

# A RESPONSE TO PROFESSOR SANDER: IS IT REALLY ALL ABOUT THE GRADES?

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Many readers will find *The Racial Paradox of the Corporate Law Firm*<sup>1</sup> provocative, but this is a necessary response. The racial paradox that Professor Richard Sander seeks to explain is why even though minorities and especially blacks are well represented—overrepresented, he argues, given their numbers in the law student ranks<sup>2</sup>—at large law firms, they are underrepresented at the senior associate and partnership ranks. Elite law firms, Sander finds, use affirmative action to produce racial diversity at the entry level positions of summer and beginning associates, but they fail to maintain diversity in the senior associate and equity partnership levels due to high attrition rates among junior black associates.<sup>3</sup>

The story Sander proffers is something along the following lines: The data show that grades are the most important element of a law firm's hiring decisions.<sup>4</sup> This suggests firms think that grades are an accurate predictor of success at their institutions. Firms also care about racial diversity and, therefore, rely upon large racial preferences to hire black associates. In other words, the grades of the black associates whom these firms hire are significantly lower than

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This piece was written in response to a draft of Professor Sander's article. Professor Sander's final version, received by the Review days prior to publication, eliminated some of the quotations cited herein. Publication deadlines prevented Professors Coleman and Gulati from revising their piece accordingly. —Eds.

1. Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006).

2. *Id.* at 1781 & tbl.7.

3. In the interests of brevity, this Response focuses on Sander's analysis of the racial paradox with respect to black law students and associates because this is where the alleged racial paradox is most stark.

4. Sander, *supra* note 1, at 1789.

those of their white counterparts.<sup>5</sup> At the end of the day, however, Sander finds that black associates, although they are just as interested in large-firm work as their white colleagues, are a great deal less successful in advancing to partnership.<sup>6</sup>

Although we find it wanting in terms of explaining the paradox that lies at its center,<sup>7</sup> aspects of *Racial Paradox* provide important contributions to the literature on large law firms. Among these contributions is its serious and largely successful attempt to document empirically the racial attrition problem at these firms. Prior work, especially that in law reviews, is based largely upon rumor and anecdote.<sup>8</sup> Sander, on the other hand, undertakes the complex and tricky task of drawing conclusions from multiple, large datasets in his attempt to triangulate this complex problem.<sup>9</sup>

In addition to documenting attrition problems,<sup>10</sup> Sander's data also help either dispel myths or confirm intuitions on a number of fronts. For example, Sander demonstrates that minority students are at least as interested in the practice of corporate law in the large law firm setting as their white colleagues, puncturing the myth that black students are disproportionately interested in civil rights and pro bono work and disproportionately uninterested in large-firm practice.<sup>11</sup> He also demonstrates that the large corporate law firms engage in significant affirmative action in their hiring of minority associates.<sup>12</sup> Most interesting to the authors of this Response, Sander documents how the experiences of black associates—in terms of key developmental factors such as mentorship, quality of assignments, and training—are perceived by them to be systematically worse than those of their white colleagues.<sup>13</sup> Specifically, Sander demonstrates

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5. *Id.* at 1785–89.

6. *Id.* at 1805.

7. *See infra* notes 30–54 and accompanying text.

8. For an overview of the literature on lawyers and law firms and a discussion of exceptions to the tendency to use rumor and anecdote, see John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 783 (2005).

9. There are a number of other puzzling aspects of the results that Sander reports to which readers of his article should pay attention, such as why white women seem relatively satisfied at these firms despite having significantly lower rates of success in the partnership tournament than their male counterparts, as well as the dramatically different experiences of black and Hispanic associates. Finally, as of this writing, Sander has not unpacked the differences between the experiences of minority male and female associates. Once he does though, we expect an even more nuanced racial paradox.

10. *See* Sander, *supra* note 1, at 1805–08.

11. *Id.* at 1768–71.

12. *Id.* at 1778–89.

13. *Id.* at 1795–1805.

that black associates are doing more of the grunt or rote work, receiving less responsibility and client contact, networking less with the partners at their firms, and consequently becoming more disillusioned with the firms earlier in their tenures.<sup>14</sup> All of this, Sander concludes, results in higher attrition rates for black associates than for associates from any other group.<sup>15</sup>

The point that Sander emphasizes the most—the one upon which most of his conclusions are based—is that corporate law firms care deeply about grades and that the black students these firms hire systematically have lower grades than their colleagues from other groups.<sup>16</sup> From this, he concludes, at least implicitly, that the racial paradox of the elite corporate law firm may be explained best by the relatively lower law school grades of black associates who are the beneficiaries of affirmative action.<sup>17</sup> Sander advances this conclusion even though he admittedly did not take into account the “dynamics within individual firms.”<sup>18</sup> This is both the flaw in *Racial Paradox*’s analysis and its mischief.

