



BRIEFING REPORT  
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U.S. COMMISSION ON CIVIL RIGHTS  
**Affirmative Action in American  
Law Schools**

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# **Affirmative Action in American Law Schools**

A Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, D.C., June 16, 2006

Briefing Report

## **U.S. Commission on Civil Rights**

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
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## Executive Summary

The November 2004 publication of Richard Sander's *Systemic Analysis of Affirmative Action in American Law Schools* in the *STANFORD LAW REVIEW*<sup>1</sup> set off an intense debate in American legal education. While previous debate focused on the extent to which race was or should be a factor in law school admissions, Sander's research suggested a different question: do large racial preferences have demonstrably counterproductive effects on at least some intended beneficiaries? While other scholars had taken up this particular issue before, Professor Sander performed a quantitative analysis to support his work, using databases that were unavailable when the previous generation of research was undertaken.

Some aspects of Sander's work may achieve broad agreement, such as data on the disparate performance of blacks and whites on grades, graduation and bar passage. However, other aspects have already sparked significant disagreement. Many of Sander's critics take issue with his contention that racial disparities in law school academic performance and bar passage rates are a result of an academic "mismatch," whereby the intended beneficiaries of large racial preferences are admitted to law schools for which they are not otherwise academically qualified.

These questions took on particular policy significance when the American Bar Association's Council of the Section of Legal Education and Admissions of the Bar proposed Standard 211 in February 2006, which would require law schools seeking accreditation to demonstrate a commitment to diversity by "concrete action." At the same time, the Council proposed Interpretation 211-1 of this standard. Interpretation 211-1 simply stated that "A constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin is not a justification for school's noncompliance with the standard." Critics argued that the standard, when read together with the interpretation, suggested that federal, state, and local laws may be disregarded when they conflict with the standard. Critics also contended that the standard and its interpretation would impinge on law schools' freedom to establish their own admissions criteria. The Council later revised the proposed Interpretation to clarify that law schools subject to such provisions would have to demonstrate their commitment to diversity by other means.

In August 2006, the American Bar Association's House of Delegates concurred with the Council's proposed standard, which the Council adopted (renumbered as Standard 212) as follows:

**Standard 212. EQUAL OPPORTUNITY AND DIVERSITY.**

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented

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<sup>1</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367 (2004).

groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

It also amended and adopted the official interpretations of this standard:

**Interpretation 212-1**

*The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 212. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 212 by means other than those prohibited by the applicable constitutional or statutory provisions.*

**Interpretation 212-2**

*Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 539 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.*

**Interpretation 212-3**

*This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.*

Critics of this standard and its accompanying official interpretations argued that they failed to recognize the limitations that *Grutter*<sup>2</sup> placed on the use of racial preferences and would pressure law schools to employ such preferences in admissions.

Little information is currently available concerning the extent to which law schools consider race in their admissions decisions and the academic and career fortunes of their

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<sup>2</sup> See *Grutter*, 539 U.S. at 333-344.

intended beneficiaries. To this day, minority applicants to law schools are not provided with information about their attrition, graduation, and bar passage at law schools where they are admitted through racial preferences, despite the significant investment of time and financial resources that law school requires. Nor do these applicants know what effect racial preferences in admission may have on their future income or likelihood of bar admission.

To address this particular lack of transparency, legislation has been proposed in Congress that would require law schools receiving federal financial assistance to disclose whether and to what extent they use racial preferences in admissions. The Racial And Ethnic Preferences Disclosure Act, introduced by Congressman Steve King (R-IA) as House Amendment 769<sup>3</sup> in March 2006, would require institutions of higher education that receive federal financial assistance to provide to the Department of Education's Office for Civil Rights a report regarding its students admissions process. This report would disclose data on the extent to which they take race into account in making admissions decisions. The report would also detail: (1) the racial, color, and national origin groups for which membership is considered a "plus" or "minus" factor; (2) a description of how group membership is considered, including the weight accorded such membership; (3) whether targets, goals, or quotas are used; (4) a statement explaining why group membership is given weight and its relationship to the diversity rationale; (5) a description of the consideration given to using race-neutral alternatives to achieve those goals; (6) how frequently the justification for giving weight to group membership is reassessed; (7) what non-racial factors are considered in the admissions process; and (8) an analysis of any correlation between membership in a favored ethnic or racial group to placement in remediation program, graduation rates, and student loan default rates.

Some experts have voiced concerns, however, about possible negative effects and practical difficulties with publicizing the effects of race-conscious admissions policies. In particular, these experts emphasize the great need to encourage minority applicants to enter the profession, while not stigmatizing them or inflaming racial animus.

On June 16, 2006, a panel of experts briefed members of the U.S. Commission on Civil Rights on affirmative action in American law schools. The panel convened to debate the empirical strength of the research on the effects of racial preferences in law school admissions and the legal and policy implications of the American Bar Association's diversity standards. Richard Sander, professor at University of California at Los Angeles Law School, and Richard O. Lempert, professor at the University of Michigan Law School, addressed the impact of racial preferences in law school admissions on the academic performance and bar admissions of African-American students. David Bernstein, Professor of Law at George Mason University, and Dean Steven Smith, Chair of the American Bar Association's Council on the Section on Legal Education and Admissions to the Bar and Dean of the California Western School of Law, addressed the

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<sup>3</sup> The Racial and Ethnic Preferences Disclosure Act, House Amendment 769 to H.R. 609, 109<sup>th</sup> Cong. (2006). It was offered by Mr. Steve King (R-IA) on March 30, 2006, at 12:26 pm. It failed by record vote of 83-337 on March 30, 2006 at 2:18 pm (Roll no. 79). *See also* <http://thomas.loc.gov/cgi-bin/bdquery/D?d109:28:./temp/~bdWroP:|/bss/d109query.html> (last accessed Nov. 16, 2006).



standards by which law schools are accredited by the Council and the Council's then-proposed changes.

Professor Sander cited widely acknowledged disparities between whites and African-Americans in law school performance, graduation, and attrition. He attributed these to an academic mismatch. According to his theory, large racial preferences enable law schools to admit African-American students who are not otherwise academically qualified to attend. Thus, these students lag in academic performance and bar passage rates, which decreases, in the long run, the number of African-American lawyers. This should concern policy-makers given the significant financial outlay needed to attend law school. Sander recommended legislation to require law schools to provide detailed data on how they make their admissions decisions; disclosure by State bars on bar passage rates by race; and a Commission-endorsed "national exit exam" for college graduates to discern whether the academic mismatch occurs in college. Furthermore, acknowledging the controversial nature of his findings and the supporting evidence, he recommended a panel of social scientists to review the empirical research available on the impact of racial preferences on African-American law students. This panel would help strengthen the research that guides educational policymakers in this arena.

Professor Lempert criticized Sander's research methodology as flawed and unscientific. He referred to survey data that appear to contradict Sander's findings by showing race, ethnicity, and LSAT score had no role in predicting future income or career satisfaction. Lempert also argued that elimination of racial preferences would result in significant decreases in minority admissions and a 21 percent decrease in the number of African-American lawyers, not the increase projected by Sander. While he agreed that the racial disparities in academic performance and bar passage are a cause for concern, he disagreed that academic mismatch was the cause. Rather, he attributed these disparities to both the greater and often unmet financial need of African-American law students and poor elementary and secondary education.

These two panelists fielded questions from the Commissioners, dealing with several issues:

- The merits of the available data on the effects of racial preferences on African-American law students;
- The value of requiring greater disclosure by law schools on the use of racial preferences in admissions and the academic performance and graduation rates of admitted students disaggregated by race;
- The value of requiring greater disclosure by law schools and bar admissions authorities of bar passage rates disaggregated by race;
- The availability of information on student loan default rates and future income of law students disaggregated by race;
- The empirical strength of the academic mismatch theory; and
- The costs of racial preferences in law schools.

