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SANDER, THE MISMATCH THEORY, AND AFFIRMATIVE ACTION: CRITIQUING THE ABSENCE OF PRAXIS IN POLICY

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This Article provides an efficient synthesis of the research to date on a controversial topic, Professor Richard Sander's mismatch theory, and the traction it continues to gain through litigation and political posturing. It is also the point of embarkation on a forthcoming exploration of the appropriate place for African American law students.[1] *Throughout the Article, I inject my own thoughts and analysis about Sander's, and each critic's, research and perspectives. This Article is timely because concepts like equity, equality, fairness, and justice continue to be heatedly discussed in a variety of forums, including academic journals and political debates. The Article's goal is to broaden the considerations involved in current affirmative action discussions and question policies constructed absent the voices of those most affected.*

INTRODUCTION

Nearly a decade ago, in November 2004, Richard Sander, a Professor of Law at the University of California Los Angeles (UCLA) School of Law, published a now oft-cited piece about affirmative action.[2] His primary question was "whether affirmative action in law schools generates benefits to blacks that substantially exceed the costs to blacks."[3] While it is difficult to determine exactly which benefits Sander included in his analysis,[4] he clearly argues that the "bad outcomes" include "higher attrition rates, lower pass rates on the bar, [and] problems in the job market."[5]

He concluded that affirmative action "produces more harms than benefits."[6] More specifically, he advocated that "a strong case can be

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1. Darrell D. Jackson, *Racing to Compete: A Critical Race Theorist's Qualitative Analysis of Whether African American Male Law School Alumni Were Mismatched or Maligned* (2012) (unpublished Ph.D. dissertation, University of Colorado) (on file with author).

2. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 369 (2004).

3. *Id.* at 369.

4. The exception being that Sander does identify "higher prestige" as a benefit. *Id.* at 371.

5. *Id.* at 370.

6. *Id.* at 371.

made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system."[7] This Article is timely due to the national agenda promulgated by Sander,[8] Ward Connerly, and supporters at the American Civil Rights Institute (ACRI).[9] For a robust discussion about affirmative action and ACRI initiatives to occur, all parties involved must place Sander's ideas within a political policy context. It is important to consider Sander's recommendation beyond its *merely* academic impact. His statements will have implications for courts as they rule on conflicts, for legislatures as they draft laws, for lobbyists as they advocate policy, and elsewhere. By including the *real world* or experiential impact of Sander's work on the very students for whom he suggests he protects, the stakeholders discussed above can make intelligent decisions about the role that race and the mismatch theory should or should not play within academia and society.

I. MISMATCH THEORY

Sander's conclusions are often labeled the "mismatch theory";[10] however, Sander gives credit for coining the term "mismatch hypothesis" to Clyde Summers, Thomas Sowell, and Paul Wangerin.[11] In short, African American recipients of affirmative action are "mismatched" with the law schools to which they are admitted, and end up with lower achievement and success rates as a result.[12] Following Sander's logic, if African Americans were matched with their "appropriate" schools, there would be greater benefits and fewer costs. By "appropriate," Sander meant a school that has a median Law School Admission Test (LSAT) and undergraduate grade point average (UGPA) score closely equivalent to

7. *Id.* at 372.

8. *See* Sander v. State Bar, 126 Cal. Rptr. 3d 330, 332–34 (Ct. App. 2011) (discussing Sander's lawsuit against the State Bar of California seeking to obtain bar admissions records in order to conduct research on the disparity between bar admission rates between different ethnic groups); Karen Sloan, *Professor Hopes Bar Passage Data Will Produce 'Crisper Debate' Over Affirmative Action*, NAT'L L.J. (June 15, 2011), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497503009&slreturn=1&hbxlogin=1.

9. *See generally About the American Civil Rights Institute*, AM. CIV. RTS. INST., http://acri.org/about.html (last visited Sept. 10, 2011).

10. THOMAS SOWELL, AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY 145–48 (2004); Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1825–26 (2005); Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 641 (2007); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., Winter 2004/2005, at 102, 105.

11. Sander, *supra* note 2, at 450. *See generally* THOMAS SOWELL, EDUCATION: ASSUMPTIONS VERSUS HISTORY (1986); Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. R. 377 (1970); Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771 (1989).

12. Sander, *supra* note 2, at 478–81.

those of the applicant.[13] This, Sander concluded, would benefit African Americans in law schools and the legal profession.[14]

A. Sander's Guiding Assumptions

I interpret Sander's conceptual framework for the mismatch theory as premised upon certain assumptions. These include, but are not limited to the following. First, an American societal goal is racially integrating the country. [15] Second, affirmative action is primarily, and has been historically, justified by "its impact on minorities."[16] And third, a colorblind system of admission is preferable to one that is not. Contrast Sander's initial assumption, that racially integrating American society is a societal goal, with authors who have suggested that American society has never fully embraced nor acted upon a goal of full racial integration in education or otherwise.[17] Instead, they argue, the remedies awarded pursuant to *Brown v. Board of Education*[18] were a matter of certain African American interests converging with those of European Americans.[19] Specifically, Professor Derrick Bell suggested that European Americans will only support policies that enhance opportunities for individuals from historically marginalized communities to the extent that those same policies *converge*, also enhancing the lives of the majority of European Americans.[20] He used the *Brown* decision as an example to demonstrate that political interests in suppressing communism were as relevant to the Court's decision as the law or other timely social issues.[21] Bell's analysis is supported by the fact that the initial *Brown* decision was made without any judicial remedies to enforce the holding.

Next, admittedly, Sander acknowledged that a goal of affirmative action was the diversification of American campuses, but he immediately proceeded to assume that affirmative action has primarily and historically been justified by "its impact on minorities."[22] He said: "Few of us would enthusiastically support preferential admission policies if we did not believe they played a powerful, irreplaceable role in giving

13. *See id.* at 478–80.
14. *Id.* at 478–81.
15. *Id.* at 368.
16. *Id.*
17. *See, e.g.*, Gloria J. Ladson-Billings, *Can We At Least Have Plessy? The Struggle for Quality Education*, 85 N.C. L. REV. 1279, 1287 (2007).
18. 347 U.S. 483 (1954).
19. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980); *see also* Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371–72 (2002) (reviewing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000)); Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 94 (2004).
20. Bell, *supra* note 19, at 523–25.
21. *Id.*; *see also* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2539 (2001).
22. Sander, *supra* note 2, at 368.

nonwhites in America access to higher education, entrée to the national elite, and a chance of correcting historic underrepresentations in the leading professions."[23] He emphasized the identity of the recipient when he labeled "black applicants" as "beneficiaries."[24] In so doing, Sander viewed affirmative action in a monocular fashion. Throughout his analysis, Sander ignored or avoided any serious analysis of potential benefits to European Americans, educational institutions, American society, or democracy.

