting and avoidance and general discomfort lay still ahead of me before I dutifully picked up my dismal grade at semester's end, on reflection I have since realized that I 'lost it' at that very moment. I was *intimidated*, and in a way that was new and daunting for me. It was not the subject that overcame me, but instead the atmosphere in which I was invited to master it. While all of my concentration would have been necessary in the best of circumstances to manage the class well, the distinct feeling of being on the short side of a 'stacked deck' made sure that that would not happen. I disconnected from the learning process altogether at that moment, with untoward results naturally following. The 'mismatch' which derailed my academic experience was not one of cognitive ability, in that case, but was instead the '*mismatch*' of *experience*, with the crisis of confidence naturally following and with its pernicious intimidation in tow, having its ultimate effect on my success, or lack thereof.

flaw in any complementary quantitative study, clouding its vision and implicating its conclusions in the most foundational of ways.⁸³

These qualitative considerations are entirely absent from Professor Sander's sprawling, omnibus study, and their absence is of no small import to the breadth of its clarity or the right weight of its categorically presented conclusions. This absence is no mystery, of course, as the careful reader explores all that Sander has to say. These very qualitative issues are among the "rather subtle matters..." deliberately given "short shrift..." by Sander's own candid admission, "hard to measure..."⁸⁴ through his constricted quantitative work, but nonetheless absolutely essential, as set out above. In their absence, the ultimate utility of Sander's otherwise valuable study is drastically limited: it can tell the academy *that* there is a problem (which the academy already knew), and can put that problem in the important declarative perspective which only numbers can manage (genuinely helpful in this case) *but it must necessarily be made to stop there*. Until capable qualitative analysis comes alongside to complement – and

⁸³ The stronger the argument for these independent factors at work in the experience of the minority law student, the weaker Sander's 'mismatch hypothesis' becomes, of course. In any event, even apart from qualitative analysis addressing these issues, their possible existence alone rightly challenges the definitude with which Sander presents his related conclusions. Sander's data can highlight the fact that African-American law students are 'mismatched' in their law school placements and can separately note that they are doing very poorly in those placements, underscoring the reality that they are 'disconnecting' from the educational process in some palpably negative way. However, by virtue of the numbers alone, the best he can reasonably suggest is the strength of the correlation between the two factors; he cannot conclude the existence of the one from the other (the very thing he does, over and over again, wrongly, in his piece). Qualitative work is necessary to establish – or refute – his correlative conclusion. If African-Americans are disconnecting from the educational process for reasons having to do with the environment itself, for example, the ubiquity of the 'mismatch' across the law school spectrum renders it nothing more than a 'false positive,' a statistical echo which gives the appearance of a true correlation, without substance in fact. In any event, apart from supportive qualitative analysis – talking with these persons and finding out *from them* what is actually going on – Sander's correlations remain suspect, and his conclusions dangerous.

⁸⁴ *Supra* note 2, at 369.

challenge – Sander’s quantitative work,⁸⁵ such things as his quantifiably neat ‘mismatch hypothesis’ remains only that – an hypothesis – interesting, and possible, but *nothing more*; such is the case for all the conclusions following from his numbers.

⁸⁵ The two forms of analysis are not mutually exclusive, of course. Indeed, in a study of as ambitious a nature as the one Sander takes on, either form of analysis alone would likely reach only half the story at best. Both would be needed to fully address such an undeniably human story: *quantitative* analysis, to concretize parameters and variables in a way unavailable through any other medium of inquiry, and *qualitative* consideration to rightly give the numbers story depth, and true meaning. Let me be very clear in saying here that while I respect the remarkable work Professor Sander has completed, the lack of comparative and contrasting qualitative considerations – readily attainable but wholly lacking here – leaves me very distrustful of his too confident conclusions and the outcomes too naturally following. I know that there is ‘another story’ out there, contrapuntal to the one to which Sander has been led by his numbers, and I know (qualitatively!) he has not reached it through his numbers (and never would, through them alone). I know this as well: full understanding of the problem and its solutions lies in the *quality* of its review and, given its importance and the urgency of its solution, I for one cannot wait to see the progress that thorough qualitative review promises in this regard.

