

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*

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In *A Systemic Analysis of Affirmative Action in American Law Schools*,¹ Professor Richard Sander asserts that affirmative action hurts blacks both as a group and as individuals.² Professor Sander finds that qualified black students are adversely affected by affirmative action because they are admitted to schools above their capacity where they are matched against more qualified whites.³ According to Professor Sander, because these minimally qualified blacks are unable to compete with their more qualified peers, they fare poorly in the classroom and on the bar examination.⁴ Moreover, unqualified black students are hurt because they are admitted to law schools where they waste valuable time and money discovering that they are unable to graduate or pass the bar.⁵ In turn, black

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

² *Id.* at 371 (“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.”).

³ *Id.* at 370 (“The principal ‘cost’ I focus on is the lower actual performance that usually results from preferential admissions. A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a ‘legacy’ admit. If the struggling leads to lower grades and less learning, then a variety of bad outcomes may result: higher attrition rates, lower pass rates on the bar, problems in the job market.”); *see also id.* at 371 (“The admission preferences extended to blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences.”); *id.* at 426 (“The data shows [sic] that blacks are heavily concentrated at the bottom of the grade distribution: 52% of all blacks, compared to 6% of all whites, are in the bottom decile. Put somewhat differently, this means that the median black student got the same first-year grades as the fifth- or sixth-percentile white students. Only 8% of the black students placed in the top half of their classes.”).

⁴ *Id.* at 371–72 (“The net trade-off of higher prestige but weaker academic performance substantially harms black performance on bar exams and harms most new black lawyers on the job market.”).

⁵ *Id.* at 441–42 (“[A]ffirmative action has two separate negative effects on black graduation rates. The first result . . . is the boosting of blacks from schools where they would have had average grades (and graduated) to schools where they often have very poor grades. . . . The second result follows from the cascade effect. Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences. These are the students with very low index scores . . . who have very high attrition rates. . . . These attrition effects are disturbing [But] [i]t turns out . . . that these

people as a whole are harmed by affirmative action because the admission of unqualified blacks and the competition faced by minimally qualified blacks result in black law students suffering from higher dropout and bar failure rates than their white peers. According to Professor Sander, under a race-neutral system, unqualified blacks would never enter law school and qualified blacks would matriculate at the lower tier schools where they belong.⁶ The result would be more black law school graduates and higher black bar passage rates, leading to more black lawyers.⁷ In other words, affirmative action is responsible for creating fewer black lawyers than a race-neutral system would produce.⁸

Professor Sander is not without critics.⁹ Part I of this article introduces

mechanisms merely foreshadow a much larger effect: the consequences of racial preferences for black performance on bar exams.”).

⁶ *See id.* at 371. Professor Sander asserts that, in a race blind admission system, the percentage of black students in any law school class would begin to come close to the percentage of black applicants as one reached the thirtieth school down in the law school hierarchy. In the thirty schools above this point, however, the number of black law students would not approach the percentage of black applicants in the pool or the percentage of black college graduates.

⁷ *Id.* at 374 (“[Blacks] admitted to a race blind system would graduate at significantly higher rates, and pass the bar at substantially higher rates than they do now. Under a range of plausible assumptions, race-blind admissions would produce an increase in the annual number of new black lawyers. It is clear beyond any doubt that a race blind system would not have severe effects on the production of black lawyers, and that the black lawyers emerging from such a system would be stronger attorneys as measured by bar performance.”).

One irony in Professor Sander’s statement concerning no significant drop in the number of black lawyers resulting from a national race blind admission system is that, on the very next page following this assertion, Professor Sander describes the period of 1964 to 1967 as one in which there was no race discrimination against blacks in admissions to law school *and* no raced based affirmative action. During this golden age, Professor Sander tells us that there was a “miserable” fifty percent dropout rate for black law students. This observation of a large drop-out rate among students in an era of race neutral admissions seems to cut against the view that affirmative action is what causes blacks to leave law school or that race neutral admissions will increase the number of black lawyers. *See id.* at 376 (footnotes omitted) (“As early as 1962, the American Association of Law Schools (AALS) Committee on Racial Discrimination in Law Schools was unable to identify any clear practices of admission discrimination outside of the South; by 1964, this group had concluded that there was ‘no longer any discrimination problem of sufficiently serious proportion to deserve the maintenance of a large committee.’ Yet, at the mid-decade, black enrollment was still miserably low and black attrition rates were miserably high (about fifty percent). . . . During the 1964–1967 period . . . affirmative action programs were still largely unknown”); *see also id.* at 378 (footnote omitted) (“[T]here is not much evidence that many law schools actually engaged in preferential admissions until 1968 and 1969.”).

⁸ *Id.* at 372 (footnote omitted) (“Perhaps most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race blind system.”).

⁹ *See, e.g.,* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Michele L. Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander’s Affirmative Action Study*, 46 J. BLACKS IN HIGHER EDUC., 102, 102–03 (2004); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE. L.J. 1997 (2005); David Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

some of the more significant critiques of Professor Sander's work, including a summary of the claims Professor Sander makes and the data Professor Sander used to support his claims, ending with a summary of the primary critiques of Professor Sander's findings. Part II demonstrates that the methodological flaws in Professor Sander's work suggest even more significant problems with the logic Professor Sander harnesses to build his arguments.¹⁰ In Part II, these logical weaknesses are used to point out the six "truths" that must follow from adopting *A Systemic Analysis*. Each of these truths requires a leap of faith into Professor Sander's logic that most readers should be unwilling to take. Part III concludes with a summary of the failings of Professor Sander's *A Systemic Analysis*.

I. IN A NUTSHELL: THE BASIS OF PROFESSOR SANDER'S ARGUMENT AND ITS CHALLENGES

Professor Sander's position is that affirmative action in law school admissions hurts black law students. Specifically, Professor Sander says that affirmative action places black law students in schools where they compete against white students who have higher LSAT-undergraduate grade point average (UGPA) indexes. According to Professor Sander, when students with relatively low LSAT-UGPA indexes compete against students with significantly higher indexes, the low-index students are more likely to get poor grades that, in turn, will increase their chances of dropping out. Or if the students with low LSAT-UGPA indexes actually graduate, they are more likely to fail the bar exam and, should they pass the bar and become lawyers, they are more likely to get poorly paying jobs.