Sander immediately confounded his "racial analysis" by pointing out that "UCLA's diversity programs had produced little socioeconomic variety."[25] Here, he changed the nature of his outcome variable from a racial emphasis to a socioeconomic emphasis. While the issue of intersectionality[26] could have been raised, Sander neglected to do so. Instead, substituting socioeconomic diversity for racial diversity has become the call of many neo-liberal and neo-conservative authors in affirmative action dialogue.[27] It suggests a "colorblind" approach to affirmative action, generally, and to educational admissions policies, specifically.[28]

Moreover, Sander's statements about success and admission standards were questionable. In his analysis, he pointed to the period from 1964–1967 as the time frame "when law schools were eliminating the last vestiges of discrimination."[29] He appeared to believe that discrimination in law school admissions was defeated some forty years ago and, at that time, African Americans gained "equal access."[30] Significant research suggests that discrimination in law schools was not defeated forty years ago.[31] It is with this grounding that I attempt to place the debate surrounding the mismatch theory into context and organize its critiques.

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23. *Id.*

24. *Id.* at 369.

25. *Id.* at 371.

26. *See, e.g.*, K.L. Broad, *Critical Borderlands & Interdisciplinary, Intersectional Coalitions*, 78 DENV. U. L. REV. 1141, 1141-1143 (2000).

27. *See* Stanley B. Malos, *The New Affirmative Action: Socioeconomic Preference Criteria in College Admissions*, 36 J. APPLIED BEHAV. SCI. 5, 17–19 (2000); Robert Bruce Slater, *Why Socioeconomic Affirmative Action in College Admissions Works Against African Americans*, J. BLACKS HIGHER EDUC., Summer 1995, at 57, 57.

28. Sander also avoided the reality of law school tuition. Unless financial packages accompany admission practices, it is virtually impossible to change the socioeconomic privilege attached to a law school education, and thus, the applicant pool.

29. Sander, *supra* note 2, at 376–77.

30. *Id.*

31. *See* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 185–87 (2004); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 207–09 (2d ed. 2006); GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 94 (2002); Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415, 415–16 (1987).

B. Affirmative Action Politics & Policy

The politics surrounding affirmative action are some of the most polarized of all political positions.[32] Within a policy context, affirmative action in higher education serves to provide greater exposure to, and of, all historically marginalized groups.[33] Its impact has been well chronicled.[34] Another purpose is to provide greater life opportunities to groups that have historically been victimized by a racist society.[35] However, it is important to distinguish racism from prejudice. Anybody is capable of showing prejudice, but for racist action to occur one must be in a position of power and privilege over another.[36] Racism eliminates and subjugates—two activities for which power and privilege are prerequisites.[37]

Supporters of affirmative action in higher education contend that it is needed to rectify societal evils of the past and achieve equality.[38] Such evils include, amongst other things, the exclusion of women and other historically marginalized communities from institutions of higher learning and exclusion from careers subsequent to such training.[39] Providing historically marginalized populations with additional measures that support their recruitment, admission, retention, degree completion, and career ascension achieves equality.[40]

Opponents of affirmative action in higher education usually do not disagree about historical evils.[41] However, equality, they argue, cannot be attained by treating individuals differently. Instead, it can only be achieved when all people attain similar measures on preordained predictors. One example is the argument that the admission of all candidates

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32. *See* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 20–22, 67–69 (1996); Randall Kennedy, Commentary, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327–28 (1986); THE AFFIRMATIVE ACTION DEBATE, at xiii–xv (George E. Curry ed. 1996); Robert Siegel, John McWhorter, Terence Pell, Joseph Phillips, Khin Mai Aung, Kimberlé Crenshaw, & Time Wise, *It's Time To End Affirmative Action*, INTELLIGENCE SQUARED (Nov. 13 2007) (transcript available at http://intelligencesquaredus.org/wp-content/uploads/Affirmative-Action-111307.pdf) (debate discussing whether affirmative action should be eliminated).

33. *But see generally* Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255 (2011) (analyzing the modifications and breadth to which racial groups are defined and affirmative action is applied).

34. DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 39–40 (Gary Orfield & Michal Kurlaender eds., 2001).

35. MICHELE S. MOSES, EMBRACING RACE: WHY WE NEED RACE-CONSCIOUS EDUCATION POLICY 131, 133, 135–37 (2002).

36. BONILLA-SILVA, *supra* note 31, at 8–9.

37. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 14–15 (2002).

38. *Id.* at 45–47; TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 38–39 (2005); Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 203–06 (2000).

39. WISE, *supra* note 38, at 11.

40. LOURY, *supra* note 31, at 131–32.

41. *See* WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES 17–20 (2000); SOWELL, *supra* note 10, at 115–22; Sander, *supra* note 2, at 371–72.

into college and universities should be measured, in whole or in large part, by grade point average and standardized test scores.[42]

In deciding whether affirmative action is warranted and, if warranted, whether to use affirmative action, a pivotal consideration is the purpose of colleges and universities. Why is it desirable to send any student to a college or university? For example, the purpose may be to heighten students' intelligence, to prepare students for careers, to encourage students toward higher levels of research, to teach students how to critically analyze, and to prepare students to be better citizens.

Grutter v. Bollinger[43] suggested that the purpose of affirmative action was to

> reaffirm the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession.[44]

However, Amy Gutmann, President of the University of Pennsylvania as well as a political theorist and philosopher,[45] suggested that institutions of higher learning "provide a realm where new and unorthodox ideas are judged on the intellectual merits; where the men and women who defend such ideas, provided they defend them well, are not strangers but valuable members of a community. Universities thereby serve democracy as sanctuaries of nonrepression."[46] In order to accomplish such a service to democracy, it would appear that homogeneity would be counterproductive. While similar mindsets could conceivably create "new and unorthodox ideas," the research on the educational benefits of diversity[47] suggests that varied mindsets would more likely create intellectually debatable issues. While thresholds must be maintained to assure that all participants are *able* to actively engage in debate, varied minds are unlikely to uniformly score within a pre-ordained range on any form of testing, standardized or not. Varied is analogous to different.[48] To obtain differentiation, institutions of higher learning must search for prospects with experiences and talents distinct from one another. Affirma-

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42. Sander, *supra* note 2, at 367.

43. 539 U.S. 306 (2003).

44. *Id.* at 2328.

45. *Biography, Office of the President*, UNIVERSITY OF PENNSYLVANIA, http://www.upenn.edu/president/meet-president/biography (last updated March 2011).

46. AMY GUTMANN, DEMOCRATIC EDUCATION 174 (1987).

47. *See generally* Michele S. Moses & M.J. Chang, *Toward a Deeper Understanding of the Diversity Rationale*, 33 Educ. Researcher 6 (2006); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002).

48. THE CONCISE ROGET'S INTERNATIONAL THESAURUS 780 (Barbara Ann Kipfer ed., 6th ed. 2003).

tive action is a tool for recruiting, admitting, retaining, and matriculating said students.

If the previous assessment justifies the use of affirmative action, another question remains: Why use affirmative action as opposed to some other tool? Michele Moses, an educational philosopher, similar to Gutmann, whose research considers the intersection of race and higher education, suggested that "affirmative action is necessary because it fosters students' self-determination by playing a crucial role in expanding their social contexts of choice, both while they are students and afterwards."[49] Moses argued that affirmative action expands the life choices of its recipients. Moreover, she suggested one outcome is increased pride for the recipients because they "get the message that their race or ethnicity," and I would add gender, "is considered important enough to be used as a qualifying factor for university admission."[50] Similar to the athlete, the musician, the legacy, or a variety of other recruits, Moses suggested that affirmative action recipients should find pride in what they bring to their institution of higher learning.[51] Their contribution may be found in, amongst other things, experiences, perspectives, and ideologies. Affirmative action supports this recognition in a way that other tools may not. Moreover, affirmative action does this in a manner that "does not significantly diminish the self-determination of white students."[52]

These nuances were not considered in Sander's quantitative analysis.[53] His articles must ignore personal experiences and growth in order to report numeric survey data. However, to suggest a "proper match" for any individual (much less group) without considering and understanding the individual or group's experiences appears to be ill advised, if not irresponsible.