E. Conclusion: “simply stop using racial preferences...”⁸⁶

*Once some honest conversation about affirmative action practices is underway, it will be much easier to talk about constructive solutions. The most obvious solution is for schools to simply stop using racial preferences.... [B] lacks as a whole would be unambiguously better off in a system without any racial preferences at all than they are under the current regime.*⁸⁷

Several years ago, in the midst of the exciting, frenetic world of ‘summertime Washington D.C.,’⁸⁸ my 19-year-old son and I met a young man who sought my signature on a petition for the defendants in the then highly anticipated *Grutter v. Bollinger et al.* case. He was a locally based law student, intellectually committed enough to the heart of the matter at issue – ‘affirmative action’ – that he would use his time to get involved at this level of direct action.⁸⁹ In acceding to his request, I could not resist asking a ‘gut’ question related to the issue with which he so passionately identified: “If matters came to it, would you be willing to yield your place to an African-American, under the aegis of ‘affirmative action’?” His response was so coldly matter-of-fact that he seemed to have anticipated the question, or had labored through it to completion at

⁸⁶ *Supra* note 2, at 482.

⁸⁷ *Id.* at 482-83.

⁸⁸ Its unique identity as the seat of American political/social power, in combination with its warm summer climate, ease of access through multiple transportation means, magnetic pull for tourists and relative ease of internal navigation, makes the District of Columbia a hotbed of activity of all sorts at that time of year: family tourism, indoor and outdoor cultural attractions and, of course, the ubiquitous political protests. It was the latter that had drawn my son and myself that particular weekend, he having just finished a book on the ‘protest years’ of late 1960’s and early 1970’s America, and wishing to experience something of that time in his own right. With the concurrent ‘gay/anti-gay’ rallies along with the first well organized ‘anti-Iraq War’ protests on for that weekend, the city did not disappoint.

⁸⁹ Admiring his commitment and seeking to encourage his energetic involvement, I resisted the urge to challenge this anomalous admixing of hyper-democracy to the Delphic, distanced reality that is constitutionally controlled Supreme Court politics.

some earlier time at least: “I favor an expanding of the pie so that opportunity can be shared by all.” Repeating the question, with slightly less ‘wobble room’ and greater emphatic inflection, his verbatim answer was more categorical, with even less accompanying emotion than before: “I favor expanding the pie so that opportunity can be shared by all.”

Conceding without contest the unfairness of the question posed in those circumstances, in considering the exchange over the ensuing years, it has taken on for me the character of something like a parable. Committed enough to the issue to have added shoe-leather to his talk, there remained a severe limit to that commitment, a possible personal cost he was simply not willing to consider in imagining resolution to the problem about which he was so passionate. But without that added, deeper commitment, his efforts and the solutions they anticipated were destined to be *conservative* in the most restrictive application of that term, notwithstanding the genuineness of his desire to see the problem really solved. Resisting even modestly radical reconsiderations of the problem, his limitation would preserve *status quo*, maintaining the ‘us/them’ distinction, at the heart of the academy’s approach to equal educational access for as long as it has considered the question. Effectively mobilizing ‘us’ to reach out (down) to ‘them,’ the final end of the impetus seems clear: to allow as many of ‘them’ to become ‘us’ as is reasonably to be expected,⁹⁰ leaving undisturbed the very structure implicated in the perpetuation of the problem.

⁹⁰ Sander himself might practically place that figure at “4% of total (law school) enrollment...” (*supra* note 2, at 483). While many within the academy would perhaps see this as a fair and even generous proposed solution to the problem, I trust that my thinking is clear in challenging it as ‘wrong headed’ in every way. It is conservative at its core – even paternalistically so – and thus provides reinforcement of the academy at a time when challenge is what is called for and so badly needed.