Professor Sander uses several different sets of data and data analyses in order to weave together a seemingly empirical story that supports his claims.¹¹

¹⁰ In fact, there are times when Professor Sander's methodology has problems. In keeping with the spirit of this piece, however, all comments on flawed methodology are based solely on assertions made within the four corners of Professor Sander's article and are contained primarily in footnotes. For a discussion of the problems with Professor Sander's view of who is black, see *infra* note 22 (failure to distinguish between blacks and whites in Sander's database) and note 49 (failure to distinguish between mixed race peoples). For a discussion of flaws in Professors Sander's claim that a race-neutral law school admissions system would increase the number of black lawyers and his claim that there is no historical period that one can look to for an answer to that question, see *infra* notes 28–29. For a discussion of problems with Professor Sander's use of predictors as qualifications, see *infra* note 34. For a discussion of Professor Sander's claim that law school grade are more important than school rank in hiring, see *infra* notes 51–55.

¹¹ Professor Sander uses the Law School Admissions Council Bar Passage Study, his own study of twenty law schools in which he surveyed students, the "After the JD Study," and results from the California bar examination results. He also uses data contained in the briefs before the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The LSAC/BPS followed over 26,000 law students from their entry into law school in the fall of 1991 until 1997. Sander, *supra* note 1, at 415. Professor Sander's own database, which he names the 1995 National Survey of Law Student Performance, was compiled from twenty law schools and over 4,000 students. *Id.* at 421 n.152. Professor Sander's

The story starts with the premise that no (or virtually no) blacks earn LSAT-UGPA indexes as high as those of white students admitted to high tier law schools.¹² This gap between black and white LSAT-UGPA indexes continues down to the very lowest-ranked law schools, all of which seek to admit black students, and none of which can find black students with scores to match the schools' white applicants.¹³

Professor Sander tells us that LSAT-UGPA indexes predict law school grades and that law school grades, particularly low law school grades, are linked to higher law school dropout rates.¹⁴

Putting these four thoughts together, Professor Sander determines that affirmative action is responsible for black students receiving lower law school grades and experiencing higher attrition rates.¹⁵

With regards to the bar examination, Professor Sander tells us that grades are more important than law school tier in determining who passes the bar examination.¹⁶ Professor Sander also tells us that “[a]t a given index level, blacks have a much higher chance of failing the bar than do whites—apparently, entirely as a result of attending higher-ranked schools and performing poorly at those schools.”¹⁷

Weaving his five points together, Professor Sander concludes that the way for black law students to get higher grades, which would lead to fewer black law school graduates dropping out of school, higher bar passage rates for black law students, and better-paying jobs for those graduates, is for top tier law schools to stop admitting black applicants on any other criterion than the one Professor Sander believes is applied to white applicants, that is, the LSAT-UGPA index. According to Professor Sander, if the most elite law schools followed his suggestion, they would reduce the number of

information about the California bar comes from a report to the California committee of bar examiners in 2003 by Stephen Klein and Roger Bolus. *Id.* at 421 n.149.

¹² Sander, *supra* note 1, at 416 (“[O]nly about three percent of the whites at these schools have academic indices as low as the median black matriculant.”).

¹³ *Id.* at 416–17 (“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 admission tracks to the same degree as the top-tier schools. The same pattern continues all the way down the hierarchy.”). Professor Sander names this the “cascade effect” because he asserts that black students receive boosts to their scores that cascade them into higher tier law schools thereby forcing lower tier law schools to admit blacks with ever lower credentials.

¹⁴ *Id.* at 428 n.172.

¹⁵ *Id.* at 441 (“To be more specific, affirmative action has two separate negative effects on black graduation rates. The first result . . . is the boosting of blacks from schools where they would have average grades (and graduated) to schools where they often have very poor grades. For blacks as a whole, this phenomenon adds four to five points to the black attrition rate. The second result follows from the cascade effect. Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences. These are the students with very low index scores . . . who have very high attrition rates This second phenomenon adds another six or seven points to the overall black attrition rate.”).

¹⁶ *Id.* at 445.

¹⁷ *Id.* at 446.

their black students from eight percent of their student bodies down to one percent.

Professor Sander urges top tier law schools to substantially reduce their black student population because black applicants have lower LSAT-UGPA indexes than those of the white students attending high-tier law schools. Because Professor Sander's studies convince him that LSAT-UGPA indexes predict grades and that low grades are responsible for poor bar passage and poor job prospects, he also believes that taking black students out of high-tier schools will solve the problems that black students face in terms of class rank and bar passage. Finally, as blacks are forced down to the level of school they "deserve" based on their LSAT-UGPA indexes, Professor Sander asserts that black law students will receive average grades, average bar passage rates, and above average job prospects.¹⁸ In fact, according to Professor Sander, without affirmative action forcing black students into high tier schools where they receive poor grades, there would be more black lawyers than there are now.¹⁹

Thus, for Professor Sander's argument to sustain itself, the LSAT-UGPA index he constructs must reliably predict law school grades, and law school grades must reliably predict bar passage. Yet despite Professor Sander's assertions, other scholars dispute precisely these points.

For example, first, Professor Sander's argument requires the belief that the LSAT-UGPA index predicts law school grades without regard to race.²⁰ This is because Professor Sander's entire approach is to claim that whatever is happening to black students is due to the cascade effect of affirmative action—a result of a mismatch between black law students' LSAT-UGPA indexes and the higher indexes held by their white cohorts. However, Timothy Clydesdale's study, which used the more comprehensive LSAC/BPS database rather than Professor Sander's more limited and personally created database, found that blacks, Latinos, Asian Americans, and older law students all get grades below expectations based on their LSAT-UGPA indexes alone.²¹

¹⁸ The above average job prospects come from Professor Sander's finding that blacks receive race preferences in hiring. For a discussion of the fallacy of his position, see *infra* Part I.E.

¹⁹ Sander, *supra* note 1, at 474–75 (“In the law school system as a whole, racial preferences no longer operate as a lifeline vital to preserve the tenuous foothold of blacks in the legal profession. Quite the contrary: racial preferences have the systematic effect of corroding black achievement and reducing the number of black lawyers.”).