Interestingly, part of Sander's hypothesis appears to be coming true. He suggested that "about 86% of blacks currently admitted to some law school would still gain admission to the system without racial preferences."[54] At the time that he collected his data, fall 2001, African Americans made up about 7.7% of first-year enrollment. As of fall 2008, in a time when Ward Connerly's American Civil Rights Institute-sponsored state initiatives have either taken effect or been substantially considered across the United States, African Americans' first-year enrollment has

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49. MOSES, *supra* note 35, at 107.

50. *Id.* at 131.

51. *See* Ashley M. Hibbett, *The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 HARV. BLACKLETTER L.J. 75 (2005) (discussing the results of a self-developed and self-conducted study on the perception of affirmative action among African American students at Harvard Law School).

52. MOSES, *supra* note 35, at 137.

53. *See generally* Sander, *supra* note 2.

54. Sander, *supra* note 2, at 373.

decreased to approximately 7.2%.[55] That is approximately a 4.5% drop in first-year enrollment. Sander's 86% hypothesis is, obviously, a 14% drop in current enrollment. Are the "new generation" of African American law school graduates "more successful" and how is that success being measured?

II. CRITIQUES OF THE MISMATCH THEORY

Many have critiqued Sander's mismatch hypothesis.[56] Moreover, Sander's hypothesis has attracted critiques from academicians in law, education, statistics, and beyond.[57] Generally, critics have challenged Sander's analysis, metrics, and methodology.[58] Moreover, attempted replications of Sander's study have raised doubts about the accuracy of his reported correlations.[59] And, using an economic analysis of the law, critics have questioned Sander's definition of success, which assigned a value of zero to an incomplete law school education.[60] Camilli, Jackson, Chiu, and Gallagher suggested "that regression analyses of the kind conducted by Sander are incapable of producing credible estimates of causal effects."[61] Ultimately, critics suggested that Sander may have been so "predisposed to show that affirmative action was counterproductive

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55. *See Total Minority Enrollment 2011 (New Aggregate Categories)*, LSAC.ORG, http://www.lsac.org/jd/pdfs/new-aggregate-categories.pdf (last visited Dec. 26, 2011); *Legal Education Statistics*, LSAC and http://www.lsac.org/JD/pdfs/Legal-Education-Statistics-Attendance-and-Degrees.pdf (last visited Dec. 26, 2011).

56. *E.g.*, Ayers & Brooks, *supra* note 10, at 1808–09; Gregory Camilli, Darrell D. Jackson, Chia-Yi Chiu & Ann Gallagher, *The Mismatch Hypothesis in Law School Admissions*, 2 WIDENER J. OF L., ECON. & RACE 165, 165–66 & n.3, 203–04 (May 3, 2011), http://blogs.law.widener.edu/wjler/files/2011/05/LSAC_Final.pdf; David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV 1855, 1857 (2005); andré douglas pond cummings, *Open Water: Affirmative Action, Mismatch Theory and Swarming Predators-A Response to Richard Sander*, 44 BRANDEIS L.J. 795, 802–05 (2006); Harris & Kidder, *supra* note 10, at 103; Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41, 42–43 (2005); L. Darnell Weeden, *Raising the Bar in the Affirmative Action Debate: A Pragmatic Comment on Professor Richard H. Sander's Systematic Analysis of Affirmative Action in American Law Schools Article*, 15 S. CAL. REV. L. & SOC. JUST. 195, 196–97 (2006); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1919 (2005).

57. *E.g.*, *id.*; *see also* Peter Arcidiacono, Esteban M. Aucejo, Hanming Fang & Kenneth I. Spenner, *Does Affirmative Action Lead to Mismatch? A New Test and Evidence* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 14885, Apr. 2009), *available at* http://www.nber.org/papers/w14885; Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 ECON. OF EDUC. REV. 1110 (2010).

58. *See, e.g.*, Ayers & Brooks, *supra* note 10, at 1807–09; Camilli, Jackson, Chiu & Gallagher, *supra* note 56, at 203, 207–08; Chambers, Clydsedale, Kidder & Lempert, *supra* note 56, at 1857; cummings, *supra* note 56, at 801–02; Harris & Kidder, *supra* note 10, at 103; Moran, *supra* note 56, at 48–58.

59. Daniel E. Ho, Scholarship Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L.J. 1997, 1997 (2005) [hereinafter Ho, *Why Affirmative Action*]; Daniel E. Ho, *Affirmative Action's Affirmative Action: A Reply to Sander*, 114 YALE L.J. 2011, 2011–12 (2005) [hereinafter Ho, *Affirmative Action's Affirmative Action*].

60. Delgado, *supra* note 10, at 647–48.

61. Camilli, Jackson, Chiu & Gallagher, *supra* note 56, at 207.

[that] he didn't think to ask what the black drop-outs were doing."[62] Sander has denied all such allegations.[63] In what follows, I thoroughly discuss the analysis surrounding Sander's research and theory, and attempt to place each into quantitative critiques or theoretical critiques. I also briefly engage qualitative considerations and expand upon that analysis in my forthcoming work, *Racing to Compete: A Critical Race Theorist's Qualitative Analysis of Whether African American Male Law School Alumni were Mismatched or Maligned.*[64]

A. Quantitative Critiques

In addition to being a professor of law, Sander holds a Ph.D. in economics from Northwestern University.[65] Likely as a result, his analyses focused on quantitative methods for the creation of the mismatch theory. Most critics, therefore, have engaged quantitative analysis to dissect his analyses. In brief, Ayers and Brooks suggested that Sander was erroneous in both his interpretation of his data and his conclusions.[66] Chambers, Clydesdale, Kidder, and Lempert found Sander's conclusions to be unreliable.[67] Dauber advised that Sander merely "mudd[ied] the waters."[68] Ho argued that Sander misapplied basic principles.[69] Rothstein and Yoon warned that there was no plausible interpretation of the data that would lead to Sander's results.[70] Lastly, Camilli, Jackson, Chiu, and Gallagher concluded that the difference in bar passage rates seems very modest relative to the substantial social networking advantages of attending an elite school.[71]

1. *Stanford Law Review*

In May 2005, Sander responded to his critics with *A Reply to Critics*.[72] This edition of the *Stanford Law Review* introduced readers to four attacks on Sander's theories and methods.[73] The issue ended with his response.[74] Ayers and Brooks began by providing a response that "refutes the claim that affirmative action has reduced the number of black

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62. Delgado, *supra* note 10, at 648.

63. Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 YALE L.J. 2005, 2005 (2005) [hereinafter Sander, *Mismeasuring the Mismatch*]; Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV 1963, 1964–65 (2005) [hereinafter Sander, *A Reply to Critics*].

64. Jackson, *supra* note 1.

65. *Richard Sander Biography*, UCLA SCHOOL OF LAW, http://www2.law.ucla.edu/sander/Bio_CV/Bio.htm (last visited Sept. 11, 2011).