Dean Steven Smith addressed the then-revised proposed standard of the American Bar Association's Council of the Section on Legal Education which would require law schools seeking accreditation from the Council to demonstrate, by "concrete action," a commitment to racial and ethnic diversity. Originally, that Council had proposed an interpretation of this standard that simply stated that "[t]he requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance" with the standard. It later revised that proposed interpretation to clarify that schools subject to such provisions would have to demonstrate compliance with the standard by other means. That Council also proposed interpretations for this standard that stated that demonstration would be judged in part by results achieved and that explicitly permitted the use of racial preferences in admissions consistent with *Grutter v. Bollinger*. Smith argued that racial preferences or quotas were not required by the new standard, but stated that the Council would judge compliance in part by results. He defended imposition of the standards based on a broad consensus on the importance of racial diversity to the legal profession.

Professor Bernstein countered that *Grutter v. Bollinger* permitted law schools to adopt race-conscious admissions based on their individual judgments that diversity was important to their educational mission. In this context, he argued, the Council displaced that judgment and substituted its own. He also argued that, based on the proposed interpretations, it would be difficult for law schools to comply with the standard without using racial preferences. He said that racial preferences in law school admissions were troublesome both as a constitutional matter and as a policy given the emerging data on the causes and nature of racial disparities in law school academic performance.

All four panelists fielded additional questions from the Commissioners, dealing with several issues:

- Empirical data demonstrating that racial diversity contributes to classroom discussion and producing better lawyers;
- Mechanisms for disclosure on how law schools achieve their diversity goals;
- The struggles faced by minority law students admitted to law schools via racial preferences;
- The extent to which the Council's standard impinges on the academic freedom of law schools;
- The Racial and Ethnic Preferences Disclosure Act;
- How law schools could comply with the Council's standard apart from using racial preferences; and
- The human costs of racial preferences in law schools

Based on the record, the Commission finds that:

- Researchers generally agree that there are significant racial disparities in law school academic performance, graduation rates, and bar passage rates

- Researchers disagree, however, on whether racial preferences in law school admissions contribute to these disparities. Data that would enable researchers to further evaluate the strength of the academic mismatch theory is not widely available
- Law students may better gauge their likelihood of academic success at a given law school and future career prospects if law schools and the entities responsible for granting admission to the bar publicly disclosed the extent to which they use race in admissions and data on academic performance, bar passage rates, graduation rates, student loan default rates, and grade point averages disaggregated by academic credentials.<sup>4</sup>
- The Council adopted a standard that law schools may have difficulty meeting without the use of racial preferences.
- This standard substitutes the judgment of the Council for that of the law schools in deciding whether diversity is essential to their educational mission

Based on these findings, the Commission recommends that:

- The National Academy of Sciences or other grant-making entities fund independent research on the impact of racial preferences on racial disparities in law school academic performance, bar passage rates, graduation rates, student loan default rates, and future income and that state bar associations cooperate with this research
- Law schools voluntarily provide disclosure to the public and, at the very least, to potential applicants on student academic performance, attrition, graduation, bar passage, student loan default, and future income disaggregated by academic credentials
- Congress enact legislation requiring law schools receiving federal financial assistance to disclose to the public detailed data on the extent to which they take race into account in making admissions decisions, the weight accorded membership in different racial or ethnic groups, whether targets or quotas are used, an explanation of how certain group membership is related to the diversity rationale, how frequently the need to use race-conscious admissions is used, a description of the consideration given race-neutral alternatives, and any correlation between academic credentials and placement in a remediation program, graduation rates, and student loan default rates
- As an interim measure, that the Council use its accreditation authority to require law schools to disclose the data sought by the recommended legislation
- States require bar admissions authorities to provide disclosure on bar passage rates disaggregated by academic credentials.
- The Council revise the recently adopted diversity standard to delete the requirement that law schools seeking accreditation demonstrate a commitment to

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<sup>4</sup> See Transcript of June 16, 2006 Meeting of the U.S. Commission on Civil Rights 187-88 (discussion between Commissioner Kirsanow and Professor Bernstein) *available at* <http://www.usccr.gov/calendar/trnscrpt/bmb060616.pdf> (last accessed April 13, 2007).

- diversity, thereby preserving the law schools' freedom to craft their own educational missions
- Law schools are clear that their constitutional and statutory obligations to non-discrimination remain paramount and that their compliance with the Council's standard will not be judged by the results achieved.

A transcript of the briefing is available on the Commission's website, [www.usccr.gov](http://www.usccr.gov), and by request from Publications Office, U.S. Commission on Civil Rights, 624 Ninth Street, NW, Room 600, Washington, D.C. 20425, (202) 376-8128, [publications@usccr.gov](mailto:publications@usccr.gov).

## Summary of Proceedings

### Professor Richard Sander

Professor Sander made the following assertions about American law schools and stated their cause to be the use of racial preferences in admissions:

- Half of African-American students are in the bottom ten percent of their law school class at the end of the first year.
- African-Americans have 2.5 times the drop-out rate of their white counterparts; four times the initial bar failure rate; and six times the chance of never passing the bar.
- Two-thirds of black students who drop out after the first year are in the bottom five percent of their class.

Sander sketched out the relationship between race-conscious law school admissions policies and the above findings with research he presented in his 2004 *STANFORD LAW REVIEW* article, *A Systemic Analysis of Affirmative Action in American Law Schools*. He argued that higher education institutions are faced with the educational achievement gap between whites and Asians on one hand and African-Americans and Hispanics on the other, as reflected in test scores. According to Professor Sander, the median black/white gap among law school applicants was about 170 points in the early 1990s and is about 135 points today on a 1000-point academic scale that Sander uses throughout his paper. Law schools' admissions offices, Sander claimed, adopt race-conscious policies to factor out this gap. Racial preferences awarded by top tier law schools absorb all the African-American applicants that would be admitted in a race-neutral system to second-tier schools. The lower tier law schools must therefore duplicate these preferences or face admitting no African-American students. This "cascade effect" pushes all African-American law school applicants up a tier or two in the law school hierarchy, often at law schools with academic standards far above the educational attainment level of the applicant.

Thus, African-American law students often suffer from academic mismatch that has significant results, according to Sander. First and foremost is that there is a racial disparity in academic performance in law school. As a result of these disparities, according to Sander, demoralization and negative stereotyping set in. Furthermore, law school grades have more of an impact on passing the bar and securing a long-term career than does the eliteness of the law school. Employers now give more weight to academic preparation as reflected in law school grades than they do to school eliteness. On average, African-American graduates who finish law school and gain admission to the bar are earning \$10,000 less per year because of preferences than they would in a race-neutral regime.

Sander offered the following policy recommendations to address this problem:

- Congress should require institutions of higher education, including law schools, to provide detailed data on how they make admissions decisions and disclose the way they take race into account in these decisions. These requirements are embodied in pending legislation proposed by Representative Steve King (R-Iowa) in his Racial and Ethnic Preference

Disclosure Act. The requirements would also be similar to those imposed on financial institutions under the Homeowner Disclosure Act and the Community Reinvestment Act.

- The Commission should endorse a national exit exam for college undergraduates to elicit data on whether an academic mismatch occurs at the undergraduate level.
- State Bars should be encouraged to provide additional disclosure on bar passage rates disaggregated by race and ethnicity to detect any racial trends in bar admissions.
- The Commission should appoint a panel of social scientists to review the research available on the impact of racial preferences in American law schools on academic performance, bar passage, and long-term career success of African-American law students.