²⁰ *Id.* at 427–28.

²¹ Timothy T. Clydesdale, *A Forked River Runs Through the Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711 (2004). Professor Sander criticizes Professor Clydesdale's work for using the bar passage study database instead of a database that standardized the LSAT and UGPA for each student. Sander, *supra* note 1, at 428 n.172. However, in their report, Lisa C. Anthony & Mei Liu, *ANALYSIS OF DIFFERENTIAL PREDICTION OF LAW SCHOOL PERFORMANCE BY RACIAL/ETHNIC SUBGROUPS BASED ON THE 1996–1998 ENTERING LAW SCHOOL CLASSES*, LAW SCHOOL ADMISSIONS COUNCIL LSAT TECHNICAL REPORT 00-02 10 fig. 4c (2003), they do use the standardized data that Professor Sander

Second, Professor Sander's argument requires the belief that the LSAT-UGPA index predicts law school grades without regard to race. In other words, black law students suffer from lower grades than their white counterparts because black law students have lower LSAT-UGPA indexes than their white counterparts. Yet, Professors Chambers, Clydesdale, Lempert, and William Kidder point out that the personal database that Professor Sander uses to support his assertion has problems distinguishing between black and white students because of the large number of respondents that did not identify race.²² Thus, it is impossible to use this database in order to support Professor Sander's position that the only grade gap that blacks suffer with whites comes from a mismatch of their respective LSAT-UGPA indexes. In fact, as noted above, Professor Clydesdale's study shows any number of "outsider" students getting lower grades than their indexes predict.

Third, Professor Sander's argument requires the belief that law school grades predict bar passage.²³ But Professors Chambers, Clydesdale, Lempert, and William Kidder point out that Professor Sander is unable to demonstrate this relationship from the model he creates and applies to the LSAC/BPS. The problem is that, while Professor Sander's model accurately identifies those who passed the bar, it does far worse in predicting who did not pass the bar. The reason for Professor Sander's model's ability to predict who passed the bar and its inability to predict who did not pass the bar is fairly simple: almost ninety-five percent of the people who took the bar exam in the database passed the examination. Thus, it is an easy matter to create a model that will accurately predict who in the database passed the bar; any model need only predict that everyone passed the bar examination and that model would be right ninety-five percent of the time. On the other hand, Professor Sander's use of law school grades to predict failure on the bar examination was accurate only twelve percent of the time.²⁴

Fourth, Professor Sander's argument is premised on the belief that students with the same LSAT-UGPA indexes who attend the same tier law schools will have the same graduation rates.²⁵ However, Professors Ayers

desires, and their findings are closer to Professor Clydesdale's than to Professor Sander's findings. For a longer discussion of this point, see Chambers et al., *supra* note 9, at 18 n.87.

²² Chambers et al., *supra* note 9, at 17–19 nn.84–93.

²³ Sander, *supra* note 1, at 444 ("If we know someone's law school grades, we can make a very good guess about how easily she will pass the bar. If we also know her LSAT score, her undergraduate GPA, and the eliteness of her law school, we can do even better.")

²⁴ Chambers et al., *supra* note 9, at 13 nn.55–63 ("Our replication of Sander's analysis indicates that his model . . . is highly accurate in predicting who passed the bar since it incorrectly labels as 'fails' only 91 of the 20,399 graduates who passed. It does a dismal job, however, in predicting who will fail, as it correctly labels as fails only 129 of the 1074 sample, students who actually did fail for a success rate of only 12%.")

²⁵ Professor Sander uses a model rather than actual law students and law graduates to support his

and Brooks have found that blacks and whites with the same LSAT-UGPA indexes who attend the same tier law schools, contrary to what Professor Sander's model predicts, do not have the same graduation rates. Instead, black students end up with lower graduation rates than their white peers.²⁶

Fifth, Professor Sander's argument is founded on the belief that if one group of students were placed in a high-tier school, and another group with identical LSAT-UGPA indexes were placed in a low-tier school, the group in the low-tier school would have higher grades. However, in a direct contradiction to Professor Sander's model, Professors Ayers and Brooks find that, although the white student at the higher-tier law school is more likely to have low grades when compared to a white student with the same LSAT-UGPA index who attends a lower-tier law school, black students' grades are not dependent on law school tier.²⁷

Last, Professor Sander's argument is based on the belief that there will be more black lawyers and fewer black dropouts in a world with no affirmative action in law school admissions. Professor Sander says that he must use a model to make this prediction because there is no historical moment in the United States when there was both no racial discrimination against black applicants in law school admissions and no affirmative action in their favor. Yet in Professor Sander's own article, he identifies the years 1964 to 1967 as a time when there was no race discrimination in law school admissions and no affirmative action.²⁸ During that time, Professor Sander tells us that there was a fifty percent dropout rate among black law students.²⁹ This observation contradicts the claim that affirmative action is the cause of high black attrition rates and that the end of affirmative action would increase the number of black lawyers.

Further, Professors Chambers, Clydesdale, Lempert, and William Kidder point out that Professor Sander uses an unrepresentative database to predict an increase in black lawyers after affirmative action. The database Professor Sander uses is inappropriate because it contains an unusually small number of white applicants, particularly, white applicants with high

point because he claims that there are no blacks and whites with the same LSAT-UGPA index in the same tier law schools to compare given that affirmative action cascades black students up to higher tier law schools than their white peers can attend. Sander, *supra* note 1.

²⁶ Ayres & Brooks, *supra* note 9, at 7–9 nn.19–21.

²⁷ *Id.* at 13 n.55.

²⁸ Sander, *supra* note 1, at 376 (footnotes omitted) (“As early as 1962, the American Association of Law Schools (AALS) Committee on Racial Discrimination in Law Schools was unable to identify any clear practices of admissions discrimination outside the South; by 1964, this group had concluded that there was ‘no longer any discrimination problem of sufficiently serious proportion to deserve the maintenance of a large committee.’ Yet at mid-decade, black enrollment was still miserably low and black attrition rates were miserably high (about fifty percent). During the 1964–1967 period . . . affirmative action programs were still largely unknown . . .”); see also *id.* at 378 (footnote omitted) (“[T]here is not much evidence that many law schools actually engaged in preferential admissions until 1968 and 1969.”).