The harm of Sander’s article is that it will contribute to the stereotyping that already undermines the success of black associates

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14. *Id.*

15. *Id.*

16. *Id.* at 1750–91.

17. Sander refers to the “large racial preferences,” Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. (draft Apr. 7, 2006) (manuscript at 113, on file with the North Carolina Law Review) [hereinafter Sander Draft], received by black associates, to overcome “the very large disparities in the grade credentials of blacks hired by large firms compared to whites,” *id.* at 164. The impression he gives is that elite firms look only at race when hiring black associates, without seriously considering other indicia of future success, failing to acknowledge that such other factors are considered. He recognizes, however, that minorities are not the only junior associates hired with lower grades. Discussing his hypothetical “elite corporate firm called Smith & Jones,” Sander, *supra* note 1, at 1791, Sander notes that it may hire some “students with weaker grades who have other appealing attributes, such as winning personalities, obvious leadership skills, or strong performance in moot court competitions,” *id.* However, he does not attempt to determine if any of those factors might have influenced the judgment of the elite firms that the black students were qualified. In addition, Sander does not examine whether white associates who are hired “with weaker grades” have the same negative experiences as their black counterparts. While his analysis ignores these lawyers, he does not imply that they are underqualified. Significantly, there were more white lawyers at elite firms with lower grades represented in his data samples than there were black lawyers with lower grades. See, e.g., *id.* at 1785 tbl.9 (indicating there were 213 white associates with GPAs below 3.24, but only 59 black associates, and that there were 38 white associates with GPA’s below 3.0 and only 13 black associates). If low grades account for the bad treatment of black associates, one would expect that the elite firms would also treat white associates with similarly low grades badly. If they do not, it would point to race, and not low grades, as the key factor explaining the racial paradox.

18. *Id.* at 1813.

in elite corporate law firms. Sander's prior work on affirmative action received extensive attention in the national press<sup>19</sup> and, given this article is a provocative extension of that prior work, we suspect *Racial Paradox* will as well. That means that Sander's article will be one of the few pieces of academic work that actually gets read and taken seriously by those outside the academy. To the extent there is material in his article that will be understood as empirical confirmation of the lack of qualification of black students, the article imposes a high cost on those who need no additional obstacles placed before them.

*Racial Paradox* paints all black associates with a broad brush. It acknowledges that some black associates succeed, but does not explain why. It leaves the impression that only those with relatively high grades succeed, but does not specifically address the point. Our experience is that elite corporate law firms do not recruit black associates from the same range of schools from which they recruit white associates. Black associates are more likely to be recruited primarily, if not exclusively, from the most elite law schools. Our guess is that the elite firms also hire white associates "with weaker grades" from these same schools.<sup>20</sup> Sander does not attempt to compare the experiences of these two groups of similarly situated associates, which one would expect to be similar, if merit rather than stereotyping or discrimination explains the negative experiences of black associates. In other words, is the white male student with low grades from Michigan hired by an elite law firm doing better or worse than the black student from Michigan with the same low grades and hired at the same firm because of affirmative action? We suspect that the white student is doing better, perhaps a lot better, in terms of his likelihood of winning the partnership tournament.

Our claim is that one cannot explain the racial paradox that is the focus of Sander's article without taking into account the dynamics within individual firms. Law firms are complex organizations. Lofty commitments made by hiring committees acting on behalf of the firm do not necessarily reflect the commitment of important individual

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19. See, e.g., John Hechinger, *Critics Assail Study of Race, Law Students*, WALL ST. J., Nov. 5, 2004, at B1 ("The research by Prof. Richard H. Sander, scheduled for publication in this month's Stanford Law Review, turns traditional critiques of affirmative action on their heads. It is already under assault."); Adam Liptak, *For Blacks in Law School, Can Less Be More?*, N.Y. TIMES, Feb. 13, 2005, § 4, at 3 ("But a recent study published in The Stanford Law Review by Richard H. Sander, a law professor at the University of California, Los Angeles, has found a new way to inflame the debate.").