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

Instead, the academy must take the best of what Sander has to offer and deliberately move forward from there. It must court qualitative review of the problem of a caliber akin to Sander's quantitative work – or it must commission that work itself – allowing African-Americans to 'tell their stories' to sympathetic professionals able to make good use of them. It must be prepared to take a good, hard look at what it finds – from Sander's results in combination with the all-important 'stories' following – and to take a good, hard look at itself in the process.⁹¹ This is not conservative; it is radical and palliative and perhaps even therapeutic in the end, in a situation where the effects of such

⁹¹ This is not without precedent, of course. This is the very thing the academy refused to do at the time that African-Americans were first seeking entry in numbers to the segregated law schools of America. Now, in light of Sander's work and the general malaise of African-Americans in law schools today, the academy has another opportunity to proactively visit and attend to the problem.

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

In the meantime, for the African-American members of the academy the matter is at once simpler yet more profound. As for its members in a 'management' capacity – minority culture administrators, professors, *etc.* – we must take very seriously the depth of the problems affecting African-Americans in the law education realm underscored and highlighted by Sander's work. We must consider very carefully his suggestion that 'affirmative action' is itself creating the devastating difficulties for our community even while rejecting outright his misapprehended reasons as to 'why.'⁹² We must be diligent

⁹² My first 'post-*Grutter*' academic conference happened to be a particularized gathering of 'law professors of color' convened to consider some of the very questions at the heart of this paper. Incidentally, I was perplexed by the group response to the just-released opinion, particularly the over-focus on Madame Justice Sandra Day O'Connor's notorious "25-year" *dicta*. (If anyone is interested in my 'take' on the Supreme Court's *unconstitutional* focus on the creation of 'constitutional rules,' please see Anthony Baker, 'so extraordinary, so unprecedented an authority...': *A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 DUQUESNE LAW REVIEW 729 (2001).) To begin with, it was on the lips of everyone at the conference, it seemed, and with an urgency that verged on desperation. The general tenor of the discussion was plain: "We only have 25 more years of 'affirmative action,' and we must determine how to use that time to greatest effect!" I must admit to having been put off somewhat by that reaction. My own initial response to that particular aspect of the Court's opinion was quite different: "You can keep your '25 years'; we don't need it, and we don't need you..." (This last comment was not meant as a sign of disrespect, but comes directly out of my work as an historian, well familiar with the cathartic interaction of that body and African-America from the 19th century forward.) Through continued consideration of the same question in the ensuing years, I feel no different today than I did then. As the academy's 'members of color,' we must challenge our own over-commitment to the 'false idol' of 'affirmative action' and negotiate our place within the whole of the academy against this vital backdrop: In the end, we do not need it. Indeed, as it has been both conceived and administered in the American context, with its fixed reliance on the active-negative language of "racial preferences" and "diversity justifications" as the cornerstones of our admittance, we cannot afford it. For African-Americans generally, the value system on which 'affirmative action' is *affirmatively grounded* is a false and debilitating one, and that reality has only grown worse with the academy's recent and ongoing scandalous self-gentrification through reactive application of the *U.S. News* profiles. The consistent, persistent 'ranking' of those law schools of most practical proven value to our people, historically and presently, at the bottom of that gentrified 'pecking order' ought to be our first clue. Where have we seen this before? We must reject outright the foundational constraints of 'affirmative action' and the over-narrow heuristic of 'success' on which it depends, for the benefit of ourselves and our people, and we must carefully and patiently explain to our colleagues "why." Until we do this, given the clear context of 'affirmative action' today, we are under-serving both our own people seeking entrance into the law school academy, and the academy actively determining their admittance.

in demanding of the academy that it ask the right questions in the wake of Sander's work, and we must be vigilant in helping it to arrive at the right conclusions, and develop the right solutions following. And we must do all of this *with purpose*, in a collaborative spirit of collegiality and constructive cooperation.

