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Note to readers:

As will be immediately evident, what follows is an extremely preliminary outline of a book designed to respond to Rick Sander's Stanford law review article which claims that in the absence of affirmative action, there would be more black lawyers. Ideally, this would be a trade press book, designed to reach a general audience of readers since my belief is that Sander's article, notwithstanding its flaws, has entered into the popular view of affirmative action. So one task is to figure out how to frame this debate in terms that are accessible to a broader public. One prototype for this project is the book, "The Black White Test Score Gap" which repudiated the claims of the Bell Curve (albeit in terms that were seriously flawed).

The very last page is the beginning of an essay targeted at an academic audience that makes some of the same arguments. I am not certain whether there is a need to do something separate from the book for that audience. My initial thought is that there is but I welcome your feedback on this question as well as the entire project.

Thanks,

Cheryl

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The Mismatch Myth

Cheryl I. Harris (editor)

This is a book that responds to claims that new empirical research has demonstrated that affirmative action has been harmful to black students, and black law students in particular by placing them in schools where they have significantly lower standardized test scores than their white peers. This mismatch purportedly means that black law students are unable to academically compete, and are doomed to fail, earning significantly lower grades in school, failing the bar in higher numbers and even for those who do become lawyers, having decidedly less successful careers. Much of the current debate over affirmative action then has been focused on the assertion that regardless of whether affirmative action is legal, it is harming the very people it is supposed to help. What is striking is that while the research underlying this claim has been roundly rejected by many highly respected and reputable social scientists, the mismatch myth has attained the status of a presumptive truth. Educational institutions as well as employers who employ even the most modest forms of affirmative action have had to justify the continuation of the policies against the assertion that affirmative action hurts black people by setting them up to fail. Thus even though there is no evidence that the mismatch hypothesis is correct, and even abundant evidence that it is wrong, the claim of racial mismatch is taken as established fact. This pattern echoes the debate over the Bell Curve over a decade ago in which claims about inherent, genetically based differences in intelligence were rejected by the broader research community even as the book's premises entered the pool of common knowledge.

This book proposes to examine the origins of the mismatch hypothesis, to trace its resurgence and traction in the current debate over affirmative action, and to lay out the compelling case that the research underlying the mismatch hypothesis is fatally flawed. The book further proposes to examine the challenges to institutions, organizations and individuals when faced with critiques of complex social policies that claim to be empirically based.

The book will be an edited group of __ essays, each directed at a range of related questions such as the following:

What are the assumptions underlying the current edition of the mismatch research? Why is the claim that affirmative action causes black students to fail wrong? What does the available evidence actually demonstrate about black law students? Why has the devastating critique of the mismatch claim had little or no traction in the current debate over affirmative action? Is there a reason that the mismatch myth re-emerged at this moment? Who is the author of the current version of the mismatch myth? Who is supporting this research? What happens when debates over highly contentious social policies are reframed as debates over "empirical facts?" What is the role of the media in reporting and interpreting these debates? How does the law, legal institutions, and law

schools in particular, process and interpret racial disparities in outcomes? What are the requirements of responsible research into these disparities? How has the mismatch research adhered or failed to adhere to these requirements? How have students—both current and former-- been affected by this research? Given that the lead researcher is a legal educator teaching students that are the subject of his research, how has this impacted the educational environment? Since the mismatch research is predicated on access to academic records and other similar information, how have concerns about privacy been considered?

OUTLINE

I. Introductory chapter:

Focus on the headlines from mainstream press proclaiming findings that affirmative action reduces the number of black lawyers. Leading entry on the California Bar website. LA Times article was particularly exemplary of the tone taken by the mainstream press.

Shocking. Compelling. Politically courageous. The problem was that it was dead wrong.

Despite the heralded claims that Sander had presented new and rigorous evidence that affirmative action was causing black students to fail, almost simultaneously researchers pointed out that there were serious problems with the research. Immediately on the heels of the publication of the article in the Stanford Law Review—in fact in the same issue—six (?) co authored articles pointed out that Sander had not in fact proven his assertions. There were other critics who also published analysis in other journals and in the four years that followed the publication of the initial article, there has not been one reputable social scientist that has gone on record in writing to support Sander's conclusions. Yet, it is not Sander's research that was greeted with skepticism but rather the response of his critics. Why is this so?

Part of the reason for this strange turn of events lies in both the nation's racial history and the politics of the present. The idea that blacks are academically deficient and ill equipped to compete with whites is a racial trope with a long pedigree. Over the years the claim has morphed from one that is biologically based—blacks have small brains, etc—to one that is grounded in notions of cultural dysfunction—black families are broken, fail to value education over sports, etc. In polite company at least, the first version is denounced as racist, while the second is taken as a sad but unfortunate fact.