20. Our reading of the University of Michigan Law School Alumni Survey data supports this conclusion.

partners. One cannot evaluate the experiences of different groups of associates in these firms without examining the particular circumstances that give rise to the experiences themselves. Instead, Sander himself recognizes that tackling this paradox adequately requires “extraordinarily systematic case studies of dynamics within individual firms.”<sup>21</sup>

The final step in Sander’s article, where he pushes back from the data and attempts to draw conclusions from it, is the one we suspect will be the most controversial—it raised the ire of many at the Symposium. Sander attempts to explain the racial paradox by working through and testing a number of explanations that scholars have advanced, ranging from outright discrimination to disinterest and stereotyping.<sup>22</sup> Sander concludes—with the caveat that other forces obviously are at work—that the fact that black associates enter with significantly lower grades likely plays a key role in the high attrition rates for black associates.<sup>23</sup> We believe that this conclusion cannot be defended solely on the basis of the data Sander analyzes. Advancing this conclusion without a more appropriate examination of the causes of the paradox likely will cause harm. We hope any harm will be minimized as readers recognize that Sander’s article is but a preliminary look at an important social question. Instead of harm, the effect of Sander’s study will hopefully be a series of serious follow-up empirical studies into the causes of black attorneys’ attrition from large law firms.

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21. Sander, *supra* note 1, at 1813. Sander may at times be misinterpreting the significance of some of the data upon which he relies. For example, Table 18 shows that black associates have a significantly higher volume of pro bono work than white associates. *Id.* at 1800 tbl.18. Sander concludes that “[t]he growth and institutionalization of pro bono work at large firms—and the ability, as measured by Table 18, of black and Hispanic associates to engage in substantial pro bono practices—indicates a promising sign of institutional flexibility.” *Id.* at 1817. That conclusion ignores the rest of the data set out in Table 18. Rather than reflecting a positive accommodation by firms, large amounts of pro bono work more likely reflect the relative lack of paying work that these associates have. In the same way, the relatively more time that black and Hispanic associates spend on recruiting likely reflects the general inclination of the firms to allocate the time of these associates to less productive activities. Both of these explanations are consistent with the overall negative experiences reported by black associates.

Another possible misinterpretation of the data by Sander is his suggestion that black associates may recognize that they are underqualified because a significant percentage of them believe that race was a factor in their employment. *Id.* at 1788 tbl.12. A different explanation of this finding is that it may reflect the intensity of the efforts of elite firms to recruit black associates. The response, we suspect, is about diversity, not underqualification.

22. *Id.* at 1809–19.

23. *Id.* at 1817–18.

Part of the answer to the high attrition rate puzzle for black associates seems to be that they are disproportionately disadvantaged when training, mentorship opportunities, and meaningful work are distributed by their firms. Sander speculates that the reason for this is that black associates have lower grades, and that the senior partners who control work, training, and mentorship opportunities are aware of these low grades.<sup>24</sup> These firms make coordinated decisions about whom they want to hire for entry-level positions, and all of them, Sander argues, seem to use significant amounts of affirmative action to increase their hiring of black students for such positions.<sup>25</sup> Inside the firms though, Sander imagines there is less coordination. There is rarely a formal assignment process for the most desirable work. Instead partners pick the associates they want to work on their projects, although associates “have great entrepreneurial freedom to secure assignments from other partners.”<sup>26</sup> Most importantly, however, partners choose which associates will work on which aspects of their deals or cases. While some types of work provide lots of training, other work is mindless and rote. Assuming that grades are the best available predictor of law firm success, Sander suggests that senior partners choose to give out scarce training and mentorship resources to those junior associates with the best chances of success—those with the highest law school grades—and that those associates will be disproportionately white because white associates have the higher grades.<sup>27</sup> It is this final stage in Sander’s article on which we focus our six comments.

### *1. Discrimination, Plain and Simple*

Large corporate law firms typically hire a number of associates right out of law school or judicial clerkships. The firms tell these associates that, with adjustments for clerkship experiences, they are all starting at the same point. In other words, firms represent that the playing field for the “Partnership Tournament” is level. The firms most certainly do not tell black students that they are starting on a different track than their white counterparts because of a presumption that they are underqualified. Yet, Sander’s results suggest that dual tracking by race in fact occurs. Black students start

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24. *Id.* at 1811–16.