66. Ayers & Brooks, *supra* note 10, at 1853.

67. Chambers, Clydsedale, Kidder & Lempert, *supra* note 56, at 1898.

68. Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1913–14 (2005).

69. Ho, *Why Affirmative Action*, *supra* note 59, at 2004.

70. Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 75 U. CHI. L. REV. 649, 677 (2008).

71. Camilli, Jackson, Chiu & Gallagher, *supra* note 56, at 204.

72. Sander, *A Reply to Critics*, *supra* note 63.

73. Ayers & Brooks, *supra* note 10; Chambers, Clydsedale, Kidder & Lempert, *supra* note 56; Dauber, *supra* note 68; Wilkins, *supra* note 56.

74. Sander, *A Reply to Critics*, *supra* note 63.

lawyers."[75] Instead, these authors suggested that "the elimination of affirmative action would reduce the number of [African American] lawyers" and that their data "suggest[ed] an equally plausible 'reverse mismatch effect,' where the probability of black law students becoming lawyers would be maximized under a system involving an affirmative action program with larger racial preferences than those presently in place."[76]

Ayers and Brooks restricted their arguments to Sander's quantitative analyses. First, they considered the various weaknesses in conclusions made from Sander's regression analysis.[77] Second, they considered probability curves, created both by Sander and by themselves, and the extent to which these curves undermined Sander's theories.[78] Third, they contradicted Sander's conclusions about the correlation between bar passage rate and law school attended, as well as the ultimate population of black lawyers.[79] Lastly, they critiqued Sander's paternalism regarding rejecting black affirmative action recipients and instead called for better distribution of information to applicants about their likelihood of success at any particular law school.[80] Ultimately, Ayers and Brooks questioned Sander's interpretation of his own data and the conclusions he ascribed to affirmative action.

In the same *Stanford Law Review* issue, Chambers, Clydesdale, Kidder, and Lempert argued that Sander "significantly overestimated the costs of affirmative action and failed to demonstrate benefits from ending it" and that "the conclusions in *Systemic Analysis* rest on a series of statistical errors, oversights, and implausible assumptions."[81] Similar to Ayers and Brooks,[82] Chambers et al. suggested that implementation of Sander's recommendations would lead to a much larger decline in matriculation by African American law students than Sander suggested.[83] Noting that Sander based his analysis on a quantitative method known as grid modeling, Chambers et al. stated that "the grid model cannot provide even a loose estimate of how many African Americans would in fact matriculate in law school, but Sander, though recognizing that the model cannot tell us what African Americans would actually do, in the end

75. Ayers & Brooks, *supra* note 10, at 1809.
76. *Id.*
77. *Id.* at 1833–34.
78. *Id.* at 1818.
79. *Id.* at 1823–25.
80. By paternalism, I adopt cummings's definition of "attempting to exercise control over another individual that purports to be implemented in the best interests of that individual." cummings, *supra* note 56, at 824. In Sander's articles, he argues that African American law students are mismatched with their appropriate institution and would be better served at less elite or rigorous schools. *See, e.g.*, Sander, *supra* note 2, at 353–34. As cummings noted, "Sander seeks to substitute his judgment for the very students that are making that decision for themselves. This is paternalism in its starkest form." cummings, *supra* note 56, at 828.
81. Chambers, Clydsedale, Kidder & Lempert, *supra* note 56, at 1857.
82. Ayers & Brooks, *supra* note 10, at 1813–16.
83. Chambers, Clydsedale, Kidder & Lempert, *supra* note 56 at 1857–62.

treats it as if it does."[84] Their research led them to contradict Sander and conclude that ending affirmative action would reduce the African American student population for two reasons. First, "it would exclude students whose LSAT scores and UGPAs are so low that they could not get into a school even if they applied to a broad range of schools."[85] Second, "some African Americans who could get into some law school somewhere would no longer choose to apply to law school, or would apply only to schools that would not admit them, or would be accepted someplace but decide not to attend."[86]

Next, Chambers et al. critiqued Sander's statistical analyses employed in *Systemic Analysis*. They noted that "Sander rests all his important claims about black student performance on statistical analyses. If his analyses are inadequate, his conclusions are unreliable."[87] They initially referenced his failure to report a Nagelkerke R-Square[88] to show the strength of associations reported in his regression models.[89] The results of their computation, an R-Square of .325, suggested that Sander's table fails to fully explain what leads to bar passage.[90] Moreover, according to Chambers et al., Sander's model, while highly accurate in predicting who will pass the bar, "does a dismal job . . . predicting who will fail, as it correctly labels as 'fails' only 129 out of the 1074 sample students who actually did fail, for a success rate of only 12%."[91] They concluded this phase of their critique by noting:

> Numerous other statistical problems can be found in Sander's analysis. These include excluding race as a cause of outcomes in models plagued by multicollinearity, neglecting to model selection effects when predicting student performance, and treating law school tier not as a set of nominal variables but as an interval scale measure. In sum, the statistical misstatements and modeling errors in *Systemic Analysis* mean that the conclusions appear to have far more evidentiary support than they in fact do.[92]

Chambers et al. go on to point out a variety of other concerns with Sander's data. For example, he chose to use the National Survey of Law School Performance (NSLSP) for some analyses and the Law School

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84. *Id.* at 1863.
85. *Id.* at 1867.
86. *Id.* at 1867–68.
87. *Id.* at 1868.
88. Briefly, for those completely unfamiliar with quantitative terminology, "R" is an abbreviation for correlation coefficient. A correlation coefficient is a measure of linear association. "The closer R is to 1, the stronger is the linear association between variables. . ." (p. 126). R squared indicates how well outcomes can be predicted by a statistical model. R squared values range from 0 to 1, and an R squared of 1 is optimal. N.J.D. Nagelkerke, *A Note on a General Definition of the Coefficient of Determination*, 78 BIOMETRIKA 691, 691 (1991).
89. Chambers, Clydsedale, Kidder & Lempert, *supra* note 56, at 1870
90. *Id.*
91. *Id.* at 1871.
92. *Id.* at 1872–73 (footnotes omitted).

Admission Council (LSAC) National Longitudinal Bar Passage Study (BPS) for other analyses.[93] Sander's choice of the NSLSP led him to conclude that African American students would perform as well as whites absent affirmative action.[94] Chambers et al. argued that had he continued to "use[] the BPS, he would have reached quite different conclusions, conclusions that would have been more consistent with almost all of the research that has been done relating standardized test scores among African Americans to later graded performance."[95] They noted that "studies conducted by the LSAC have shown more than once, even among white and African American students with identical entry credentials, African American students typically receive somewhat lower law school grades than whites."[96]

Dauber then added to the criticism of Sander's research by stating that "Sander has muddied rather than clarified the waters with a flawed and ultimately misleading contribution."[97] In large part, her criticism focused on Sander's inappropriate use of a dummy variable, using white lawyers as a stand-in for black lawyers.[98] Instead, she argued that "black law students with similar academic credentials who attend higher-status schools do better, not worse, than comparable black law students attending lower prestige schools in terms of bar passage rates."[99] Ultimately, she pointed to the *Stanford Law Review* and its failure to engage in a peer-reviewed process as the critical flaw in disseminating Sander's research.[100]