²⁹ *Id.* at 376.

LSAT-UGPA indexes. This lack of white applicants with high LSAT-UGPA indexes was a result of the dot-com craze which attracted high-performing, white college graduates away from law school and toward the business world. Using a more appropriate database, these scholars predict a significant decline in the number of black law students if affirmative action were to end.³⁰

II: THE CASE FOR BLACK INFERIORITY: WHAT YOU MUST BELIEVE IF YOU BELIEVE PROFESSOR SANDER

In Part I, this article examined the basic methods that Professor Sander employed and the conclusions he drew from their application. This article also showed that Professor Sander's critics, using the same data, arrive at disparate conclusions. Based on the critics' findings, it is not clear that black students will receive higher grades if they matriculate into lower-tier law schools, nor it is clear that fewer black law students will drop out of law school or that more black law graduates will pass the bar examination if affirmative action were to cease. The only conclusion that can be drawn from the data is that there will be fewer black law students and fewer black lawyers if black law applicants were to be kept out of high-tier schools either because they are simply not admitted to those schools or because they are admitted but are frightened away by being told that their prospects for success are poor.

Part II, then, will examine the logical flaws that flow from the methodological problems revealed in Part I. The following six "truths" must be accepted when Professor Sander's conclusions are adopted.

A. "Truth" Number One: *The Best Blacks Are Simply Not as Qualified as the Best Whites*

Professor Sander's article is based entirely on combining three ideas. First, that all law schools give great weight to undergraduate grade point average and LSAT score in selecting their entering class and that the great majority of law schools combine LSAT and UGPA into a single index that provides for easy comparison of candidates.³¹ Second, that the index created by combining undergraduate grade point average and LSAT score is not culturally biased and is a remarkably powerful predictor of both law school grades and bar performance. Indeed, Sander believes that it is appropriate to regard this index, without more, as a valid and neutral mechanism for determining who should attend law school and which law school they should attend. Further, although it might be appropriate to

³⁰ Chambers et al., *supra* note 9, at 16–41.

³¹ Sander, *supra* note 1, at 393. There is no evidence that law schools consider anything other than this index score and the applicant's race in deciding whom to admit.

consider other factors (for example, economic class), these other factors should not be given so much weight that they allow for the admission of students who do not have the requisite LSAT-UGPA index for that particular school.³² Finally, Professor Sander's article asserts that, even at the most demanding law schools, the average black student has a much lower index than the average white student.³³

These three points taken together mean that schools can use index scores in order to identify those black students with the best chance of graduating and passing the bar, and that within any given school, the best black students have, almost without exception, less ability than both the best white students and the very good white students.³⁴

If Professor Sander is correct, why does this disparity exist? Are

³² *Id.* at 372 ("I find . . . compelling evidence that the numerical predictors are both strong and unbiased."); *see, e.g., id.* at 425 ("The point I suggest here is that. . . admitting law students whose academic credentials vary dramatically by race is likely to have dramatic effects in law school."); *see also id.* at 420–21 (footnotes omitted) ("Another way to avoid the weaknesses of conventional validation studies [of the LSAT] is to use academic indices to predict performance on bar exams. Bar exams are taken by a broad cross-section of law graduates of many different schools, which greatly reduces the restriction-of-range and biased-selection problems. . . . [S]ome recent validation studies have succeeded in matching undergraduate grades and LSAT scores with raw scores on the California bar exam. The studies find the predictive power of the LSAT is quite good. LSAT scores have a .61 correlation with multistate exam scores . . . and a correlation of .59 with overall exam results. . . . Adding undergraduate grades to the predictor produces a further, modest increase in correlations. The R² of these academic indices with bar results is, therefore, well over 35%. . . . No other predictor tested for admissions purposes . . . has been able to explain more than 5% of individual variance in school performance.").

As pointed out by Cheryl Harris & William Kidder, *supra* note 9, at 104, when the Law School Admission Council does the same study on much more reliable data, the result is that the LSAT-UGPA index explains less than ten percent of variation in bar pass-fail status; *see also* Linda F. Wightmann, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997); Daria Roithmayr, *Policy, Politics & Praxes: Deconstructing the Destruction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997).

³³ Sander, *supra* note 1, at 413–14 ("Even at the top of the distribution of undergraduate performance and LSAT scores, there is a significant black-white gap. The blacks that Yale admits, on our 1000-point index scale, will tend to have indices of perhaps about 750, while the white admits will tend to have indices of perhaps about 875."); *see also id.* at 416 (offering a chart, based on his modeling using the Law School Admissions Council's Bar Passage Study data, which finds that there is a significant LSAT-UGPA gap between whites and blacks in all law schools ranging from 125 on a 1000 point scale in the historically black law schools to 202 on a 1000 point scale in the midrange public schools).

³⁴ *Id.* at 417 (footnote omitted) ("In a race-blind system, the numbers of blacks enrolling in the top twenty schools would be quite small, but the numbers would be appreciable once one reached schools ranked twentieth to thirtieth, and blacks would steadily converge toward a proportional presence as one moved down the hierarchy of schools."). A problem with Professor Sander's views in this matter is that the LSAT-UGPA indices are, at best, predictors. As predictors, these indices are not qualifications in the sense that the word "qualification" is normally used. Even in Professor Sander's study, the best that these indices can do is predict the grades a person will receive in law school when that person is matched against people with either higher, lower or equal predictors. Yet, as pointed out in the critique of Professor Sander by Ayres & Brooks, *supra* note 9, at 20–28 (confirming the LSAT-UGPA index does not accurately predict how people with equal indices will do when they compete against one another if one person is black and the other is white), even as predictors, these tests are not performing as Professor Sander claims and as credentials or qualifications. They are inappropriate at best.

differences in preparation, economic status, or age when attending law school responsible? Are the LSAT-UGPA indexes, subsequent law school grades, and bar passage rates the result of stereotype threat or racial harassment? Would changing the way we teach help?

Professor Sander is not interested in any of these issues even though, if any of these explanations applied, the country's educational system could change so that black students might receive the education and resources they need in order to successfully compete with others who already have access to those resources.