25. *Id.* at 1778–89.

26. *Id.* at 1810.

27. *See supra* notes 16–17 and accompanying text.

on a track where they get little in the way of mentorship or training. They receive disproportionately lower-quality assignments, less client contact, and less contact with their senior partners. They spend disproportionately more time on nonproductive—for purposes of advancing in the Partnership Tournament—activities such as pro bono and recruiting. A much larger fraction of white students, by contrast, are on a track where they receive generous infusions of training, meaningful work, and mentoring. Such differential treatment, based solely upon an assumption that black associates are presumptively less qualified, is discriminatory.

If anything, *Racial Paradox* should be required reading for law firm partners who profess not to know why the attrition rate among black associates is so high, or why many who do stay inexplicably fall through the cracks. Sander provides evidence that what is going on is discriminatory dual tracking.

Sander takes the opposite perspective. He argues that his data preclude us from “inferr[ing] racist behavior on the part of firms that have low proportions of minority partners. There is strong evidence that firms are violating fair employment laws, but the violations are on behalf of minority hiring, not against it.”<sup>28</sup> In other words, the relevant discrimination is the use of affirmative action to favor black law students at the hiring stage. Even if Sander were right in characterizing such hiring practices as “discriminatory,” it is irrelevant to what happens to the black associates *after* they are hired. The fact that firms hire diverse groups of associates, pay them all the same salary, *tell them implicitly or explicitly that they are all starting at the same point*, and then systematically treat black associates worse than others in terms of assignments, training, and mentoring *because of a racially based presumption about the black associates’ ability*, is racial discrimination. We doubt that any elite law firm would defend the dual track that Sander documents on the basis of a presumption that the black associates whom it hires are less qualified than the white associates hired at the same time and often from the most elite law schools.<sup>29</sup>

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28. Sander Draft, *supra* note 17, at 165.

29. In addition, as noted, Sander does not look to see whether white associates with similarly lower grades are treated as badly as black associates. *See supra* note 17 and accompanying text. The law firms certainly would determine the answer to that question before trying to defend their treatment of black associates on the basis of low grades. Proof that black lawyers and white lawyers with similarly low grades are not treated similarly would suggest that the dual track reflects racial discrimination.

2. *Testing the Claim that Black Associates with Higher Grades Would Succeed*

At the heart of Sander's paper is the assertion that it must be the case that grades are a good predictor of the qualities that law firms value—qualities that predict law firm success.<sup>30</sup> The question is how to test this assertion. Ideally, one would simply take data on those who actually succeed at these firms and determine whether these were the individuals with the higher grades in their entry level classes at the firms. Performing such a test would be onerous because it would require collecting data from the individual firms on the grades of partners, and perhaps senior associates, and then comparing those to the grades of the others in their entering classes.

Absent that data, Sander looks to two datasets that tell us: (1) the grade levels of a group of Michigan Law School alumni who were still at law firms with fifty or more lawyers five, ten, and fifteen years after graduation were progressively higher, creating an inference that those with higher grades are more likely to survive in these law firms;<sup>31</sup> and (2) that grades are one of the best predictors of income later in a legal career.<sup>32</sup> Sander admits that this is only the first step of his analysis. More important, the analysis is not adequately on point.

The core question *Racial Paradox* asks is not whether grades are good predictors of lifetime income or law firm survival, but whether the reason for the systematically higher attrition rates of black associates is that their grades are presumed to be systematically lower. To test that question, one needs a group of black associates who are known to have stronger grades, or grades just as good as their white colleagues, who received good assignments, training, and mentoring, and another group who were presumed to have lower grades. Setting up such a test may strike the reader as impossible. After all, if firms are using affirmative action, is not the negative presumption always going to apply, even to the subset of black associates who had grades just as high as their white colleagues? Not so. We believe the datasets are out there and hope the next group of researchers who tackle the racial paradox of the corporate law firm will find and make use of them.

The datasets likely exist because we suspect many black students already fear the dynamic that Sander describes. They know that even

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30. Sander, *supra* note 1, at 1789–92.

31. *Id.* at 1792–95.

32. *Id.*

if they can find their way into these corporate law firms, some partners will suspect them of having been the beneficiaries of affirmative action and, for that reason, will deny them all but grunt work. If this is true, black students with stronger grades who wish to avoid the Sander dynamic will search for firms that have a reputation for hiring black students with the highest grades—those elite firms seen as the most racially friendly. At these firms, because these are the black students with grades high enough to compete with the best of their white counterparts, and because everyone at the firm knows this, any presumption that these associates benefited from affirmative action should be minimal. A low success rate for black associates at these firms would pose a challenge to the Sander hypothesis.