### **Professor Richard Lempert**

Professor Lempert first responded to Professor Sander's testimony by presenting findings of a survey that he and several colleagues conducted of African-American graduates of the University of Michigan Law School from a 27-year period. The great majority of these students were admitted with substantially lower admissions credentials because of racial preferences. He and his colleagues found that, in the 1970s, 98.5 percent of respondents to this survey graduated and passed the bar; for the 1980s, 95.1 percent; and for the 1990s, 96.1 percent. They also found that race, ethnicity, and LSAT score had no role in predicting post-law school income or career satisfaction. Professor Lempert thought these survey results showed that gaps in applicant credentials do not necessarily result in poor achievement, contrary to Sander's hypothesis.

Lempert stated that affirmative action at top law schools was worthy of examination since those schools are such a gateway to leadership opportunities. Sixty percent of all African-American law faculty attended the top 20 law schools, as did 40 percent of African-American judges and 50 percent of Latino judges and 75 percent of African-American partners at leading corporate law firms.

In his oral remarks, Lempert referred the Commission to his written testimony for his in-depth critiques of the reliability of Sander's findings, in addition to his published articles on the subject and to noted academics who disagreed with Sander's conclusion, namely Ian Ayres and Richard Brooks of Yale University, Daniel Ho and Michelle Dauber of Stanford; Jesse Rothstein of Princeton, and Albert Yoon of Northwestern, among others.

Lempert then turned to the possible effects of eliminating racial preferences from law school admissions. While Professor Sander predicted a 7.1 percent increase in the number of African-American attorneys as a result of this elimination, Lempert and others expect a substantial decrease in this number. According to one study Lempert and others



conducted that used some of Sander's methodological steps, the number of African-American law school applicants accepted for admission would have dropped by 14.1 percent in 2002, approximately 32 percent in 2004, and 29.4 percent in 2005. Lempert cited other researchers' work, using different methods, that showed a similar range of effects on the number of minority attorneys.

Nevertheless, Lempert stated that the academic performance and bar passage of African-American law students should be a cause for the Commission's concern. In part, he attributes these performance disparities to lower skill levels, as indicated by LSAT/undergraduate GPA index scores. According to Lempert, a low index score increases the risk of poor performance, but such indices are imperfect predictors of academic performance. Moreover, he stated that the data suggests the benefits of attending a better law school outweigh any mismatch effect as alleged by Sander, particularly for those attending the best schools.

Lempert further attributed the performance disparities to the greater financial need of African-American law students and outright discrimination. One reason why so few African-American students fail to pass the bar is that they do not graduate, and the most common reason for not graduating is unmet financial need, a sense of financial difficulty, or a sense that their law degree will not show financial benefits commensurate with the financial outlay for attending. He also attributed the performance disparities to "racially-related" causes, namely hostile or uncomfortable environments, stereotype vulnerability, discrimination, and the like.

Lempert opined that the cures for these trends lie in elementary and secondary education, not in higher education. He recommended improving the skills of African-Americans at all levels of education, even before their formal education begins. He recommended increasing financial support to African-American law students to curb attrition. He recommended creating a more welcoming and supportive environment at law schools for African-American students, which may entail more affirmative action.

In conclusion, Lempert referred the Commission to the work of Linda Wightman, former vice president at the Law School Admission Council (LSAC), who developed an empirical model to evaluate the likely consequences of ending affirmative action. Wightman's model analyzed the race of students admitted to a school based on a preference policy when their LSAT and undergraduate GPA predict admissions denial. According to the model 2,748, African-American students secured admission to law school in 1991 through racial preferences while in that same year, 6,321 white students secured law school admission through other preferences such as for alumni's children. Thus, according to Lempert, more than two times as many white students as African-American students would not have gotten their education but for some preference policy like the affirmative action that benefits minorities.

## Discussion

Commissioner Kirsanow asked Sander if he agreed with the *Grutter* and *Gratz* decisions. Sander replied that he did not because Justice O'Connor's empiricism was flawed. However, Sander stated that if he thought the effect of affirmative action really were a "feather on the scale," he would be somewhat agnostic about the decisions. However, he indicated that the University of Michigan practices affirmative action more mechanically and more vigorously at the law school level than the undergraduate level—if the law school and the college base admissions decisions on a 1,000 point scale, the college's racial preferences amount to a 120-point increase, while the law school's preferences amount to a 140-point increase. His research indicates that such results are typical of most law schools.

Commissioner Braceras asked Lempert about the possible negative effects to African-Americans if they were to attend less elite law schools. Lempert stated that professorships, the top positions at firms, and clerkships go to the students from the top schools. Students from elite law schools have higher incomes over their lifetime. Sander added that Harvard students, on the whole, are more talented than their counterparts at Boston College.

Chairman Reynolds asked Lempert why there should not be a single admissions standard for all applicants, as law schools currently absorb the costs of the social values underlying the use of preferences. Lempert stated that black students who see Michigan as a welcoming place are given a motivation to work hard, because they have a possibility of admission even if they do not have the same grades and SAT scores as their white counterparts. Sander responded by citing his 2004 Stanford Law Review article, in which he found that law firms seem to give grades more weight in hiring decisions than they accord to school elitence.

Chairman Reynolds stated that the problem of racial discrimination pre-exists a student's admission to law school and that racial preferences at that stage are a poor fix. Sander agreed, citing research indicating that, once seven factors involved in upbringing are controlled for, the effect of race washes out in later academic performance.

Commissioner Kirsanow hypothesized that racial preferences might be one cause of a hostile environment for minority students. He recounted that, while he was a guest speaker at the University of Michigan Law School, a number of African-American students revealed that they felt as if they did not belong at the school, once they realized that they were sitting next to white counterparts with better academic credentials. During that event, Commissioner Kirsanow stated that an African-American applicant to that school was 174 times more likely to be admitted than a similarly situated white applicant.

Vice Chair Thernstrom posited a tension between integration, diversity, and equality, specifically citing her own observations of social self-segregation of study groups and lunchrooms. She attributed this lack of integration to the use of racial double standards. She also agreed with Lempert that the achievement gap begins in elementary and secondary school, but added that education reform was a political problem, not an

educational one. She proposed random admission to combat the negative stereotyping that she attributes to racial preferences in admission.

Commissioners and Professor Lempert discussed the validity and transparency of the data available on the topic. Lempert pointed out that Sander conceded flaws such as ignoring selection bias in his own data. He alleged that Sander misinterpreted the meaning of “significance tests” in his data and that Sander did not present all of the diagnostics he should have presented with respect to certain logistic regression analyses. He referred Commissioners to his published works for further critiques of Sander. Vice-Chair Thernstrom and Chairman Reynolds expressed their belief that few scholars would be willing to support Sander’s research and conclusions due to the potential political backlash.

Commissioner Taylor asked Lempert if he were able to detail the costs, if any, of affirmative action in law schools in the same detail as he could with respect to its benefits. He also asked whether it was in the best interest of an African-American prospective law student and the African-American community for that student to attend an elite university as opposed to a second-tier university; whether it's better for that black student and, therefore, better for the black community. Lempert responded that African-Americans attending the top 25 law schools pay no more costs than their white classmates in terms of failing out or passing the Bar. Sander countered that, according to a first choice/second choice analysis conducted by him and his colleagues, students who opted to attend schools that were less elite than those to which they were admitted were about half as likely to fail the Bar and half as likely to not graduate than those students who opted to attend the more elite school. Lempert alleged that Sander’s study only took first time Bar passage rate into account and that the significant results disappear when you look at eventual Bar passage. He also said that the difference between first and second choice schools was unclear, since there is a higher percentage of “second choice” students in elite schools than “first choice” students. Lempert cited a 2006 study from Jesse Rothstein and Albert Yoon which found no evidence of mismatch for the top 20 percent of African-American law students and that a small proportion—approximately ten percent of the remaining eighty percent (or eight percent of the total)— of African-American law students with credentials below that range may suffer from mismatch effects.