B. "Truth" Number Two: 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

Throughout his article, Professor Sander is careful to state that the differences in law school grades and bar passage rates for blacks and whites are not explained by race.³⁵ Rather, Professor Sander makes it clear that his findings explain all the differences in performance by blacks and whites by what he calls a "mismatch" between the LSAT-UGPA index of blacks and whites who compete directly against one another in law school. According to Professor Sander, this mismatch is the result of affirmative action which tempts blacks into attending schools above their capacity.³⁶ Forced to compete with more-qualified whites, black students learn less, get lower grades, and are more likely to drop out of law school or fail the bar. Race means nothing in this scenario while UGPA and LSAT are everything.

While it appears race-neutral to place the entire explanation for law school performance and bar passage on the LSAT-UGPA index, the claim is not race-blind without an explanation for the gap itself. Why are the best blacks so far below the best whites on the LSAT-UGPA index that the top-tier schools would be virtually white in a race-neutral regime?

Professor Sander explains the grade gap and the bar-passage gap by

³⁵ Sander, *supra* note 1, at 429 (footnote omitted) ("In other words, the collectively poor performance of black students at elite schools does not seem to be due to their being 'black' (or any other individual characteristic, like weaker educational background, that might be correlated with race). The poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools' use of heavy racial preferences. It is only a slight oversimplification to say that the performance gap . . . is a by-product of affirmative action.").

³⁶ *Id.* at 453 (footnote omitted) ("Research on the 'academic mismatch' phenomenon has not settled on an exact causal mechanism, but there is a growing consensus that the mismatch problem is real and that it is exacerbated by large racial preferences in admissions. The most conclusive way to demonstrate that law school racial preferences cause blacks to learn less and to perform worse would be an experiment comparing matched pairs of blacks admitted to multiple schools, with the 'experimental' black student attending the most elite school admitting them and the 'control' black student attending a significantly less elite school. The problem with conducting such research is that just like students of other races, few blacks pass up the opportunity to go to more elite schools.").

resorting back to the LSAT-UGPA index gap between black and white students. For example, Professor Sander often makes it clear in his discussion of the grade gap and the bar-passage gap that his databases, regression analysis, and experiences do not explain the difference for blacks and whites through social class,³⁷ failure to take review courses,³⁸ weaker educational preparation,³⁹ stigma or stereotype threat,⁴⁰ race discrimination,⁴¹ the pressure of timed examinations,⁴² course selection,⁴³

³⁷ *Id.* at 371 (stating that affirmative action has not lead to class diversity).

³⁸ *Id.* at 423 (footnotes omitted) (reporting that blacks are more likely, not less likely, to take test preparation courses and that these courses “have very modest effects on performance. Under the most generous assumptions, test cramming could not explain more than one or two percent of the black-white credentials gap”).

³⁹ *Id.* at 429 (“In other words, the collectively poor performance of black students at elite schools does not seem to be due to their being ‘black’ (or any other individual characteristic, like weaker educational background, that might be correlated with race). The poor performance seems to be simply a function of disparate entering credentials.”).

⁴⁰ *Id.* at 369 (“The ‘costs’ to blacks that flow from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters, such as the stigma and stereotypes that might result from differential admissions standards. These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough or objective enough for my purposes.”).

In fact, there is a fair amount of significant information on the cost of stereotype threat to both blacks and white women. See e.g., Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, J. PERSONALITY AND SOC. PSYCHOL. 797–811 (1995); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997); Claude M. Steele, *Stereotyping and its Threats are Real*, 53 AM. PSYCHOLOGIST 680 (1998); Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 456 (2003); Ayres & Brooks, *supra* note 9, nn.56–66 (suggesting that the entire gap in the LSAT-GPA index might be the combination of stereotype threat for blacks combined with stereotype lift for whites).

⁴¹ Sander, *supra* note 1, at 440 (footnote omitted) (stating that grades, rather than race, explain who will or will not drop out of law school: “And if race is not a significant predictor of attrition, this implies that there is no correlate of race (e.g., discrimination) that causes blacks to drop out at disproportionate rates”).

⁴² *Id.* at 424 (footnote omitted) (“One might respond that law school exams and bar exams simply perpetuate the unfairness of tests like the LSAT—they are all timed and undoubtedly generate acute performance anxiety. But almost all first-year students take legal writing classes, which are graded on the basis of lengthy memos prepared over many weeks, and which give students an opportunity to demonstrate skills entirely outside the range of typical law school exams. My analyses of first-semester grade data from several law schools shows [sic] a slightly larger black-white gap in legal writing classes than in overall first-semester grade averages.” (emphasis added)).

⁴³ *Id.* at 434–36 (footnote omitted) (“During the second and third years of law school, we might well expect the grade gap between blacks and whites to narrow significantly, for a variety of reasons. As we have noted, a common premise of affirmative action programs is that the more time disadvantaged students have to ‘catch up’ with more advantaged peers, the better they will do. And in law school, changes in the environment in the second and third years provide particularly good opportunities for students in academic difficulty to catch up: competition is less intense; fewer courses are curved (which generally means fewer low grades); and students have far more discretion in choosing subjects. Not least, professors’ methods of grading students are probably more heterogeneous in the second and third years of law school than in the first, so timed exams probably play a less critical role.”).

Nevertheless, Professor Sander finds that black students’ grades actually go down in the second and third year rather than up.

or economic hardship.⁴⁴

For Professor Sander, a focus on the LSAT-UGPA index need not be restricted by concerns that standardized tests present any fairness issues or questions of cultural bias.⁴⁵ In fact, the LSAT-UGPA index is, according to Professor Sander, a better predictor of law school grades than the number of hours each student studies, the quantity or quality of the student's class participation, whether the student has read his or her class assignments, or whether the student participates in a study group.⁴⁶

So when faced with the important question of where the LSAT-UGPA gap comes from, one might suppose that, like the mark of Ham,⁴⁷ the LSAT-UGPA gap simply follows black students.⁴⁸ In fact, according to Professor Sander, the only factor that seems to help black students rise above the credentials gap between blacks and whites is removal from black parents and placement in a white household.⁴⁹

⁴⁴ *Id.* at 371 (footnote omitted) (“The first student survey I conducted suggested that UCLA’s diversity programs had produced little socioeconomic variety: students of all races were predominantly upper crust.”); *see also* Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997).