Our reason for suggesting the foregoing test is not wholly theoretical. First, the two authors of this Response are racial minorities who went into large corporate law firms after graduation, so the dynamic that Sander describes is one that we thought hard about at the time. Second, among the sources that Sander cites prominently is an article by Alan Jenkins discussing the high attrition rate of black associates at Cleary Gottlieb.<sup>33</sup> Cleary was the firm where many of the top black law students wanted to work—at least those from the Harvard Law School—when one of the authors was graduating from law school in 1994 because it was perceived as more friendly towards minorities than many of the other firms. So, to read that the attrition rates at Cleary for that cohort of black associates had been abysmal is jarring in light of Sander's hypothesis.<sup>34</sup>

Stated more formally, the dynamic Sander describes will operate differently at different firms depending upon the amount of affirmative action a firm uses. Therefore, if his “affirmative action stigma” effect is the driving force for minority attrition, this

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33. *Id.* at 1767 & n.53 (citing Alan Jenkins, *Losing the Race*, AM. LAW., Oct. 2001, at 90).

34. The other author was a partner at an elite corporate firm and personally witnessed the dual track that Sander's article describes. What is noteworthy for this author is the route by which black lawyers have become partners in his former firm. Elite law firms today make partners either by promotion from within (the traditional way) or by bringing them in laterally. In the former case, the firm develops the associates through the work assigned, training, and mentoring. At the time of the partnership decision, this ensures the firm that the associate has the skills and other qualities necessary to perform well as a partner. In the case of lateral partners, the firm makes this determination based upon the lawyer's accomplishments outside the firm. What is striking in the firm in which one of us was a partner is how many black partners have been laterals, including some who started at the firm as associates and left; only one black partner in the firm was promoted from within in the traditional way, starting as an entry level associate and remaining until he became a partner.

differential should correlate with the differentials in affirmative action rates. Collecting this type of data will not be easy, but the goal is worth the effort. Stopping at the first step in the analysis, but still making provocative claims about what causes the racial paradox, creates the danger of giving added strength to an insidious presumption that already disadvantages black associates under a different name.

The underlying point here is that if the dynamic in elite firms is the one that Sander describes, there will be second-order effects in terms of black associates recognizing the dynamic and taking steps to ameliorate it. Evidence of those steps should be visible. Once again, the question is what happens to the black associates with good grades? If the dynamic that Sander describes is right, these black lawyers should use every opportunity to signal their grades. Black associates should hand in a copy of their law school transcript with every assignment. If they were on the law review, they could have a framed picture of their law review class displayed in a prominent position in their office. These are easy and cheap signals. If the perception that black law students have bad grades is the problem, the ones with good grades will engage in this type of signaling and solve the problem, at least with respect to themselves. We suspect black associates with high grades in fact are not engaging in this type of behavior.<sup>35</sup>

The activities in which black associates are disproportionately engaging are likely of a different sort. These activities are of the stereotype-negation type. To the extent these black associates fear there is a stereotype of black men as being hostile and oversensitive about race, they may spend a disproportionate amount of time socializing with their white colleagues and attempting to persuade them that they are not one of those hostile, oversensitive types. If black associates fear that the perception is that they are intellectually inferior, regardless of their grades, they may try to take on more difficult assignments than their white counterparts with the same grades.

There is also the matter of the law firm response. Sander's thesis posits that law firms lose money because they refuse to mentor black students with good grades—lumping these students into the category

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35. If they are engaging in these relatively cheap signaling activities though, then high-grade black students should find it easy to show themselves as such and, according to the Sander theory, should succeed at the law firms at about the same rates as their white colleagues with similarly high grades.

of affirmative action hires. In Sander's framework, firms lose out on these high performing black students because they end up quitting. But a rational firm—even one that did not want to mentor low-grade black students—would want to mentor the black associates with high grades, particularly if they really did care about diversity, as so many claim. It is easy for the firm to determine which students are which. Once again, grades are not that difficult to observe.<sup>36</sup> If they were all that important, the firm could easily ensure that every partner could identify the associates with the high grades. We are fairly certain this practice is not used. Why not? The answer surely has to be that something other than grades is driving assignments.