Sander's response to the concert of opponents in the *Stanford Law Review* issue was multifaceted. He portrayed his hypothesis as receiving "predominantly favorable" responses and maintained that the critiques were "toothless."[101] Interestingly, he considered the Wilkins rebuttal, which I analyze below, as the strongest of all the published critiques. Before engaging each of his critics individually, he discussed a data set made up of individuals he defined as his "'second-choice' sample."[102] This is the group of African American law students who were admitted into an elite institution yet elected to go to a lower ranked school. According to Sander, this group produced "outcomes *closer to the white average than the black average*."[103] The implication is that this is further support for the mismatch theory. The arguments against such an implica-

93. *See* Sander, *supra* note 2, at 426–29, 453.
94. Chambers, Clydsedale, Kidder & Lempert, *supra* note 56, at 1877.
95. *Id.*
96. *Id.*
97. Dauber, *supra* note 68, at 1902.
98. *Id.* at 1905.
99. *Id.* at 1902.
100. *See id.* at 1908.
101. Sander, *A Reply to Critics*, *supra* note 63, at 1964.
102. *Id.* at 1973.
103. *Id.* at 1974 (emphasis added).

tion include, but are not limited to, the decision made by many students (not just the African American students that Sander quantitatively analyzed) to incur less debt by attending a less selective law school and attending a law school closer to home so that jobs could be maintained. There is no indication that Sander accounted for, attempted to account for, or could account for students who elected a less selective school for reasons unconnected to their standardized scores.

Sander dispensed with the critics by specifically addressing each of their central complaints. With the quantitative critics, he agreed with certain facets of their arguments, but ultimately dismissed their conclusions as either a misinterpretation of his argument or the data.[104] Notably, Wilkins's argument, discussed below, received as much, if not more, space than any other critique.

2. *Yale Law Journal*

In addition to the *Stanford Law Review*, the *Yale Law Journal* produced a three part analysis of the mismatch theory that included a comment by Daniel Ho, a response by Sander, and a reply to that response by Ho. Ho's comment argued that Sander misapplied "basic principles of causal inference" by relying on "unjustifiable assumptions."[105] The faulty assumptions, Ho argued, all led Sander to articulate erroneous conclusions.[106] Ultimately, Ho concluded that, although African Americans "get lower grades as a result of going to a higher-tier school,"[107] ultimately, "for similarly qualified black students, attending a higher-tier law school has no detectable effect on bar passage rates."[108] In summary, Ho stated that "whichever way one cuts it, there is no evidence for the hypothesis that law school tier causes black students to fail the bar."[109]

Sander responded by stating, "Ho seems to miss the central analytical framework of my article, is vague in his claims of bias, and offers an alternative approach that violates the very methodological precepts he lays out."[110] Sander went on to argue, "There are two fundamental problems with Ho's analysis. First, he assumes that the 'tier' variable in the BPS data set is a perfect hierarchical measure of school prestige."[111] The second problem was what Sander called "unobservable characteristics."[112] These are unknowns such as a student's "undergraduate college, their major, and other skills and achievements."[113] Sander concluded by

104. *See generally id.*
105. Ho, *Why Affirmative Action*, *supra* note 59, at 1997.
106. *Id.*
107. *Id.* at 2004.
108. *Id.* at 1997.
109. *Id.* at 2004.
110. Sander, *Mismeasuring the Mismatch*, *supra* note 63, at 2005.
111. *Id.* at 2009.
112. *Id.* at 2010.
113. *Id.*

suggesting that "[c]riticism is vital, but critics who wish to reject the mismatch theory outright have a responsibility to offer their own explanation and cures for the disparate harm our current system inflicts on blacks."[114]

Ho's reply argued, "[t]he descriptive facts Sander presents may account for some of the *reasons* for affirmative action, but they do not address the *consequences* of affirmative action."[115] Ho's three key criticisms of Sander were: i) "Sander's control group, as he conceived it, is invalid;"[116] ii) Sander ignored the "rule of interference" which propounds "that controlling for a consequence of the cause is never justified and will never produce the right causal effect;"[117] and iii) Sander introduced "a textbook example of bias induced by controlling for a consequence of the cause."[118] Ultimately, Ho suggested that Sander has (re)introduced an important dialogue about affirmative action, but has mishandled the opportunity.[119]

Ho's conclusion that Sander's regression suffered from post-treatment bias was later supported by Katherine Barnes.[120] She added to the list of quantitative researchers who found that Sander's hypothesis is not supported by the very data he used. However, her analysis was new because she did not solely analyze Sander's mismatch theory; she considered "two theories that seek to explain black students' depressed achievement in law school: the mismatch theory and the race-based barriers theory."[121] Using three variables, "race, school type, and credentials," she investigated "three performance measures: bar passage, graduation, and obtaining a well-paying first job after law school."[122] Statistically, Barnes argued, "[e]nding affirmative action would lead to 13.4% fewer black lawyers, 22.6% fewer new black law graduates, and 23% fewer black law graduates with well-paying jobs."[123] She concluded that the difference in grades between black and white law students is not attributable to mismatch. "Instead, some form of latent race-based discrimination may be at play."[124] Furthermore, her data suggested a "reverse-mismatch": African American law school students are *more* likely to graduate from elite institutions.[125] Finally, she "suggests that the legal academy should prioritize further investigation to determine what specif-

114. *Id.*
115. Ho, *Affirmative Action's Affirmative Action*, *supra* note 59, at 2011–12 (emphasis added).
116. *Id.* at 2012.
117. *Id.*
118. *Id.* at 2014.
119. *See id.* at 2016.
120. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759, 1800 (2007).
121. *Id.* at 1765.
122. *Id.* at 1775. Barnes defines a "well-paying job as earning $40,000 or more in 1995." *Id.*
123. *Id.* at 1800.
124. *Id.* at 1807.
125. *See id.* at 1789.

ically about law school culture has negative (or positive) consequences. The challenge is to determine what in law school culture helps students, particularly minority students, thrive."[126]

3. Other responses

Rothstein and Yoon engaged in one of the most current and in-depth quantitative critiques of Sander's ideas.[127] Arguing that Sander's analysis implicitly attributes *any* black underperformance to mismatch, Rothstein and Yoon implemented a strategy of "compar[ing] black students with white students with the same credentials irrespective of the school that they attend[ed]."[128] They argued that their approach was preferable to Sander's because "[t]o identify the mismatch effect of affirmative action, Sander must correctly estimate four effects from three different statistical models. If any of these models goes wrong, the answer obtained at the end of the process will be biased."[129] Rothstein and Yoon concluded, contrary to Sander's suggestions, that "[i]n the absence of affirmative action . . . the number of black students entering law school would fall by about 60 percent, while black representation at the most selective schools would fall by 90 percent."[130] Furthermore, their analysis "casts doubt on the mismatch hypothesis, particularly as it applies to elite schools"[131] and they warned that "[t]here is no plausible interpretation of the data under which the elimination of affirmative action would increase the number of black lawyers, or even decrease it by a small amount."[132]