Lempert reiterated his belief that the students in Commissioner Taylor’s hypothetical pay no costs greater than those borne by their white counterparts. He emphasized the benefits to these students—moving into positions in legal academia where they can be role models for the African-American community. According to his data, the legal profession is still highly racially structured, with ethnic attorneys more likely to serve people of their same ethnic group.

Lempert described some costs in Taylor’s hypothetical, specifically the dropout rates of African-American students at the third-, fourth-, fifth-tier law schools. According to Lempert, slightly over 50 percent of African-American law school drop outs were concentrated in the bottom three tiers. Such students drop out with significant debt and

limited career prospects. He also said a potential cost is stigmatization as an “affirmative action baby.” However, he said, African-Americans at University of Michigan are happy to be there, and more than half of the white students polled said that having minority students there added considerably to the value of their classroom education. In particular, he noted good in-class performance by African-American students, even those who do relatively poorly on the final exam, as contributing to the demise of stigmatization. The success of many notable African-Americans who benefited from affirmative action also helps break down stereotypes. He said that African-Americans who graduate from Harvard Law have a median income of \$312,000 after twenty years.

Sander cited an extensive data collection from LSAC that showed that the disparity in bar passage rates between ethnic groups was the same in the elite schools as it was in the less elite schools. He expressed concern that many African-American students arrive at law school with high expectations given the aggressive recruitment to attract them. Lempert responded that the percentage rates are misleading. While it is true that, among Michigan graduates in the 1980s, 99 percent of white graduates and 95 percent of African-American graduates passed the bar, this five-to-one ratio translated into a small number of people.

He cited other disparities—94 percent of African-Americans graduated from the University of Michigan Law School with debt in the 1990s and that average debt for them was \$66,000. Only 76 percent of white graduates in that time period left with debt and their median was \$43,000. He hypothesized that the difference in Bar passage rates might be that African-Americans often cannot afford expensive bar review courses.

Commissioner Yaki expressed his belief that being exposed to people of different racial and ethnic backgrounds in your peer group is a per se benefit for those in the training grounds for future leaders. He urged the panelists to continue their independent track of research and scholarship free of politicization.

Commissioner Kirsanow asked Sander and Lempert if they agreed that African-Americans are two and a half times more likely not to graduate from law school than whites. Lempert and Sander agreed that data available as of 1991 demonstrated this phenomenon, but Sander said more recent data indicates that graduation rates for African-American law students have been falling. Commissioner Kirsanow asked Sander and Lempert whether African-Americans were four times more likely to fail the Bar exam on the first attempt and if half of black students are in the bottom decile of their class. Lempert responded that this data comes from a subset of Sander’s analyses with which he has some disagreement. Commissioner Kirsanow then asked if racial disparities in attrition and Bar failure rates could be explained by factors other than racial preferences in admissions. Lempert responded that financial matters play a part and that preferential policies only come into play for students at the low-end. He did not attribute these gaps to a mismatch. Commissioner Kirsanow then asked if Lempert agreed that approximately 50 percent of African-American law students cluster in the bottom decile in terms of grade point averages at law schools. Lempert agreed that the data so indicates.

Commissioner Kirsanow asked Lempert if he thinks we will be able to erase the need for racial preferences in the next 22 years. Lempert responded that he did not think we would erase this need without heavy investment in elementary and secondary education. Commissioner Kirsanow then referred to graphs provided by Sander that suggested that the racial gaps in attrition rates, Bar passage rates, and academic performance were twice as large as could be explained by any factors other than preferential admissions. He then asked Sander how to explain that, given these disparities, African-American law students had starting salaries 6 to 9 percent higher than their similarly situated white counterparts. Sander responded that large firms and the government use preferential hiring policies.

Commissioner Kirsanow asked Sander what the basis was for extending racial preferences for another twenty-two years per *Grutter* when the initial moral imperative for the preferences—remedies for invidious and pernicious discrimination—is no longer present. He responded that a diversity imperative has replaced the “social reparations” imperative that underlay the introduction of racial preferences.

Commissioner Kirsanow asked Lempert to elaborate on the benefits of racial preferences to law schools and the benefits to the law professor in having a racially diverse class. Lempert responded that there is still a moral imperative for racial preferences, as invidious discrimination continues today as evidenced by wealth gap between African-Americans and whites and audit studies of car purchases, rentals, or employment of African-Americans relative to whites. The lack of racial and ethnic diversity ensures that issues of police brutality, racial profiling, or residential segregation are not discussed. Sander interjected that, at law schools, African-Americans are nearly as socioeconomically elite as their white counterparts. Thus, according to Sander, the diversity law schools seek is cosmetic.

Commissioner Kirsanow asked the panelists if they thought it would be useful to have statistics on the disparities between African-American and white students in terms of graduation rates and class percentiles more widely known in the interests of consumer protection. Lempert agreed in principle, but expressed concerns that greater availability would carry the risk of racial stigmatization and self-fulfilling prophecy and that the data is not stable. He advocated further research on the costs and benefits of the disclosure. Commissioner Yaki agreed with the concerns about self-fulfilling prophecy and said that greater investment in K-12 education should take place alongside this disclosure so as not to exacerbate performance disparities among ethnic groups.

Vice-Chair Thernstrom asked Lempert the reasons for the persistence of the dropout rates since the 1960s, especially given the greater difficulty now in failing out. Lempert clarified that he meant to refer to graduation rates in the 1930s. At that time, according to Lempert, admission to law school was fairly open, whereas much of it today is more selective and in part predicated on an LSAT score. As a result, failure rates are declining. Lempert described the relationship between admittee credentials and law school performance as possibly curvilinear—if a student has above a certain level of credential, that student will be able to make it in law school. According to Lempert, minorities

admitted by elite law schools pursuant to affirmative action are all above or almost all above that level. Lempert continued that some 2,700 African-Americans are “displaced,” that is, attending law schools into which they would not have gained given their credentials. Some 6,000 white law students were also displaced. Sander found this statistic misleading because white displacement is by half of a tier and African-American displacement is by two to three tiers.

Commissioner Kirsanow asked Sander what was a better predictor of Bar passage rate and future earnings: graduating at the bottom of a top-tier school or graduating in the middle of a middle-tier school. Sander replied that the latter generally leads to higher graduation rates, a higher chance of passing the Bar on the first attempt, and, eventually, higher earnings. Commissioner Kirsanow asked Sander if, based on the statistics he has seen, he believed that any schools were complying with the dictates of *Grutter*. Sander replied that predominantly minority law schools were probably complying. He opined that law schools subject to Proposition 209 in California probably use smaller preferences than before the proposition’s enactment, but that these make up a small minority of law schools.

Commissioner Melendez inquired whether the panelists knew if Native American law students followed the same pattern as African-American law students. Sander replied that statistical analysis is too difficult in the context of Native Americans because their numbers are too small. He added that the numbers of Hispanics are large enough for statistical analysis of this type, and indicated that that the racial preferences extended to Hispanics are about half as large as those extended to African-Americans. Likewise, the effects of these preferences on grades and Bar passage are about half as large but are still substantial.