### 3. *The "Fell Through the Cracks" Story*

The racial paradox is that while firms aggressively hire black associates at the entry level, they do not retain them.<sup>37</sup> Within a few years of being hired, black associates are disappointed with the ways in which their careers are progressing and begin looking for exit options. Sander proposes a structural explanation for this phenomenon. The loose manner in which these firms are organized—where partners and associates, in a sense, choose each other—results in black associates falling through the cracks.<sup>38</sup> The partners may collectively desire a diverse pool of associates for the firm, but when it comes to their individual projects and the most desirable work, Sander claims, they want the best associates and generally do not think that black associates fall into this category. A key element of Sander's story then concerns the "looseness" of the internal assignment processes at these firms.

Firms are not all the same in terms of internal structures. The structure at some firms is looser than that at others. For example, there are firms that rotate junior associates through a variety of departments for at least two years before those associates are allowed to specialize. There are other firms where assignments are the product of a free market matching system from day one. If Sander's hypothesis is correct, we should see differential attrition rates for black associates that are a function of differential structures. Further,

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36. Unless of course what Sander means by "grades" is some nuanced understanding of law school transcripts that takes into consideration the difficulty level of the courses, the material covered, the personal situation of the student and on and on. We are unaware of any law firms that perform such a nuanced evaluation of grades.

37. Sander, *supra* note 1, at 1759.

38. *Id.* at 1810.

as black students come to understand the dynamic that Sander describes, one should see disproportionate numbers of black students migrating towards firms with more formal assignment systems; that is, firms where there is a lower likelihood of falling through the cracks. If we do not see that, it suggests that the problem of attrition may not be a function of the informality of internal assignment structures.

#### 4. *Diversity as a Source of Status*

A key element of Sander's thesis is that overt discrimination does not seem to explain the lack of senior black lawyers at corporate law firms.<sup>39</sup> Discrimination, Sander suggests, is belied by the aggressive recruiting and hiring of black associates at the entry level. The aggressive use of affirmative action for entry-level positions seems to suggest that the firms have good intentions vis-à-vis their black associates, but that things simply do not work out for reasons beyond the firm's control.

We suggest the possibility of a different story. Firms, and especially the larger and more elite firms, care about status. One way to acquire status is to do expensive things that lower-status firms will find difficult to do. To the extent that there is but a small pool of black associates available for the top law firms, these firms may view employment of these associates as a source of status—a dynamic that becomes more plausible in a context where the entering associates are more attracted to firms that are considered diverse. If the purpose of hiring these black associates is largely a means to acquire status, and if status comes from a minority group's numerical presence rather than its success within the firm, then one should not be surprised to see the firm investing little in the group's training and mentoring. David Wilkins's forthcoming book on the history of blacks in corporate law firms documents how real this story was in the days when black lawyers were first admitted into these firms.<sup>40</sup> A key

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39. *Id.* at 1818.

40. For an explication of this point in the context of the broader literature on lawyers and status, see Kimberly D. Krawiec, *Organizational Form as Status and Signal*, 40 WAKE FOREST L. REV. 977, 1004–05 (2005) (citing DAVID WILKINS, *THE BLACK BAR: THE LEGACY OF BROWN V. BOARD OF EDUCATION AND THE FUTURE OF RACE AND THE AMERICAN LEGAL PROFESSION* (forthcoming 2007)). In a recent article, Laura Beny takes a somewhat different spin on the analogous issue of why law firms appear to spend significant resources on diversity initiatives like engaging diversity trainers and yet seem to be making little progress in terms of actual numbers. See Laura N. Beny, *Reflections on the Diversity-Performance Nexus Among Elite American Law Firms: Toward a Theory of a Diversity Norm* (Sept. 6, 2005) (unpublished manuscript, on file with the North

element during this period was the desire for status (some of which came from being seen as “doing good” in the Civil Rights era) that opened doors. Those lawyers, however, precisely because their value to the firms was in terms of status, rarely got training and mentoring. Perhaps that same dynamic, albeit on a larger scale, is still at play.<sup>41</sup>

5. “To make partner at an elite law firm, go to a law school where you will earn high grades.”