⁴⁵ Sander, *supra* note 1, at 424 (footnotes omitted) (“There is a more fundamental problem with the fairness critique. If it were true that academic indices generally understated the potential of black applicants, then admitted black students would tend to outperform their academic numbers. But this is not the case. A number of careful studies, stretching back into the 1970s, have demonstrated that average black performance in the first year of law school does not exceed levels predicted by academic indicators. If anything, blacks tend to under perform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges.”).

⁴⁶ *Id.* at 421–22 (footnote omitted) (“In research I conducted in 1995 . . . thousands of first-year law students completed questionnaires on their school experiences and their schools provided data on their first-semester grades and predictive indices. Although we did not set out to study predictors of academic performance, I was nonetheless struck that the simple LSAT-UGPA index was several times stronger at predicting first-semester grades than direct information on how much students said that they were studying, participating in class, completing the reading, or attending study groups.”).

⁴⁷ The “curse of Ham” refers to the biblical story in which Ham, seeing his father drunk and naked, refused to turn away as his two brothers did. When Noah awoke, he cursed Ham and his son Canaan, supposedly causing a darker pigmentation in their descendants. This so-called curse has often been wrongly used to justify racism. THE NEW DICTIONARY OF CULTURAL LITERACY 10 (3d ed. 2002).

⁴⁸ Sander, *supra* note 1, at 371. For a discussion of the role of socio economic status in elementary and secondary education, see generally RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004).

⁴⁹ Sander, *supra* note 1, at 429 n.175 (“[T]here is nonetheless a very large black-white credentials gap among those applying to law school, and this gap does not disappear when one uses simple controls for such glib explanations as family income or primary-school funding. Researchers have made great strides over the past generation in accounting for the black-white gap in measured cognitive skills. The dominant consensus is that: (a) the gap is real, and shows up under many types of measurement; (b) the gap is not genetic, i.e., black infants raised in white households tend to have the same or higher cognitive skills as whites raised in the same conditions; and (c) there are a variety of cultural and parenting differences between American blacks and whites (e.g., time children spend reading with parents or watching television) that substantially contribute to measured skill gaps.”). This blaming of black parents is particularly interesting given that Professor Sander is himself a white parent of a black child. *Id.* at 370 (“My son is biracial, part black and part white, and so the question of how nonwhites are treated and how they fare in higher education gives rise in me to all the doubts and worries of a parent.”). The reference to “biracial” and “nonwhites” might suggest that the rest of

C. “Truth” Number Three: Affirmative Action Helps White Students

Professor Sander is explicit on one point: affirmative action helps white students by providing them with less competition. By forcing blacks to fill the bottom of each law school class, affirmative action allows every white student to think that he or she is above average. According to Professor Sander, white students could not maintain this superior self-perception if they were actually forced to compete against their true peers.⁵⁰

D. “Truth” Number Four: Employers That Hire White Graduates Based on Their Grades Rather Than Their LSAT-UGPA Indexes Are Making a Bad Mistake

Professor Sander writes that law school grades are a more important factor in obtaining a high-paying law firm job than the tier in which the graduate’s law school resides. If it is true that employers care more about grades than law school rank, then based on Professor Sander’s findings, employers are making a grave mistake.

Based on Professor Sander’s three insights,⁵¹ it is clear that simply

Professor Sander’s analysis would distinguish between students with eight black great-grandparents and those with some other mix. This is not what happens as his arguments develop. Instead, Professor Sander makes no distinction between the number of black forbearers among the students in his study. The only category we encounter is black. Professor Sander never explicitly addresses the question of who is black in his article (other than to imply that biracial people are black). *Id.* at 370 (“[T]he data on blacks is the most extensive [of the ethnic groups]; and the law school admissions offices treat ‘blacks’ as a group quite uniformly—something not true for Hispanics or Asians.”). Professor Sander provides no reference in support of this point that law schools do not differentiate among people with sub-Saharan African heritage in the same way that he fails to differentiate between these people in his study. Further, Professor Sander does not deal with the question of those who do not identify race in his databases. Where race is not identified, Professor Sander assumes that the respondent is white. For an interesting treatment of this issue, see generally Chambers et al, *supra* note 9.

⁵⁰ Sander, *supra* note 1, at n.6 (“Careful readers will realize that the evidence in this Article suggests that the material harms to whites from affirmative action in law schools are comparatively slight. Indeed, the effects on whites are in many ways a mirror image of the effects on blacks (though more muted by relative numbers), and thus whites probably have higher grades, graduation rates and bar passage rates than they would in a system totally lacking racial preferences.”); *but see* Ho, *supra* note 9, whose work shows that whites with the same LSAT-UGPA index perform equally on the bar examination without regard to law school tier. This should not happen in Professor Sander’s world where students with the same indexes do better on the bar as their law school tier drops.

⁵¹ Professor Sander’s three foundational points are that, first, an applicant’s undergraduate grade point average combined with his or her LSAT score are powerful markers of qualification. Students with higher indexes simply are stronger than students with lower indexes. Sander, *supra* note 1, at n.159 (claiming that a difference of one point on the LSAT (from 160 to 161) has significant effects on law school grades and bar passage).

Second, because LSAT-UGPA indexes are so powerful in predicting law school performance, a student will do poorly if he or she is forced to compete against a student with higher credentials although that same student might perform very well if surrounded by people with his same (lower) qualifications. *Id.* at 445 (“Going to a better school . . . carries with it a higher risk of getting poor grades; going to a much better school creates a very high risk of ending up close to the bottom of the class. Prospective law students tend to assume automatically that going to the most prestigious school

because a white student from a second-tier law school performs well when competing against people of similarly low credentials, it does not follow that this same person will do well when competing against those with higher indexes. In fact, Professor Sander expects the opposite: a high-ranking student at a second-tier law school will not perform well if matched against a more qualified peer from a higher-tier law school. This is the foundation of Professor Sander's argument as it relates to blacks. Given Professor Sander's claim of race neutrality, the argument should apply equally to whites.