### **Dean Steven Smith**

Dean Smith addressed the Commission on the standards proposed by the Council of the Section on Legal Education and Admissions to the American Bar Association by which law schools would be accredited by the ABA. Proposed Standard 211 would require a law school seeking accreditation from the Council to demonstrate by “concrete action” a commitment to having a student body that is diverse with respect to race, gender, and ethnicity. Furthermore, the Council proposed interpretations to this standard to guide law schools in implementing Standard 211. First, Interpretation 211-1 would put law schools on notice that the “[t]he requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school’s non-compliance with Standard 211. This interpretation would require “law school[s] ... subject to such constitutional or statutory provisions” to demonstrate this commitment to diversity by “means other than those prohibited by the applicable constitutional or statutory provisions.” Second, Interpretation 211-2 permits such law schools, “[c]onsistent with the U.S. Supreme Court’s decision in *Grutter v. Bollinger*,” to use race and ethnicity in their admission process to promote equal opportunity and diversity. Lastly, Interpretation 211-3 states



that Standard 211 “does not specify the forms of concrete actions a law school” must take to demonstrate this commitment, but does state that the “[t]he determination of a law school’s satisfaction of such obligations is based on the totality of the law school’s actions and the results achieved.” 211-3 also provides examples of concrete action—“a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.”

Dean Smith justified the imposition of this standard and its accompanying interpretations on educational grounds. According to Dean Smith, when students have the greatest variety of backgrounds, classroom discussion is livelier, more spirited, and more enlightening. For similar reasons, it is important for law schools to commit to having a diverse faculty and staff.

The standards give law schools latitude to meet this requirement with means other than race-conscious admissions. They are allowed to implement this commitment in a manner that accounts for each school’s mission, circumstances, and the laws to which it is subject. Dean Smith then clarified that the proposed standards do not impose significant new requirements on law schools. Rather, the proposed standards continue the requirements of the existing accreditation standards while providing greater clarity and more guidance. Since 1980, the ABA has required law schools to demonstrate a commitment to providing full opportunities for the study of law and entry into the legal profession by members of minority groups. Secondly, he clarified that the revised standards and interpretations do not require law schools to consider race or ethnicity. Rather, Interpretation 211.2 states only that law schools may use race and ethnicity in their admissions decisions in a manner permitted by the Supreme Court in *Grutter*.

He also clarified that the proposed standards and interpretations do not establish or mandate a system of quotas for minority enrollment. However, he conceded that Interpretation 211-3 indicated that the results that a law school achieves in diversity are relevant. According to Dean Smith, these results would not be dispositive on the question of the law school’s commitment to diversity. Rather, it would be only part of the wide range of facts that would be considered in gauging this comment. Finally, he clarified that the revised standards and interpretations do not require law schools to violate state or federal laws. Law schools that are subject to a constitutional or statutory prohibition against race conscious selection policies would have to demonstrate the commitment that the standards require by means other than those prohibited by the applicable constitutional or statutory provisions.

To emphasize that point, the Council added the following sentence to Interpretation 211-1: “A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions.”

Dean Smith concluded his presentation with his belief that the proposed standards implement three values that should have broad consensus in legal education and in society. First is the importance of diversity, since it enhances the education of the next generation of our profession inside and outside of the classroom. Second is that flexibility is appropriate in implementing a commitment to diversity. Third is that law schools, consistent with *Grutter*, are permitted but not required to use race as a factor in admissions decisions.

### **Professor David Bernstein**

Professor Bernstein voiced two objections to the proposed accreditation standard. First, he alleged that the standard would require law schools to act unlawfully. Second, he claimed that it would require law schools to act unwisely to the great detriment of minority students.

He elaborated on the first objection by taking issue with the use of the word “purports” in Interpretation 211-1. According to Bernstein, this word denotes that such laws are invalid and must be challenged. Also, the interpretation states that these laws are not an excuse for schools' noncompliance with Standard 211. Moreover, the interpretation leaves room for accreditation officials to require law schools to adopt or increase preferences in those jurisdictions without such laws. Bernstein stated that, based on his conversations with several law school deans, law school accreditation officials were doing just that. He expressed his concerns that, with less ambiguous textual ground for such practices, such practices might continue or become worse.

Bernstein provided further evidence that the American Bar Association wanted law schools to violate the law. Interpretation 211-2 states that law schools may use race and ethnicity in admissions “consistent with the Supreme Court's decision in *Grutter*” to promote equal opportunity and diversity. Bernstein made it clear that *Grutter* did not permit law schools to engage in racial preferences for equal opportunity purposes or to remedy general discrimination. Furthermore, law schools' discretion to do so is limited for diversity purposes, as Justice O'Connor wrote that the Court deferred to law schools' educational judgment that such diversity is essential to its educational mission. According to Bernstein, not all law schools think it is essential to their educational mission to have diversity. The interpretation would substitute the ABA's judgment for that of the individual law school in crafting its educational mission.

Finally with respect to the lawfulness of the proposed standards, the means that Interpretation 211-3 offers to demonstrate a commitment to diversity—special recruitment efforts, programs of special financial aid, special programs that meet the needs of minority students entering into law school—would require law schools to spend hundreds of thousands of dollars every year. Such an expense would push law schools to use relatively less expensive preferences to achieve the diversity results deemed relevant by the ABA.

Bernstein then turned to the impact of these standards on racial minorities in law schools. According to Bernstein, approximately 42 percent of African-American students who matriculated law school never become lawyers. In the bottom two-thirds of law schools, 52 percent of African-American matriculants never become lawyers. At the lowest ranked law schools, especially those in states with difficult Bar examinations, the percentage is greater. He mentioned that, based on conversations he has had with people knowledgeable about law school admission statistics, many law schools have an informal or formal LSAT cut-off point under which they will not admit students, unless they are pursuing diversity, in which case, the cutoffs are often put aside.

Bernstein concluded his presentation with a reference to ABA's existing Standard 501(b), which prohibits law schools from admitting applicants who are unlikely to succeed in law school and the Bar exam. According to Bernstein, this standard provided law schools a safe harbor from adopting racial preferences. Now, however, a proposed Interpretation 501(2) would require law schools' admissions policies to be consistent with the diversity standard. It would seem that, under this interpretation, when presented with a conflict between Standard 501(b) and the proposed diversity standard, the law school would have to choose the latter.

## **Discussion**

Commissioner Kirsanow asked Professor Bernstein whether he thought there was any way that law schools could comply with both the proposed diversity standard and with Grutter, assuming that law schools simply used race as a "thumb on the scale" in terms of admissions. Bernstein responded that law schools would have to lower their admissions standards and admit students by lottery if they were to use race as "plus factor" a la *Bakke*.

Commissioner Kirsanow then asked all four panelists if they knew of any empirical data that supported the theory that classroom diversity creates a more enlightened atmosphere, prompts more spirited classroom discussion, and produces better lawyers. Professor Lempert responded that his survey of University of Michigan alumni indicated that over 50 percent of the class in the 1990s had stated that classroom diversity had enhanced their educational experience. Commissioner Kirsanow mentioned a study that linked lower satisfaction with educational experience and greater racial diversity. Lempert took issue with that study, as he alleged that it did not control for other factors, such as quality of the school. Sander stated that there is no study which has controlled for quality of school and resources.