Sander makes much of the fact that law firms have “weaned themselves from a predominant reliance on elite schools as a source for young lawyers.”<sup>42</sup> Instead, he argues, firms now try to “balance school eliteness with school performance to determine the predictors of law firm success.”<sup>43</sup> From this he suggests that black students—indeed all students who receive weaker grades at elite law schools—would be better off attending a second- or third-tier law school where they would get stronger grades than attending an elite school and not performing as well.<sup>44</sup> This claim is made without corroboration, either generally or specifically for black students. We doubt this claim for two reasons.

First, Sander makes no attempt to determine if the experience of white junior associates who graduated from law schools from which

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Carolina Law Review), *available at* <http://ssrn.com/abstract=777504>. Beny hypothesizes that the firms may care little about the numbers, but may be spending on diversity to signal to the market their “cooperative reputation” (put differently, low discount rate). *Id.* at 23–27.

41. This dynamic is consistent with some of Sander’s data. For example, using black associates to recruit signals to white lawyers who care about diversity that the firm embraces diversity. The same is true of permitting black associates to spend extraordinary amounts of time on visible pro bono activities. One also would expect these firms to buy tables at public interest events and invite their black associates to attend, along with prominent members of the firm.

42. Sander Draft, *supra* note 17, at 164.

43. *Id.*

44. Sander hypothesizes that:

[T]he net result of these shifts was a new hiring calculus among elite firms. Rather than simply hire from the best schools, the firms began to evaluate the tradeoffs between high grades and school eliteness. Firms discovered that graduates of second-tier or even third-tier schools with top grades were succeeding and often making partner, and over time they gauged and calibrated the mix of grades and eliteness that were sufficient to pass muster and prosper at their firms. The most obvious result was a dramatic broadening of the range of schools from which elite firms drew associates . . . .

Sander, *supra* note 1, at 1778. These are bold assertions. If wrong, a chunk of Sander’s thesis comes into question.

their firms do not traditionally recruit are treated as well as white students who graduated from the traditionally recruited law schools. Are white associates from these nontraditional law schools given the same challenging assignments, the same training, and the same mentoring as white associates from the traditional schools from which the firms recruit? Or is there a presumption among partners in these firms—who likely graduated from the traditional law schools—that the graduates of these second and third-tier schools are underqualified, even though their grades are high? Is Sander correct that these associates are “succeeding and often making partner,”<sup>45</sup> or, are these associates on another side track?<sup>46</sup>

Second, nothing in Sander’s data suggest that *black* law students at lower-tiered law schools are being or would be hired by elite law firms, even if their grades are high. Our experience is that elite law firms continue to recruit minority associates almost exclusively from the elite schools from which they traditionally have recruited their most successful white associates. If students from lower-tiered schools also are subjected to a presumption that they are underqualified, black students at such a school would experience a double burden. For this reason, except in the most exceptional case, it seems to us unlikely that elite firms are recruiting many black students from lower-tiered schools. This too can be tested.<sup>47</sup> If elite firms recruit black lawyers from a narrow range of law schools, Sander’s proposed solution to the racial paradox would serve only to severely reduce the number of black associates at the elite law firms. Given that likelihood, why would any rational black student give up the known benefits of a degree from an elite law school to roll the dice at a lower-tiered school from which his or her opportunities likely would be significantly reduced?<sup>48</sup>

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45. *Id.*

46. The experience of one of the authors suggests that these associates also are the victims of lower expectations within elite law firms, and that they experience some of the same negative consequences as black associates. They likely will report “fewer projects, less training, less mentoring, less social interaction with partners, and a lower level of responsibility on their assignments. In other words, they [will] seem to experience a sort of benign neglect at the firm.” Sander Draft, *supra* note 17, at 165.

47. At one of the authors’ former law firms, the overwhelming majority of black lawyers were from Harvard, Yale, Michigan, Columbia, the University of Virginia, and the University of Pennsylvania, with a substantial majority from Harvard and Yale. These are the law schools from which the firm traditionally recruited its best white associates.

48. Sander notes, for example, that “[n]ot surprisingly, GPA thresholds for those going into large firms were lower at the elite University of Michigan than at the broader cross-section of schools represented in the [Bar Passage Study] data.” Sander, *supra* note

### 6. *It Is About Firm Dynamics*

Professor Sander acknowledges that disentangling the role of merit and stereotype discrimination would “require extraordinarily systematic case studies of dynamics within individual firms, studying the incoming credentials of associates, the assignments they receive, the evaluations of their assignments, and the evolution of their work load.”<sup>49</sup> Given that no one seems to be doing these studies or even plans to do so, we fear that Sander’s hypothesis about grades and merit being the root cause of the racial paradox, as opposed to stereotyping, will fill the vacuum for a significant period of time. Our goal, therefore, is to attempt to suggest why even a basic understanding of internal firm dynamics at large law firms brings Sander’s hypothesis into question.