Recall that Professor Sander assures us that all white law students are placed in the law school they deserve based on their credentials and that these credentials are so powerful that they can predict law school and bar performance like no others.⁵² From the race-neutral placement of a white student in a low-tier school, one can predict that the high-grade graduate from the low-tier law school is no match for students, even low grade students, from a higher-tier school. This is exactly the point that Professor Sander makes about black law students, who would thrive in a lower-ranked school, but who fall into the bottom six percent when they are mismatched into higher-ranked schools. This failure to thrive, both in law school and on the bar, is not a result of race, but rather, of relatively lower LSAT-UGPA indexes.

Whites in lower-tier schools have relatively lower LSAT-UGPA indexes than whites in upper-tier schools. Thus, just like their black counterparts, whites in lower-tier schools should fail to thrive if placed in direct competition with their more qualified white peers.⁵³

Knowing that low-tier law graduates cannot compete against their high-tier peers, why would any employer want to risk hiring the high-grade student from the low-tier school when that student will have to compete against his or her more qualified white peers in practice?

possible is always the smart thing to do, but we can now see that there is, in fact, a trade-off between 'more eliteness' and 'higher performance.' And . . . if one's primary goal is to pass the bar, higher performance is more important. If one is at risk of not doing well academically at a particular school, one is better off attending a less elite school and getting decent grades.").

Third, white students are placed in law schools based on their LSAT-UGPA indexes. *See id.* at 409.

⁵² Professor Sander is so confident of the importance of scores that he tells us that "[o]ne hundred persons with an LSAT score of 161 are highly likely to have higher law school grades and higher pass rates on the bar than one hundred persons with an LSAT score of 160." *Id.* at 423 n.159.

⁵³ Under Professor Sander's "academic mismatch" theory students who are placed in competition with stronger peers find that their weaknesses compound over time so that they become weaker and weaker with each passing class. To this, Professor Sander offers the possibility that the higher stress of being unable to face competition also affects performance as does the tendency of students who are out-matched to disengage from the educational process. *Id.* at 450-51. These effects should be equally strong for the under-qualified white law graduate or student. In fact, we should consider that there are twice as many whites as blacks in the position of having lower indexes than one would expect based on an index only admission program. *See Wightman, supra* note 32.

It is hard to accept the proposition that employers should prefer low-grade students from higher-tier schools over high-grade students from lower-tier schools because the assertion seems so bizarre on its face. Why would an employer not prefer evidence of *actual* performance over *predictors* of performance? Nevertheless, this preference for predictors is a direct result of Professor Sander's logic, because Professor Sander's entire point is that performance is a function of whom one performs against rather than a function of performing against some fixed standard. Under this reasoning, high grades received when competing against people with the same predictors does not reveal how that person will function when matched against those with higher predictors. Thus, it is the predictors that become important, not the performance.⁵⁴

But this very insight into hiring practices for whites also creates an insight into hiring practices for blacks, leading to "truth" number five.

E. "Truth" Number Five: When Hiring at Any Given Law School, Law Firms Should Pay Black Law Graduates With High Grades More Than White Graduates With High Grades

Another part of Professor Sander's work is his analysis of the law graduate job market. According to Professor Sander, although law professors believe that job offers closely track the rank of a graduate's law school, in fact, legal employers show a greater preference for high grades rather than graduation from a high-ranked law school.⁵⁵

However, Professor Sander's reason for studying the job market is not to discuss how white men are hired. Instead, for Professor Sander, the insight that employers prefer grades to law school rank is another blow against affirmative action which he blames for low grades among black law students. According to Professor Sander, blacks with high grades are paid more than comparable whites with the same high grades. Thus, blacks would do well to go to lower-tier schools, which would lead to blacks achieving higher grades and getting better-paying jobs.⁵⁶

⁵⁴ Professor Sander's preference for predictors over performance is contradicted in the work of Professors Ayres & Brooks, *supra* at note 9, at 1819 nn.20–21, 1821 n.22, 1837 tbl.6, where they find both that (1) blacks and whites do not perform equally when they share the same predictors and compete directly against one another in the same schools and that (2) blacks with the same predictors do not perform equally well on the bar when they go to schools of different tiers. Instead of following Professor Sander's logic, with black students in lower tiers doing better on the bar, Ayres and Brooks find that the black students who attend the higher tier schools, where they have the most mismatch, actually perform better on the bar.

⁵⁵ Sander, *supra* note 1, at 459 ("The second-most-powerful predictor of earnings is not school prestige (a distant third), but law school grades.")

⁵⁶ *Id.* at 466 ("My consistent finding is that the effect of racial preferences in law school admissions for black students upon their job market outcomes is overwhelmingly negative for blacks in middle- and lower-ranked schools. It is a smaller penalty for students at schools near the top of the status hierarchy and, it is nearly a wash—perhaps even a small plus—for students at top-ten schools.

According to Professor Sander, when employers pay blacks who have high grades more than whites with high grades, the extra pay to blacks is a race preference.⁵⁷

That Professor Sander sees the higher pay for blacks as a racial preference finds no support in his work. There is nothing in his databases or his reported experience that justifies the assertion. Rather, at least when it comes to blacks, Professor Sander's work completely justifies a race-neutral reason for paying blacks who have high grades more than comparable whites. The reason, coming from Professor Sander's research, is that blacks who have higher grades are clearly better than their white counterparts.

Just as Professor Sander asserts that whites are placed in their proper law school based on their powerfully predictive credentials, he also asserts that blacks are placed in law schools above their credentials. According to Professor Sander, because the LSAT-UGPA so accurately predicts performance, it comes as no surprise that most black students place in the bottom ten percent of their law school classes and that less than ten percent of all black students place in the top half of their law school class.⁵⁸

Although Professor Sander's work is meant to draw our attention to the blacks at the bottom of the class, his insight about black students at the top of the class reveals something very significant about these high-scoring black students: these people have achieved something that, according to Professor Sander, is virtually impossible. Blacks with high grades have competed against people who were better qualified than they in every significant respect and yet these allegedly less-qualified blacks have bested their superiors in head-on competition.