Most recently, Camilli, Jackson, Chiu, and Gallagher engaged Sander by analyzing whether positive effects exist from supporting the mismatch hypothesis. Their analysis furthered the current research because they engaged the mismatch theory by looking at potential benefits instead of potential detriments, as previous articles had focused.[133] The authors grounded their theory in similar studies by Alon and Tienda[134] and Dale and Krueger.[135] Focusing on the "match effect" that should occur if Sander's hypothesis held true, the authors considered the value added effect of attending an elite law school. Using the BPS for their data source, the authors found "[s]ome evidence supporting the negative match hypothesis for Black and Asian law school students in the lower

126. *Id.* at 1806.
127. *See generally* Rothstein & Yoon, *supra* note 70.
128. *Id.* at 682–83.
129. *Id.* at 685.
130. *Id.* at 711.
131. *Id.*
132. *Id.* at 712.
133. Camilli, Jackson, Chiu & Gallagher, *supra* note 56, at 166.
134. Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. OF EDUC. 294 (2005).
135. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. OF ECON. 1491 (2002).

propensity range. Yet the match effects for the bar passage in the upper range were much lower than Sander's reports, and did not approach statistical significance at $\alpha = .05$."[136]

They concluded that "the bar passage rates difference seems very modest relative to the substantial social networking advantages of elite school attendance"[137] and highlighted Sander's own acknowledgement that "he did not consider 'perhaps the single greatest benefit of affirmative action in law schools: its role in building the long-term careers of [B]lack lawyers and giving them a place in the most elite ranks of the profession and American society.'"[138]

B. Theoretical Critiques

At present, there has not been a law review issue specifically dedicated to theoretical responses to the mismatch theory. Of the theoretical responses to Sander, in brief, Wilkins recounted the history of racism and affirmative action in law schools.[139] Harris and Kidder pointed out the failures of those who had erroneously made previous claims similar to Sander's.[140] Kidder, individually, suggested that the data Sander chose to use was an anomaly and that a wider date range would have led to different conclusions.[141] Johnson and Onwuachi-Willig argued that Sander chose to avoid the more difficult assessment of how "soft" variables, like a hostile law school environment, contributed to his conclusions.[142]

Wilkins wrote the last article in the *Stanford Law Review*'s series of criticisms against Sander.[143] However, Wilkins undertook a theoretical rebuttal to Sander's hypothesis and is, therefore, placed within this section of the literature review, not beside his fellow critics found in the quantitative section. Wilkins asserted that, under the mismatch theory, "Sander must prove that grades are more important than law school prestige for those black law students who actually become lawyers."[144] He then argued that Sander provided only one piece of evidence to support his burden: that according to the first wave of responses to the *After the JD Study*, "black lawyers with high grades from low-status schools are as—if not more—likely to obtain high-paying jobs than their counterparts from higher-status schools with lower grades."[145] Wilkins contend-

136. Camilli, Jackson, Chiu & Gallagher, *supra* note 56, at 203.
137. *Id.* at 204.
138. *Id.* at 207.
139. Wilkins, *supra* note 56, at 1920–24.
140. Harris & Kidder, *supra* note 10, at 102–03.
141. *See* William C. Kidder, *Does Affirmative Action Really Hurt Blacks and Latinos in U.S. Law Schools?*, TOMAS RIVERA POL'Y INST., September 2005, at 3.
142. Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L. & POL'Y REP. 1, 12, 17–18 (2005).
143. Wilkins, *supra* note 56.
144. *Id.* at 1918.
145. *Id.*

ed that "this single piece of evidence does not come anywhere close to proving that most black lawyers would be better off in a world in which the vast majority of them would attend law schools twenty to fifty places below the ones that they currently attend."[146]

In a four part analysis, Wilkins recounted the history of affirmative action in law schools and the legal profession, weighed the importance of attending an elite law school against the importance of grade point average, questioned the validity of the bar exam and its connection to law school or the practice of law, and, finally, suggested alternatives for analyzing and addressing the issue that Sander claimed is paramount—the disproportionately lower grades and bar passage of African Americans in law school.[147] Ultimately, Wilkins introduced two paradigms that must be considered in concert with Sander's hypothesis. First, he stated that, "It is only by placing affirmative action in the broader context of how careers are actually forged in today's legal marketplace that we can reach credible judgments about whether such policies hurt some of their intended beneficiaries, and, more importantly, what we might do to rectify this situation."[148] Second, he interviewed African American Harvard Law School alumni and engaged in counter-storytelling[149] to stress the benefits of a Harvard Law School education.[150]

In his dissent to Wilkins' response, Sander admitted a crucial reality behind the mismatch theory that often goes overlooked by its proponents. He stated, "*Systemic Analysis* does not (and does not pretend to) consider *all* of the costs and benefits of racial preferences.[151] Furthermore, in responding to Wilkins, Sander raised another valuable question when he stated, "[d]oing poorly in law school could be a significant long-term handicap for lawyers in two other ways. First, how much one learns in law school could actually influence how good a lawyer one becomes after law school."[152] Second, how do law students define what they learned in law school and what is the connection between what students learn in law school with how good a lawyer they become? In addition, Sander suggested that the typical black law graduate "would have gotten a significantly better job had he been somehow able to bypass affirma-

146. *Id.* at 1919.
147. *Id.* at 1919–20.
148. *Id.* at 1920.
149. Counter-storytelling is a method for (re)examining a normative perspective. A belief or understanding can become grounded in recurring narratives that lead an individual to suggest that a conclusion or action is simply "common-sense." Counter-storytelling is one method for questioning and critiquing the common-sense narrative by inserting perspectives, experiences, and understandings that are often unheard or failed to be considered within the normative framework. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 42–43 (2001); *see also* IAN F. HANEY LOPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 110–13 (2003).
150. Wilkins, *supra* note 56, at 1915–16, 1934 & n.72.
151. Sander, *A Reply to Critics*, *supra* note 63, at 2005 (emphasis added).
152. *Id.* at 2006.

tive action in law school."[153] I raise each of Sander's theoretical arguments as points of departure for future researchers.

Harris and Kidder, a professor of law at UCLA and a researcher at the Equal Justice Society, respectively, added to Wilkins's consideration of costs and benefits. They assigned a host of errors to Sander's conclusions. The authors pointed out that Sander's theories were previously argued by a host of other individuals, including, but not limited to, Stephan and Abigail Thernstrom, Ward Connerly, Walter Williams, Gail Heriot, and Thomas Sowell.[154] Using Thernstrom's erroneous prediction that California's Proposition 209 would redistribute African Americans from UCLA and UC Berkeley to campuses like UC Riverside, Harris and Kidder pointed out that such "benefits" never materialized and that in 2004 UCLA provided the most applicants to law schools in the country.[155]

They then addressed Sander's theory that, absent affirmative action, African Americans would relocate to more "appropriate" law schools by questioning his assumption "that law schools are fungible in terms of attractiveness to black applicants."[156] Instead, they argued that "there is no reason to believe that an African-American candidate from New Jersey" (a metropolitan area with a significant minority population) "would attend the University of Montana" (an area with a small minority population).[157]

They also disputed Sander's conclusions by referencing the BPS (amongst others), which found that black students with the same entry credentials as their white classmates within the same law school still earned lower grades. This calls for a deeper analysis of causes and includes theories like "underachievement" and "stereotype threat."[158]