Commissioner Kirsanow asked Dean Smith if the ABA would support disclosure to students of the mechanisms by which they achieve their diversity goals. Dean Smith responded that such disclosure might be difficult for law schools since they might not be mathematical in the way in which they admit students. Chairman Reynolds contested that claim with his observation that, year after year, these schools admit the same numbers of minority applicants, which indicates that they are intentionally aiming for a

particular numerical range. Given that admissions is rolling throughout the year, Chairman Reynolds mused that once the target numbers of ten to thirteen percent are achieved, the use of racial preferences in admissions falls off. Dean Smith believes that the applicant pools are similar year-to-year, which explains the consistency, although he conceded that admissions officials review data of the admittee pool from week to week throughout the year.

Professor Bernstein responded that, based on his observations, most law schools outside of the elite use a formulaic method of admitting students based on LSAT scores and the GPA. He also mentioned that George Mason cannot look for students near its statistical range or otherwise it would not have any African-American students. According to Bernstein, George Mason once had a race-blind admissions policy and was able to attract a few black students who wanted to attend a law school where they knew that their presence would not be questioned. Now, he stated, the ABA formally and informally tells law schools that they cannot have such a policy.

Chairman Reynolds asked if this was an infringement on academic freedom, and Bernstein responded that it was. Dean Smith responded that, under Interpretation 211-3, the ABA does not specify what concrete actions law schools would have to take to fulfill their equal opportunity and diversity obligations. Chairman Reynolds pointed out that, in *Grutter* and *Gratz*, arguments were made that, without racial preferences, many schools would not have racial diversity. He asked what other methods could be used. Dean Smith pointed to California law schools as a model for what could be used apart from racial preferences in admissions to create diversity, as they are subject to Proposition 209 which forbids such preferences. Commissioner Kirsanow responded that he is aware of data that suggests that California law schools are not complying with Proposition 209.

Chairman Reynolds posited a hypothetical institution which did not discriminate on the basis of race and one which did not hold diversity as a compelling interest. He asked Dean Smith how such a school would fare under the proposed diversity standard. Dean Smith responded that such a school would have a problem demonstrating a commitment to diversity. Professor Bernstein pointed out that it is plausible that many schools may find a conflict between embracing diversity in racial and ethnic terms and their educational judgment to admitting only qualified students.

Commissioner Braceras turned to the meaning of “diversity,” noting that common parlance seems to restrict the meaning to racial and ethnic diversity and does not include viewpoint diversity. She also criticized panelists for using the terms “equal opportunity” and diversity interchangeably. Since “equal opportunity” refers to procedural fairness and “diversity” refers to the mix of students that emerge from that process, the terms are not synonymous. She asked whether a professed “commitment to diversity” is not actually a euphemism for a commitment to proportional representation—to having a student body that looks a certain way. Dean Smith responded that the ABA defines diversity as including but not limited to race, ethnicity, and gender. He also assured the Commission that the ABA accreditation committee would not only consider results in its evaluation of a school’s commitment to diversity. Commissioner Braceras opined that a

school using race-neutral means to achieve diversity would likely not satisfy the ABA's standards. Dean Smith responded that the ABA accreditation committee would deem a school's efforts very relevant in evaluating its commitment to diversity.

Commissioner Braceras asked whether a school that sought diversity of viewpoint in order to satisfy its educational mission, but did not concern itself with the racial make-up of the student body, would have problems complying with the proposed standard. Dean Smith stated that the school would have to show other efforts to achieve diversity consistent with the proposed standard. Commissioner Yaki stated that he does not believe that the proposed standard would require any race-conscious or race-neutral remedies. He returned to the issue of academic freedom and pointed out its limits. For example, the Commission believed that it could not protect incidents of anti-Semitic harassment. Professor Lempert responded that the ABA is violating academic freedom and *Grutter*, as the university must determine, through its educational judgment, that diversity is crucial to their students' education.

Commissioner Yaki stated that academic freedom would not divest law schools of their responsibilities to provide equal opportunity. Professor Lempert agreed that academic freedom has limits—for example, schools cannot divest themselves of their libraries and retain accreditation. According to Lempert, if there was strong research demonstrating that diversity contributes to the quality of education, then the academic freedom argument in this context would be weakened by a legitimate educational reason for racial preferences. He added other reasons why the ABA might wish to mandate diversity in legal education—to maintain a diverse legal profession and to counter past racism in the profession. Professor Sander countered that, if law schools abandoned racial preferences, 86 percent of black students would still attend law school. The use of preferences simply shifts which law school they would attend. He recommended that individual schools, and not the ABA, should make the judgment on defining diversity and gauging the impact on educational outcomes and environment.

Chairman Reynolds asked how the proposed diversity standard would affect the law school at Howard University. He also asked that, with respect to diversity among faculty and staff, how private law schools could use preferences without violating the law, since there are different legal standards permitting the use of racial preferences in employment. Dean Smith stated that there are no specific standards within the standard for hiring faculty and staff. Professor Bernstein advised Commissioners that it was common knowledge in legal academia that ABA accreditation was results-oriented in its approach to racial diversity. That is, the ABA would place a law school on probation if it were to adopt race-neutral admissions. According to Bernstein, the proposed standards simply formalize that strategy. Commissioner Yaki professed his belief in the importance of having a diverse Bar and that the proposed diversity standards might be a way of simply "balancing things out."

Vice-Chair Thernstrom questioned the necessity of the proposed standards, since she believed that most law schools would not give up their racial preferences. Professor Bernstein disagreed and offered his observations that officials at lower ranked schools

would prefer mitigation or elimination of racial preferences. According to Bernstein, these officials are disappointed at seeing their institution admit a certain number of African-American students because of diversity or ABA pressure and have these admittees fail out, struggle, graduate at the bottom of the class, or fail the Bar exam. Dean Smith objected that the standard does not require the use of racial preferences. Commissioner Braceras countered that the standard must require preferences as it highlights the importance of results.

Vice-Chair Thernstrom mentioned that, in the *Grutter* litigation, many law schools submitted briefs arguing that race-neutral admissions would not achieve meaningful diversity. She asked how these schools and those in states which prohibit racial preferences can satisfy the proposed standard if it does not mandate preferences. Dean Smith responded that law schools would have to be more creative in attracting diverse student bodies. Professor Bernstein reiterated that there is no safe harbor in the proposed standards and its accompanying interpretations—a law school that complies with Interpretation 211-3 but does not achieve certain results is not guaranteed of meeting the proposed standard. Dean Smith responded that there are no guarantees in most accreditation decisions.

Commissioner Kirsanow asked Dean Smith if the ABA would favor requiring law schools to disclose bar passage rates, graduation rates, student loan default rates, and grade point averages disaggregated by race so that applicants can get a better picture of how their ethnic group fares at a particular school. These disclosures would resemble those sought in the Racial and Ethnic Preferences Disclosure Act proposed by Representative Steve King and distributed to panelists. Dean Smith believed that, while such a question was worthy of consideration, the data was difficult to obtain. He mentioned that the ABA had already asked for some assistance from the National Conference of Bar Examiners for some of the data. Commissioner Kirsanow asked whether it would be helpful to ask law schools to disclose the weight they accord race or ethnicity in their admissions decisions. Dean Smith responded that most schools would likely say that they cannot provide a specific weight for it.

Professor Bernstein argued that disclosure need not be disaggregated by race. Rather, he said disclosure should at a minimum show the correlation between a student's LSAT score and first year grades. He stated that African-American law students suffer the most as a result of racial preferences, as academic struggle and often failure prevents them from pursuing other careers where they could be successful. Furthermore, bad grades are discouraging to students; professors have long noted that class participation drops after students receive their first semester grades. Bernstein quoted a letter he found on the Internet from a University of Colorado law student who had a 2.5 GPA and had to repeat a year of law school to underscore this point. The letter stated that, while it is true that students from all races who have disadvantaged backgrounds with relatively low academic credentials have performed exceptionally well inside and outside the classroom, this does not abolish the university's equitable duty to give under qualified students information that's particularly relevant to their situation. The student states that,



she would gladly exchange her University of Colorado law degree for one from a Tier 3 school as a result.