In Professor Sander's analysis, blacks with high grades present employers with a different situation than whites with high grades. According to Professor Sander, whites with high grades are merely competing against other whites with the same predictive indexes and against blacks with lower predictive indexes. Thus, it is not clear from the performance of a low-tier white student's performance how he or she would perform if placed opposite a high-index competitor.

One might think that the white student's actual performance in the

But nowhere do I find that the prestige benefits of affirmative action dominate the costs stemming from lower GPA."'). A major problem with Professor Sander's findings on this point is that his entire study of black law student pay is based on 19 black law graduates.

⁵⁷ *Id.* at 459 ("With the controls in this model, blacks generally earn about 10% more than whites This suggests that blacks experience significant preferences in the private [law] firm job market").

⁵⁸ *Id.* at 426 ("The data shows [sic] that blacks are heavily concentrated at the bottom of the grade distribution: 52% of all blacks, compared to 6% of all whites, are in the bottom decile. Put somewhat differently, this means that the median black student got the same first-year grades as the fifth- or sixth-percentile white student. Only 8% of the black students place in the top half of their classes."').

lower-tier school would signal that he or she would do well in the higher-tier school. Professor Sander would disagree. Instead, Professor Sander would predict that the high grade student with low predictors would do poorly in competition against a high-predictor competitor.

On the other hand, Professor Sander's article discloses that the black with high grades has competed directly against whites with higher predictors. Thus, speculation about how this black student would do when faced with superior competition is unnecessary. It is a fact that the black student can compete against high-predictor peers and prevail.

Why would an employer not pay a premium for such an overachiever regardless of that person's race? How Professor Sander uses his data to find a race preference in the higher salaries he reports is unclear at best.

F. "Truth" Number Six: Blacks as a Group Will Be Better Off When There Are Virtually No Blacks in Elite Legal Jobs

Professor Sander's solution to his finding that the best blacks are equal to second-tier whites is to force half of the best black law school applicants into second-tier law schools while letting the other half know that they face poor grades and a higher risk of flunking the bar if they accept an offer from a first-tier school. Professor Sander claims that his solution will actually increase the number of black lawyers. Yet even if Professor Sander is right (a conclusion that others have challenged based on Professor Sander's methodology), forcing the majority of the best blacks out of the top-tier law schools (either by refusing to admit them or by admitting them and then scaring them away) will cause a decrease in the number of black lawyers in the high-prestige jobs that require first-tier law school credentials.

The harsh reality of the legal marketplace is that some legal jobs are open only to graduates of the highest-ranked law schools. The number one graduate from a third-tier law school is not going to be considered for a law teaching job at a first-rank school or for an associate's position at an elite law firm. High prestige government jobs are also closed to good students from mid-ranked schools. Yet, for Professor Sander, there is no cost to black people as a group if black individuals are shut out of high-prestige law positions.

Whatever the preference for more black lawyers in absolute numbers, one might ask if women would be better off if there were fewer female CEOs, or if Jews would be better off if there were even fewer Jewish Senators. That such an argument is even considered tells us that many people still believe the negative stereotypes that flow from Professor Sander's article.

III. CONCLUSION

No doubt Professor Sander would disagree with the six “truths” extracted from his work, despite the documentation of each truth through direct citations to specific language in his text. But with or without citation, each proposed “truth” must in fact be true if Professor Sander is to move from his premise to his conclusion.

The reason that these “truths” arise is that Professor Sander overreaches throughout his work by treating a multidimensional admissions system as if it has only two dimensions: index scores and race. The problems in Professor Sander’s article are further compounded when he seeks to explain the complicated process of law school success and failure as almost entirely determined by index scores, law school grades, and law school tier. Further, law school tier is important to Professor Sander primarily as an interaction effect. In other words, Professor Sander believes that law school tier depresses black law students’ success because he finds that black law students’ index scores are not close to white index scores within the tier.

Although Professor Sander’s theory is a theory of interaction, he fails to test the very interaction he asserts. That is why his critics are able to find such flaws in Professor Sander’s work.⁵⁹ These authors actually tested for Professor Sander’s interaction effect, and they found no such effect—not in law school grades and not in bar passage. In the end, Professor Sander’s arguments fail on their methodology, their logic, and their real-world application.

If the affirmative action debate is to move forward, one must consider why articles like Professor Sander’s keep their currency even after so many blacks have successfully occupied high-prestige positions. Society needs to understand why the case for black inferiority is still so appealing to so many. Why do the legal academy and the nation’s media pay more attention to an article that shows that blacks disproportionately fail to graduate and pass the bar than to works that seek to discover what in legal education causes these outcomes?⁶⁰ Why does the country worry so much about affirmative action for blacks when even more white students receive affirmative action (if that term is defined as admitting a student for reasons other than LSAT-UGPA index)?⁶¹ Why does society pay no attention to

⁵⁹ See sources cited *supra* note 9.

⁶⁰ See, e.g., Clydesdale, *supra* note 21.

⁶¹ Wightman, *supra* note 32, at 16–17. Professor Wightman reports that, in the year that she studies, there were more whites who should not have been admitted to law school if law school admission was based solely on LSAT-UGPA indexes (6321) than there were black students admitted into law school that year. *Id.* (“For example, the LSAT-UGPA-combined model identified 4392 white applicants who were not accepted to any school although they were predicted to be admitted based on their LSAT scores and UGPAs alone. But the model also identified 6321 white students who *were* admitted who were predicted not to be admitted to any school.”).

the success of affirmative action as laid out, for example, in an award-winning study that 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?⁶² Why was that study ignored, while Professor Sander's claim that affirmative action hurts black law students is widely publicized, despite its faulty methodology?

Perhaps the answer is that the story of black inferiority is more comforting than a story that shares responsibility across many different groups. Because if there is something wrong in law school, then law professors need to make appropriate changes, and that is so much harder than placing the blame elsewhere. Perhaps the answer is unconscious racism.⁶³ Whatever the answer, it is not found in *A Systemic Analysis*.

⁶² The award-winning article is Richard O. Lempert et al, *Michigan's Minority Graduates in Practice: Answers to Methodological Queries*, 25 LAW & SOC. INQUIRY 585 (2000).

⁶³ See STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).