*Racial Paradox* makes a number of debatable assumptions about what goes on in elite law firms. Sander cannot imagine, for example, that firms would “use aggressive pro-minority preferences in hiring, only to engage in racial discrimination once associates arrive.”<sup>50</sup> He assumes any such discrimination would be “open,” but his data suggest that what is going on within these firms is discrimination in the guise of benign neglect, not open discrimination. This is evident from Sander’s statement that the “disturbing patterns are ones of disengagement, not overburdening.”<sup>51</sup>

Sander assumes that black associates who are not receiving good work because of discrimination can easily identify racist partners who might discriminate, asserting that associates enjoy “great entrepreneurial freedom to secure assignments from other partners and senior associates in the firm, and likewise many different partners can seek out the help of particular associates.”<sup>52</sup> This assertion ignores how internal markets for work operate at these firms.

First, entrepreneurial freedom matters only if partners with desirable work are willing to share it. An associate trying to escape a partner who is not providing him or her good work may find few other partners responsive to calls for work. A bad experience with one partner may poison the well with all partners. Associates quickly

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1, at 1787. Thus, even for white students, going to an elite school broadened the opportunities upon graduation, even for those with weaker grades.

49. *Id.* at 1813.

50. *Id.* at 1809.

51. *Id.*

52. *Id.* at 1810.

develop reputations within elite firms. A partner who concludes, rightly or wrongly, that an associate is underqualified will report this conclusion informally to other partners. It is unlikely that another partner with "good" work will waste it on someone who has been declared on the wrong track.

Second, Sander assumes partners will judge the work of all associates fairly even if they think the associate is underqualified. We doubt that this is often the case. Our experience is that partners will often evaluate an associate's work consistent with their expectations or presumptions. When the work comes from an associate whom the partner suspects is underqualified, the partner likely will find deficiencies in the work that confirm his or her suspicions; in some cases, the partner will actively look for such deficiencies. The same errors in the work of an associate whom the partner assumes is a star may be minimized and treated as aberrational. In the former case, the errors, no matter how insignificant, may appear prominently in a formal evaluation; certainly they are reported informally through the grapevine. In the latter case, however, the errors are used to teach and thereafter will likely be forgotten. An associate for whom the firm has low expectations may never recover from a mistake, no matter how understandable or trivial it was. What constitutes merit under such circumstances?

Third, Sander assumes that firms can "ensure that every minority associate has an effective mentor, or that assignments are distributed with greater care."<sup>53</sup> Our experience suggests that neither assumption is valid. Firms often find it difficult to ensure that an associate has a meaningful mentor. The best mentors are those who take a personal interest in a junior associate and are willing to put time into mentoring. Unfortunately, law firms are often organized so that individual partners have no personal responsibility for poor mentoring or bad assignments. Moreover, most partners will not be inclined to commit time to meaningful mentoring before first concluding that the associate is worth the effort. Additionally, formal mentoring programs, like formal assigning systems, do not always eliminate the problems experienced by black associates. That requires a personal commitment by the partners who are effective mentors and those who have good work to share.

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Sander concludes his article by calling on elite firms to "pressur[e] law schools to modify policies that cause blacks to be so

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53. Sander Draft, *supra* note 17, at 165.

heavily concentrated in the bottom of their classes.”<sup>54</sup> This is Sander’s agenda. If law firms wish to understand the racial paradox about which Sander writes, they would do better to conduct their own systematic study of the experiences of black associates. Sander’s data show that black associates are treated less fairly than white associates. As a result, they leave the firms earlier than white associates. Is this really a paradox?

Empirical work is difficult. It is easy to attack because critics can always hypothesize some alternate method of testing that addresses a problem more directly and assert, without basis, that they claim such data are easy to collect. The problem is that those throwing stones at the empirical work rarely are either unable or unwilling to do the inevitably hard work of collecting such data. We have done our share of stone throwing in this response, but that should not take away from the fact that Professor Sander has identified a real problem that needs serious study, and that his study has added considerably to the limited body of available, public research, even though his conclusions are, at best, premature.

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54. *Id.* at 166.