For its African-American consumers – students presently seeking entrance into the profession through its one narrow door and its unique halls – the matter is more urgent. In a vaguely paternalistic spirit of ‘full disclosure,’ Sander suggests that law schools give African-American applicants the whole dismal numbers profile in advance,⁹³ but we should go one step further: we should require the information ourselves, for our own use and benefit.⁹⁴ The same thing applies to his misapprehended “solution for schools to simply stop using racial preferences....”⁹⁵: we ought to count the cost, appreciating the value of ‘first strike’ in this regard, and turn the “racial

⁹³ Sander states the matter plainly:

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

Supra note 2, at 482. This last sentence is reflective of his own ‘mismatch hypothesis’ and adds the vague paternalism of which I have complained above. I cannot resist noting what a wonderful suggestion this is: singling out a group of persons ‘benefiting’ from preferences they did not create, highlighting the fact of their benefit, their comparatively non-competitive class status and the long chances of their final success, all before their first law school class, and then inviting them in to competition ‘on an even playing field.’ Under the circumstances, to describe this as a “great aid” for these students is to fundamentally miscomprehend the basic trajectory of human nature.

⁹⁴ Requesting that information for ourselves is significant, and significantly different from receiving it from the institution, as Sander suggests. The act of requesting affords for the requester the important feeling of taking a hand in their own destiny, gathering information for their own purposes and use. It also serves notice to the institution receiving the request of the same thing. It has practical benefit as well. It allows African-Americans to determine ‘who’s who’ in legal education while simultaneously affording each institution an opportunity for self-reflection, measuring their own progress in the necessary goal of creating of a nurturing, enabling environment for all its constituents.

⁹⁵ *Supra* note 2, at 482. Sander's thinking here also derives directly from his ‘mismatch hypothesis.’

preferences” back outright, ourselves.⁹⁶ We must fundamentally challenge the ‘success’ paradigm currently segregating the American legal academy and holding it hostage in the process, and we must do so in terms compatible with our own discrete character. We must declare ourselves no longer ‘for sale,’⁹⁷ refusing to chase after bright promises that too often hold a different reality for us than for others in the American spectrum,⁹⁸ and we must chart our own ‘success’ in unique, circumstantially relevant ways.⁹⁹

⁹⁶ Here I highlight again the empowerment of such an action, suggesting it as a valuable and necessary action as well. Sander augments this suggestion with the colorful observation, “this is not an unthinkable armageddon...” (*id.*), and for once he and I are *ad item*, though again for different, almost opposite reasons. We must train ourselves not to fear the outcomes of such a plan, while at the same time fully understanding the ancillary benefits of meeting these challenges before us in circumstances reifying our own discrete and important cultural values. If a refusal of racial preferences means marginally fewer colored faces at ‘elite’ institutions, what does that really matter to us in the end? The attending cost is the fundamental challenge of the achievement and ability for every African-American throughout the system, and it is a cost our people cannot afford to pay, and should not have to. Indeed, the entire ‘elite success’ paradigm is one running naturally counter to some of our own bedrock cultural values at least, and ought to be held in some suspicion by virtue of its unremitting ‘whiteness’ alone. The ‘best’ American law school for the African-American, now as ever, does not depend on institutional reputation. That school is the one that will encourage us in the realization of our goals without great sacrifice to our values, values which are quintessentially American even if uniquely so, give our unique experience in American history. The list of those law schools is different for each of us though likely not long for any of us – or at least not as long as it might be – and it simply does not show up anywhere on the *U.S. News* profile. A refusal of ‘racial preferences’ would aid us in identifying those law schools more naturally compatible with our direct needs while highlighting as well, for ourselves and themselves, those that are less so. And we need not fear a dearth of our own anywhere, even at the most ‘elite’ American law schools: God scatters ability across cultures indiscriminately, and those of us most suited to those particular environments will find our way there without question, and, finally, and refreshingly, on our own terms.