Individually, Kidder dealt with many of the quantitative issues in his Tomás Rivera Policy Institute executive summary.[159] Calling Sander's conclusions "speculative," Kidder concluded that "based on 2004 admission data, an annual decline in African American attorneys of 30% to 40% is more likely if affirmative action were ended."[160] Kidder discussed three primary reasons that led to Sander's estimates being too optimistic. First, the quantity of applications and acceptance rates in 2001 (the year from which Sander drew his data), were an anomaly due

153. *Id.*
154. Harris & Kidder, *supra* note 10, at 102.
155. *Id.*
156. *Id.* at 103.
157. *Id.*
158. THERESA PERRY, CLAUDE STEELE & ASA G. HILLIARD III, YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN AMERICAN STUDENTS 110–12 (2003).
159. Kidder, *supra* note 141, at 1.
160. *Id.*

to the national economy and job market.[161] Second, in using another researcher's (Wightman's) model, Sander simply ignored that researcher's "warning that the grid model is 'less realistic in its assumptions' because it ignores the schools to which minority students actually applied."[162] Additionally, Kidder pointed out that Wightman found "that LSAT scores and college grades 'are not significant predictors of graduation from law school.'"[163] Lastly, Kidder suggested "that Sander did not really apply 2001 data after all, much less the latest available data."[164]

Kidder concluded by suggesting that "the number of black lawyers resulting from the 2004 admissions cycle would likely decline by 30-40% if affirmative action were not practiced."[165] In questioning the idea of a mismatch, Kidder pointed out that "in 2001-2003, the top 26 law schools graduated about 1600 African Americans, with an impressive graduation rate above 96%, including 100% at Columbia, Georgetown, and Michigan."[166] It is from these law schools that one finds the majority of law professors, federal judges, and partners at major law firms.[167]

In connecting Sander's critique of affirmative action to the theory of institutional diversity, Johnson and Onwuachi-Willig "re-cast the question posed by Professor Sander from 'what's wrong with affirmative action?' to 'how do we diversify our law schools?'"[168] They critiqued Sander's article by focusing on two points. First, they "contend that the focal point of 'A Systemic Analysis of Affirmative Action on American Law Schools' is unduly narrow."[169] Second, they "examine critically Professor Sander's assumption that relatively lower UGPAs and LSAT scores explain why African Americans fail to fare as well academically in law school as their white peers."[170] They chose not to question the statistical conclusions reached by Sander. Instead, they argued that Sander chose to avoid the more difficult assessment of how "soft" variables, like a hostile law school environment, contributed to his conclusions.[171]

The final articles that I will consider were grounded in an analysis of privilege. Together, they question whose "truths" get priority over others and why. Moran summarized many of the authors described herein and concluded that there are what she calls six truths one must accept when Sander's "conclusions are adopted."[172] The six truths[173] are, essen-

161. *Id.* at 3.
162. *Id.*
163. *Id.* at 5–6.
164. *Id.* at 3.
165. *Id.* at 7.
166. *Id.* at 6.
167. *See id.* at 7–8.
168. Johnson & Onwuachi-Willig, *supra* note 142, at 28.
169. *Id.* at 4.
170. *Id.*
171. *Id.* at 12.
172. Moran, *supra* note 56, at 48–57.

tially, contradictions to the very data used by Sander. An example, from "*'Truth' Number One: The Best Blacks Are Simply Not as Qualified as the Best Whites*,"[174] is Moran's critique of Sander's failure to consider economic status, educational preparation, age, or the potential of stereotype threat in LSAT scores, UGPA, subsequent law school grades, and bar passage rates. Moran framed her argument in a manner that forced supporters of Sander's hypothesis to be "boxed" into six beliefs and assumptions. Ultimately, she questioned why Sander's argument received so much attention from the media while another study received none. That study, by Lempert, "showed that black Michigan Law School Graduates earn as much as white graduates, are as satisfied with their careers, and do more public service than whites."[175]

Randall was much more direct.[176] She used the law school at which she is on the faculty as an example of how the LSAT has been and continues to be improperly considered. Specifically, she objected "to the use of [LSAT] cut-off scores, or any admission process that has a disparate impact on Blacks and other minorities."[177] Moreover, she found that instituting a cut-off for applicants based on their LSAT scores is not only "clear evidence of institutional racism, but it is also evidence of systemic racism since many institutions—including law schools, the American Bar Association ("ABA"), and *U.S. News & World Report*—could change their policies, practices, or procedures, to use the LSAT ethically and responsibly."[178] Her article discussed why the use of a cut-off score was not legally defensible and suggested many alternative approaches a law school could undertake to create a more diverse and successful law school class.[179] She argued that given the disproportionate importance law schools have historically placed on an applicant's LSAT score and the clear evidence that the result discriminates against African American and Latino applicants, this practice must stop immediately.[180]

Weeden adopted Roithmayr's argument, in part, when she directed that "admission standards should not systematically and disproportionately exclude . . . any . . . discrete group" on the basis of disadvantage

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173. 1. "The Best Blacks Are Simply Not as Qualified as the Best Whites"; 2. "The Black-White Performance Gap on What Are (for Professor Sander) the Two Most Significant Law School Admission Criteria Are Explained by Bad Black Parenting"; 3. "Affirmative Action Helps White Students"; 4. "Employers That Hire White Graduates Based on Their Grades Rather Than Their LSAT-UGPA Indexes Are Making a Bad Mistake"; 5. "When Hiring at Any Given Law School, Law Firms Should Pay Black Law Graduates With High Grades More Than White Graduates With High Grades"; 6. "Blacks as a Group Will Be Better Off When There Are Virtually No Blacks in Elite Legal Jobs." *Id.*

174. Moran, *supra* note 56, at 48.

175. *Id.* at 59.

176. *See* Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006).

177. *Id.* at 142.

178. *Id.* at 108.

179. *Id.* at 107, 136–38.

180. See *id.* at 142.

traceable "to historical anti-competitive conduct."[181] Weeden accepted most of Sander's argument as logical and true. Examples included: "I believe Sander is correct in concluding that, because of the larger boost given at top-tier schools to African Americans under affirmative action, law schools in the next tiers have no practical choice but to use segregated admissions tracks in the name of affirmative action" and "Professor Sander advances the common sense argument that students with substantial gaps in LSAT score, undergraduate GPA and racial experience will not perform similarly on the bar, no matter what law school they attend."[182] Weeden also argued for race-neutral admission standards, but unlike Sander, who asserted that the current system is corrupt, Weeden argued that the current system needs reform. Using Bell's theory of interest convergence, Weeden argued that "citizens must always engage in due diligence when considering whether policies allegedly designed to benefit minority groups actually benefit or harm those groups when the policies are implemented." [183]

cummings analogized Sander to a shark, "nip[ping] at the heels of affirmative action."[184] As an author often associated with the critical race theory and LatCrit movement, cummings is one of a few critics that brought that analysis to Sander's hypothesis. cummings did this by reviewing the host of earlier quantitative and theoretical critiques, then, suggested that he has a nuanced insight to offer. cummings's critique focused on the privilege Sander enjoyed, yet never acknowledged, in advancing his hypothesis. Referencing the experiences of indigenous peoples, cummings addressed the paternalistic nature of Sander's suggestion that he knew what was best for African American students. cummings located Sander within a historical context that has led white males to engage "in the worst kind of clandestine racism-that of deciding as a member of the majority race what is appropriate for a minority race."[185] cummings further historicized Sander's article by educating the reader about Sander's failures while acting as an architect of UCLA's post-Proposition 209 formula for admissions. Finally, cummings called Sander to task for using his biracial son "to authenticate and present himself as 'non racist' in divulging his data analysis,"[186] equating it to "it's o.k., my sister has a half black . . . child" and for failing to appropriately credit the value that diversity brings to the law schools' classrooms, a benefit that Sander should be well aware of given his position as a law school professor.[187]

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181. Weeden, *supra* note 56, at 225.
182. *Id.* at 197.
183. *Id.* at 198.
184. cummings, *supra* note 56, at 796–97.
185. *Id.* at 830.
186. *Id.* at 840.
187. *Id.* at 841.