Chairman Reynolds asked panelists what they thought of the disclosure proposed by Professor Bernstein. Professor Lempert indicated that undergraduate GPA could predict minority student success but not white student success. Dean Smith stated that Bar passage rates as a function of GPA and LSAT are difficult to calculate, given the huge variance in difficulty among different states.

Commissioner Taylor conceded limits on the ability of law schools to collect certain data, but expressed concerns that encouraging diversity without exploring its possible negative outcomes violates the “do no harm” principle. He expressed his belief that it is important to know these outcomes, especially when 52 percent of African-American law students in the bottom-tier law schools fail out. He warned that, if the ABA is unaware of the negative outcomes from its policy, it should not advocate for affirmative action. Dean Smith stated that many accreditation standards are written without assessing the benefits and disadvantages. Professor Lempert interjected that the problem is not the lack of data in this context, but with significant statistical error in the data which renders questionable its predictive value for an incoming law student. However, given this irreducible error, Lempert conceded that there would be some value disclosing any correlation between LSAT/GPA and academic performance, but not disaggregated by race. Commissioner Taylor asked Dean Smith why such data was not part of the ABA’s standards. Dean Smith responded that he would ask the ABA’s questionnaire committee to consider integrating these disclosures as part of the ABA’s Standard 509 concerning consumer information.

Professor Bernstein mentioned that ABA Standard 501(b) required law schools to only admit students who are capable of satisfactorily completing its educational program and being admitted to the Bar. According to Bernstein, under the proposed standard and its accompanying interpretations, law schools would not be allowed to admit white students with a low chance of success, but would be obligated to admit African-American and Latino students who are not likely to succeed.

Commissioner Braceras asked about the rationale for changing Standard 211 to include diversity along with equal opportunity. Dean Smith responded that a consensus has emerged in legal education over the last 15 years about the importance of classroom diversity. He admitted that there are not strong empirical data or studies that demonstrate the value of diversity. Commissioner Braceras reiterated her view that, under the proposed standard, “diversity” is an outcome-oriented standard. She stated her opposition to any results-driven approach on the ground that it would inevitably lead to quotas in pursuit of proportional representation. Dean Smith responded that the results are one means of measuring a school’s commitment to diversity. Chairman Reynolds voiced his belief that there were not enough academically qualified African-American students available to satisfy the results as a result of past discrimination, rendering the results-oriented approach a “band-aid” on a bigger social problem.

Professor Lempert stated that, if he were an ABA accreditor, he would accredit a law school that made good faith efforts to achieve diversity even if they were not able to produce results. In his example, these efforts included special recruitment at minority schools, visiting historically black schools, and advertising that they wanted to have a diverse student body. Also in the example, the school had demonstrated that minority students who applied had no better than a five percent chance of staying in school. Chairman Reynolds asked Lempert whether law schools without a two-tier admissions process would be out of compliance with the proposed standard, and Lempert responded affirmatively.

Commissioner Taylor expressed his concern that accrediting teams do not ask questions related to the students who are not performing well in law school. Professor Bernstein pointed out that the proposed standards do not require the students who are admitted to law school to succeed there. Dean Smith countered that Standard 501 requires that the school not admit students who do not appear capable of succeeding with the academic program and being admitted to the Bar. He added that the accreditation teams examine attrition rate, academic support programs, and Bar passage rate.

Professor Bernstein claimed that many law schools over the years had been put on probation by the ABA for not using racial preferences aggressively enough. He wondered aloud whether law schools had been put on probation for having half or more of its African-American matriculants not become lawyers. He went on to state that George Mason University School of Law had been on probation for not meeting the equal opportunity standard until last year, but Dean Smith stated that it had not been on probation as far as he was aware. Commissioner Kirsanow asked if any law school had been put on probation by the ABA for that reason, and Dean Smith said that very few had. Dean Smith clarified that law schools are sometimes asked to report to the ABA the success rate of their students both in completing the academic program and in Bar passage.

Commissioner Kirsanow asked Dean Smith if he thought it was valuable for the ABA to promulgate a standard that would require the ABA to take a hard look at those law schools who do not graduate a certain number or percentage of students. Dean Smith agreed that there should be standards requiring that law schools prepare students to be admitted to the Bar and have academic programs to ensure they graduate law school. In fact, according to Dean Smith, Standard 501 does just that. He added, however, that there has been resistance to a bright line standard that would require a certain percentage of students meet that standard. In response to a question from Commissioner Taylor, Dean Smith stated that the ABA gathers some information on law students broken down by race pursuant to Standard 501.

Chairman Reynolds closed the discussion with his hopes that the panel debate was a step towards keeping the ABA honest. Dean Smith responded that he would welcome comments from Commissioners on the proposed standards.

## Testimony for the United States Commission on Civil Rights

*Richard H. Sander*

A scandal has been brewing in American legal education for the past generation. Since 1970, law schools have succeeded in making their institutions racially diverse. But the outcomes of black students diverge disturbingly from those of their classmates:

- At the vast majority of law schools, half of all blacks are ending up in the bottom tenth of their class.
- Blacks are two and one half times more likely than whites to not graduate from law school.
- Blacks are more than four times as likely to not pass the bar on their first attempt.
- Blacks are more than six times as likely as whites to never pass the bar after multiple attempts.

And this was in the mid-1990s. Since then, all the available evidence suggests the problems have gotten substantially worse. As best as we can tell, today only about one-third of blacks starting law school will graduate, take the bar, and pass on their first attempt.

These statistics are shocking. Far more shocking, however, is that one of the principal causes of these disparities is the discrimination policies of law schools themselves – the practices of racial balancing under which law schools engage in uninformed and illegal social engineering to create student bodies at each law school that roughly reflect the overall racial composition of the law school applicant pool.

How did this sad situation come about? In this testimony, I will summarize some of the research results I published in the *STANFORD LAW REVIEW* in November 2004, in an article entitled *A Systemic Analysis of Affirmative Action in American Law Schools*. I will also discuss some of my follow-up work, and the implications of this work for current policy choices before the federal government.

### **The General Operation of Racial Preferences in Law Schools**

When law schools talk about race-based admissions preferences—something they generally discuss as little as possible—they make three claims: (a) the preferences are small and not automatic, (b) race is one of a myriad of factors taken into account to create a diverse class, and (c) everyone admitted is fully qualified to do well at the school. These were the central messages advanced by the University of Michigan Law School in their defense of affirmative action before the Supreme Court. I found in my research that all three claims were substantially untrue, both for Michigan and for law schools generally. More interestingly, I found that each law school follows such a similar pattern that a powerful “cascade” effect sets in, creating interesting collective action problems

for the system as a whole and for any school that wants to approach admissions less mechanically.

The problem every university faces is the gap in test scores and grades between whites and Asians on the one hand, and blacks and Hispanics on the other. On a 1000-point academic scale I use throughout my paper, the median black/white gap among law school applicants was about 170 points in the early 1990s and is about 135 points today. As you may recall, the Supreme Court issued two opinions in last year's affirmative action cases. In *Gratz*, the Court found that undergraduate college at the University of Michigan violated the constitution by awarding a fixed number of points to black applications. The Law School's admissions passed muster, according to Justice O'Connor's decisive opinion, because race there was part of a complex individualized assessment of each applicant - the opposite of a mechanical award of points.