⁹⁷ Here I mean to challenge our often under-considered, too quick grasping at financial incentives in the form of ‘scholarship offers,’ proactively and cynically designed to ‘buy us’ for particular programs. This is ‘trophy hunting’ at its base, and it unfairly and unwisely favors the ‘biggest players’ in the student enrollment sweepstakes, too often at great personal cost to the individual taking the bait. The prospect of a relatively debt-free education is only of value if the individual is able to *get the education* in the end. In a case where that outcome is reasonably in the balance, the student would be far more greatly benefited by foregoing the windfall and accepting debt-financed education if they can reasonably look forward to employment in their profession of choice in retiring that debt. The prospects of ruined professional opportunities and the accompanying loss of personal worth and self-esteem accompanying failure does not justify the risks associated with being ‘bought’ into an institution which holds for that student little ability to deliver on its elite promise. Besides, the ‘buying’ prospect references its own peculiar and troubling historical echoes with regard to African-America, echoes that ought to produce concern and even skepticism in all of us.

⁹⁸ Someone must say it and we must hear and understand it: like much in the American experience, the promise of the ‘elite’ success paradigm – the better the law school the better the job prospects – does not always translate the same for African-Americans as for others. In a conversation with Mr. Justice Clarence Thomas some years ago, I was fascinated by his confessed initial job difficulties on graduation from an

In the end, and with no intention of trivializing the matters at hand, the problem of ‘affirmative action’ in the fabric of American civil liberty, justice and peace might best be appreciated as a three-act passion play, which is still being staged. Addressing as it does the efficacy of the impetus over the thirty-plus years of its life so far, the first act is perhaps the easiest to consider and understand, though the answer to the question remains a subtle one, to be sure.¹⁰⁰ Assuming as Sander does a negative response to the question shaping Act I, the second act considers the ‘why’ of the failure, and here the academy must challenge his conclusions as presumptive, until contrasting qualitative information is brought alongside. But however Act II concludes, there is still Act III to come – the what-to-do-about-it-all act – the most important act of all, and here Professor Sander simply has nothing constructive to add. This act belongs to the academy as a whole, to all of us making our living in it and interested in its outcomes, and we must make no

‘elite’ northeastern law school. He alluded to some surprise and disappointment at the time, his experiences pointedly differing from many of his majority culture colleagues, undoubtedly. Even if the promise of ‘elite’ benefits is available to us, they can only be realized by completing the program in question, and doing so in good standing, a matter which remains connected to the particular institutions we attend.

⁹⁹ While this is seldom the case for our majority culture colleagues, many African-Americans currently entering the stream of higher education represent the first generation of their respective families to do so. For those persons, ‘success’ must be carefully defined in both circumstantial and culturally relevant terms. For us, merely attending a higher ranked law school is clearly secondary in value to graduating from any law school, period. While it does happen on rare occasion – and almost always regarding individuals of inordinate natural ability – seldom does an individual gaining initial entrance into any competitive arena start their journey at the very apex. For such individuals as are typical among African-Americans in today’s culture, the ‘best’ law school is not the one with the highest reputation, by any measure, but rather the one at which they individually can learn, grow, mature, develop professionally and *graduate*, wherever it finds itself in the status order. The typical rhythm of things is not necessarily wrong: my father and mother took college courses, their children graduated from four-year institutions and it is their grandchildren that are now walking ‘ivy halls.’ This must be important, and foremost in the thinking of those of us who are not simply seeking to walk halls of ‘prestige’ for a time, but rather to establish our families for generations to come, as did my own parents, patiently and realistically.

¹⁰⁰ It is this ‘act’ that may be seen as ‘most right’ in Sander’s work, though his own clearly supported conclusions ought not to be viewed as an end to the matter in any way. While it is difficult to give ‘affirmative action’ anything more than a low passing grade at best in his own particular, careful review, different perspectives on the proper notion of ‘success’ – and there are many – will yield subtly different results for the question, we should remember.

mistake here: on it the entire success of the play depends, if you will, and, of course,
much, much more.

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