Interestingly, however, Sander's claims about black mismatch were not situated within this framework. Indeed, charges that Sander's article was trading on racist stereotypes about black intellectual inferiority were largely dismissed for several reasons. First, Sander said that his work could not be racist since as he was at pains to point out in the article, he is the father of a bi-racial child. Second, a central part of his argument was that more black lawyers would be produced in the absence of affirmative action rested on the claim that once black law students attended schools with white peers who were matched in terms of standardized test scores, blacks performed equally as well as whites. Hence Sander asserted that his research was not about black underperformance, but rather about the fact that when anyone regardless of race was placed in a too competitive academic environment, they could not succeed. Finally, since Sander's argument was based on a series of

highly sophisticated statistical analyses—regressions—the numbers did not lie and he could not be faulted if they told an inconvenient truth. In other words, it's not racist if its true.

To be continued……

Chapter II: Genesis (au: Harris, et.al)

A. Origins of the mismatch hypothesis and prior debates
B. Why its re-emergence—Local History

1. Role of California in the affirmative action debate
2. Role of UCLA law school: central institution in the debate over affirmative action, and arguably one of its most noted success stories having produced black lawyers over a period of three decades
3. Proposition 209: use of the initiative process
4. Post 209 debates over admissions in UC generally and at UCLA Law in particular in wake of precipitous drops in enrollments. Sander's "class based" admissions policies
5. Resistance produces review of policies and abandonment of Sander admission plan
6. Mad about Grutter and research as revenge

Sander's LA Times op-ed: "Colleges will Disguise Quotas"

D. Why its re-emergence—broader political context in which large buy in to notion of colorblindness not only among conservatives but among liberals.

Chapter III. Sander's argument: Summarize

Chapter IV. How the article found a home: The role of the Stanford Law Review: Michele Landis Dauber, "The Big Muddy" arguing about why articles based on social science methods should not be published in non peer reviewed, student run journals.

Chapter V, VI, VII, VIII and IX: Critics—Lempert and Chambers; Ayres and Brooks; Ho and or Katherine Barnes and ABF study; reprise and popularize their critiques of the methodology. New chapter commissioned from Claude Steele and Phillip Goff on black underperformance—the phenomenon in which black students with relatively equal academic credentials to white students still underperform—and the role of institutions in affecting performance

Chapter IX: The role of the media
Chapter X: Race liberal neo con

US Civil Rights Commission
Heriot, Connerly et al
Funding by Scaife

Chapter XI: The next wave: Prove me wrong—give me more information

Access to data and the fight over the Cal Bar information
The use of FOIA
Privacy issues: When and how do privacy protections apply? How were they and how should they be balanced against need for access to data for research

Chapter XII: Black students under the gun

Black life at UCLA law: hostile educational environment
Declining black enrollment
Black experiences at other institutions

Conclusion: Lessons learned?

Role of social science in debates over complex social policy: When is a regression regressive?

Race, Affirmative Action and the Revival of Inherent Racial Inferiority as Liberal Discourse

The debate over affirmative action as well as other forms of race conscious remedies such as school desegregation has always been fraught. This is a reflection of the perpetually unsettled nature of the national psyche around the past and future of racial dynamics—about whether and how race matters. The contentious nature of the debate is also a byproduct of how the law and legal institutions have both been enlisted in and played a crucial role in defining the terms of the debate including most centrally the meaning and significance of race. Not surprisingly then, the most recent era which is marked by the Supreme Court's narrowly decided opinions in Grutter and Gratz is one which the terms of engagement around the issue of affirmative action continue to be hotly contested and under revision. On the one hand one might say that Grutter at least temporarily settled the normative question of whether any form of race conscious remediation might be ever be legitimate.

Yet at the same time the narrow nature of the decision as well as the apparent repudiation of the more straightforward accounting of race taken by the University of Michigan undergraduate school in Gratz reflected the somewhat unstable nature of the guidelines and premises regarding how race might count. Nevertheless, Grutter fragile though it was and is, remained an important barrier to the declared agenda of the neoconservatives to eradicate all forms of race conscious social policy. That neo cons saw Grutter as unprincipled and a capitulation to the politics of racial appeasement does not surprise. What was a new hallmark of the post-Grutter era was that the assault on affirmative action was repackaged as both practical imperative and legitimate liberal and in some instances even progressive discourse.

The reframing of the attack on affirmative action as part of a liberal racial agenda was facilitated by several phenomena and factors, some historical and some new features of the racial terrain. As Crenshaw has argued the retrenchment of racial politics of the 80s was a product of the way in which liberal racial discourse of the preceding period of the 60s and 70s framed discrimination as the exception to an otherwise racially neutral status quo. The ascendancy of colorblindness as the predominant form of racial aspirations and policy reflected the exhaustion of liberal politics and justification for racial equality predicated on the assumption of a racially neutral status quo. Once this premise The re engagement with state wide initiatives as a mechanism for thwarting normal democratic processes for setting racial policy was also a feature of this period. Resistance to racial equity measures was then part of populist politics and an affirmation of the voice of common people in opposition to elitist racial hegemony.