Delgado used critical race theory, of which he is considered to be a founding member, to engage a counter-narrative to Sander's theory.[188] Using two fictional characters, Delgado argued that "[r]acism at the law schools and in the legal curriculum and sheer economic hardship are equally plausible hypotheses" to Sander's mismatch theory.[189] Delgado addressed issues of paternalism and Social Darwinism found within Sander's writings and suggested that a logical extension would lead to the elimination of social security, veteran's benefits, and national parks.[190] Delgado uses Dr. Martin Luther King, Jr. as an example because Dr. King scored so poorly on the GRE that he was unable to pursue a Ph.D. in sociology and instead enrolled in divinity school.[191] Though Dr. King's standardized scores would suggest that he was an inappropriate candidate for doctoral studies, he went on to lead an accomplished life and engaged in some significant intellectual analyses.[192] This example led Delgado to suggest that:

> [B]ecause [Sander] was predisposed to show that affirmative action was counterproductive, he didn't think to ask what the black dropouts were doing. With their knowledge of the legal system, they may well be going on to careers of great worth, even if they are not practicing law. Sander defines success too narrowly.[193]

C. Qualitative Analyses

It is noteworthy that although some authors call for additional qualitative analysis of the issues surrounding the mismatch theory, there is a dearth of research based on qualitative methods. Many of the articles assert what is best for African American law students. None asked those same students what they felt was best for themselves. My forthcoming work grapples with this issue. Instead of *telling* "them" what academics find best for them, I *ask* "them" and assess what they describe as the most relevant factors toward academic success in law school.

III. AFFIRMATIVE ACTION POLICY IN HIGHER EDUCATION ADMISSIONS

Previously, I identified some of the costs that Sander attached to African American affirmative action recipients. He also identified what he viewed as societal costs. These "obvious disadvantages" included "the sacrifice of the principle of colorblindness [and] the political costs."[194] Sander has appropriated one of the most prominent arguments against affirmative action—the desire for a colorblind society.[195] Under this the-

188. *See* Delgado, *supra* note 10.
189. *Id.* at 644.
190. *Id.* at 645–46.
191. *Id.* at 648.
192. *Id.*
193. *Id.* (internal quotation marks omitted).
194. Sander, *supra* note 2, at 371.
195. CONNERLY, *supra* note 41, at 15.

ory, no decision would involve any consideration of an individual's race or ethnicity. Race, ethnicity, and any similarly defining traits would be "unseen" and, therefore, irrelevant. This idea is in tune with an oft-cited quote from a United States Supreme Court decision stating that "[t]he [best] way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[196]

The opposing argument to this faction of the Supreme Court, as well as Ward Connerly, is that race is a bellwether for the health of our nation and that we ignore it at our peril.[197] In their book, Guinier and Torres argue for something called "political race."[198] They use the analogy of the miner's canary as a symbol for race. A canary was sent into the mines with the miners. Due to its delicate respiratory system, a canary would stop breathing at the first sign of toxins in the air of the mines—well before humans would be affected—giving the miners notice and time to flee.[199] In this manner, the authors argue that race and racial issues should be a sign to American society about issues that may already be significant, but on the cusp of becoming even larger. Just as the miners know that the problem is not with the canary, but with the air around it, Guinier and Torres suggest that the problem is not with race, but with the "air" or "social atmosphere" that surround it.[200] The miners could assume or believe that the bird is weak and not heed the warning. If so, they will die. In the same vein, the authors suggested that ignoring problems identified as racial will likely take a far greater toll on a wider band of America than anticipated.[201]

Another prominent argument against affirmative action is that it allows for the admission of less "meritorious" or deserving applicants. Sander's (2004) analysis relies, in large part, upon this premise. If non-European American students do not score the same or better on standardized testing and grading, they are considered less meritorious of admission.[202] However, as Professor Michele Moses and I showed, merit can have competing interpretations.[203] In their analysis of affirmative action as it was being debated over a proposed amendment to Colorado's constitution, Moses and I evaluated the way in which differing sides framed the concept of merit. One debater, Jessica Corry, represented the anti-affirmative action coalition while Melissa Hart represented the other.

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196. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
197. Guinier & Torres, *supra* note 37, at 11.
198. *Id.*
199. *Id.*
200. *Id.* at 11–12.
201. *Id.* at 11.
202. Sander, *supra* note 2, at 424–25.
203. Darrell D. Jackson & Michele S. Moses, *Understanding Public Perceptions of Affirmative Action* 18, Paper presented at the annual meeting of the Am. Educ. Research Assoc. (April 2009) (on file with author).

> According to Corry, affirmative action programs ignore merit, causing students admitted under such programs to feel, and others to see them as, inferior or second-class citizens. Hart discussed what students of color and women might bring to the classroom as evidence of their merit for higher education admissions. She [saw] merit as an expansive concept, one that not only include[d] traditional ideas of academic merit, but also goes beyond academic credentials as measured by GPAs and standardized test scores. Corry view[ed] the idea of "merit" in a restricted sense (i.e., academic qualifications only) whereas Hart [saw] it in an expanded sense (i.e., social-experiential as well as academic qualifications).[204]

Lastly, another prominent argument against affirmative action is that it "stigmatizes" the recipients and therefore reduces their own credibility.[205] This argument is premised on the idea that once people are labeled affirmative action recipients, they will never know whether their accomplishments are due to their own efforts or due to affirmative action. They will, therefore, forever live with an affirmative action label attached to everything that they do. This conceptual stigma harkens back to the days of *The Scarlet Letter*. However, research does not bear out such stigma. Most recently, researchers surveyed 610 students at seven public law schools and determined that "affirmative action policies do not in fact 'harm' students of color in the way that opponents of affirmative action have claimed . . . ."[206]

CONCLUSION

As previously discussed, the Sander controversy is indicative of the larger debate over affirmative action. While Sander contended that affirmative action has worked to the detriment of African Americans, Rothstein and Yoon and others concluded that without affirmative action, the population of African American lawyers would be significantly smaller. In a deliberative democracy, this suggests the need for continued civil discussion of these concepts and issues within a variety of forums.[207] The *Denver University Law Review* is providing just such a forum.

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204. *Id.*

205. Terry Eastland, *The Case Against Affirmative Action,* 34 WM. & MARY L. REV. 33, 41–43 (1992).

206. Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1346 (2008).

207. Amy Gutmann, Democratic Education 204–07 (1987); Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? 21 (2004).