Many of O'Connor's colleagues hinted that she was elevating form over substance. With good reason. Using logistic regression and other techniques, I estimated the weight given to race and to academic numbers by the College and the Law School. The Law School's admissions were more dominated by numbers, and the implicit "boost" given black applicants was larger (and as mechanical) as the College's system. The only substantive difference between the two schools is that the College took more account of factors like socioeconomic background, writing samples, and extracurricular activities - differences that should have made it more constitutional in O'Connor's eyes, not less. What apparently saved the law school was the way they talked about their admissions system, and perhaps the plaintiff's failure to adequately demonstrate its actual workings.

The Michigan law school admissions cycles litigated in *Grutter* (mostly the 1995 through 1999 cycles) are highly representative of practices at law schools nationally. I gathered data from seven other public law schools through FOIA requests, and analyzed another database that has data on 27,000 law students from the Class of 1994. At every law school, at least 80 percent of admissions decisions (and usually more like 90 percent) could be predicted by knowing the LSAT, undergraduate GPA, and race of the applicant. Nearly every law school used the same metric for white and black students, but either added points to eliminate the black-white gap in credentials or simply segregated admissions files by race. Nearly every school admitted black and white applicants at rates that were statistically indistinguishable. And in the 1990s, a virtually identical 170-point gap could be found between the credentials of the median white matriculant and the median black - a gap that reached from the most elite schools to the smallest regional schools (ironically, only the historically black law schools were exempt from this pattern).

Herein lies the collective action problem. The preferences awarded by the top tier law schools absorb all the black applicants that would be admitted, in a race-blind system, to second-tier schools. These schools must therefore choose between having essentially no black students or duplicating the types of preferences pursued in the top-tier. Nearly all the second-tier schools choose the latter course, thus putting third-tier schools into the same bind, and so on. The net effect of this system is to move nearly all blacks up a tier

(or two) in the law school hierarchy, thus placing nearly all blacks at an enormous academic disadvantage in the schools they attend. The only net addition of blacks to the system comes in the lowest-tier schools, and the black students they admit have such marginal academic credentials that they face long odds against ever becoming attorneys.

### **The Effects of Preferences on Grades, Graduation, and the Bar**

As I discussed above, a very large majority of American law schools essentially race-norm black and white academic credentials when they admit their classes. Since the black/white credentials gap in the applicant pool is quite large, this means a typical law school has very little overlap between the highest credentials of its black students and the lowest credentials of its white students. This wouldn't matter very much if, as critics have long argued, the LSAT and UGPA were poor predictors of law school performance. And it's true that, individual by individual, these credentials are only rough indicators of performance. But applied to groups they are extremely accurate.

Consequently, blacks as a group have academic trouble in law school in very consistent and predictable patterns. At American law schools that use large racial preferences, half of all black students end up in the bottom tenth of their first-year class. Put a little differently, the median black student performs in the first-year at about the 7th percentile of the median white student. The gap is statistically no different in legal writing classes than in classes with timed exams. And, when we adjust for dropouts, the black-white gap gets slightly wider over the second and third year of law school.

It's important to note that this performance gap has nothing to do with race per se; whites who attend law schools where their credentials are far below most of their peers have pretty much the same types of troubles. The performance gap is a function of preferences. (Now, it's true that the preferences come about in the first place because of the black/white credentials gap - but that is another story, which I'm happy to address later if readers are interested.) There is no credible evidence I've seen that, if schools used race-blind admissions, blacks would underperform whites at all.

The most obvious consequence of the grade gap in law school is that blacks are expelled, or drop out, at much higher rates than whites (19 percent of blacks don't complete law school compared to 8 percent of whites). Almost all of the attrition is among students with very low grades. The more serious consequence is that students at the bottom of the class apparently learn less than the same student would learn at a lower-tier school where the student was closer to the middle of the class. This is what's known as the "mismatch effect."

A number of studies of college students have found various types of mismatch effects. Black law students who go to schools where their credentials are far below most of their classmates are less likely to graduate, more likely to switch out of science majors, and more likely to abandon aspirations for an academic career than blacks who attend college where their credentials place them closer to the middle. These studies have been

hampered, however, by the absence of any general test that college students take after graduation; no one could demonstrate that blacks actually learned less at more elite schools.

For my research, I was able to capitalize on a massive database compiled by the Law School Admissions Council in the 1990s, which tracked law graduates through up to five attempts to pass the bar. Bar exams vary state by state, but they have much in common and there are ways to control for the variations. I found that law school grades predicted bar passage rates far more powerfully than school eliteness did -- it was more important to be near or above the middle of the class than at a higher-ranked school -- and, again, this was equally true for blacks and whites. However, since the preferences system pushes most blacks to attend more elite schools, the tradeoff has devastating effects on black bar passage. Blacks are 50 percent to 100 percent more likely to fail the bar on their first attempt than are whites who started law school with identical credentials. Combined with the admission, at the bottom of the law school hierarchy, of blacks with very weak academic backgrounds, one finds that nationally, blacks fail the bar at four times the white rate.

Taking the graduation effect and the bar effect together, one finds that only 45 percent of blacks who started law school in 1991 graduated and passed the bar on their first attempt (compared to 80 percent of whites). Again, this is not a "racial" effect, but a preferences effect. I find in my analyses that the graduate-and-pass rate for blacks would rise to 64-70 percent in a preference-free system -- still a little lower than the white rate, but only because the distribution of black credentials is lower than the white distribution, and not because of things law schools are doing to make the credentials gap worse.

### **Black Law Graduates in the Job Market**

There was already some awareness before *Systemic Analysis* that for some reason blacks were having exceptional difficulties with the bar, though most of my colleagues were surprised by their scale and by the tendency of preferences to exacerbate existing gaps. But it has been almost universally believed that an unmitigated blessing of racial preferences, from the perspective of black beneficiaries, is the entrée preferences give to good jobs. Since employers like to hire new attorneys with famous name-brands, giving blacks boosts into more elite schools is thought to enhance greatly their marketability and, eventually, their power and position in the legal hierarchy.

A new database that I describe in my article provides the first nationally representative data on young lawyers and their jobs. Although the data is not perfect, it makes it possible to weigh the effect of over a dozen background factors in shaping the types of jobs new lawyers get. Analyses of the data show, quite strikingly, that employers care — and care a lot — about how job-seekers did in law school. Law school prestige is important, but for law graduates as a whole, good grades are a much more powerful predictor of getting a higher-paying job than the eliteness of one's school.

What this implies about racial preferences is not completely obvious. One needs to estimate both how much of an "eliteness" boost the typical black applicant gets in the admissions process, and how much the average black student's law school GPA would go up if admissions were race-blind and the student went to a lower-ranked school. Both calculations are difficult, and subject to some debate. That said, I think the general pattern is fairly clear. Anywhere outside the most elite schools, new black lawyers are hurt by preferences more than they are helped. For a typical black graduating from a middle-ranked law school, the grades/prestige tradeoff that goes with affirmative action lowers her earnings by about twenty percent.

I found that at the most elite (top ten) law schools, blacks gain enough from the enhanced prestige of their school to roughly offset the grade disadvantage. This seems intuitively plausible, too. Yale, Harvard and Stanford are universally known as blue-chip schools, while many employers won't know what distinctions to draw between Fordham, Iowa and Case Western. And it is probably true that some very elite employers largely limit recruiting to the top ten schools. But even at the top, I was unable to find a clear net plus for blacks from preferences — just a wash.

One might suppose that some employers use grade cutoffs, in part, as a device to discriminate against minority job candidates. This may be true for some, but the general pattern is just the opposite: legal employers pay a premium to recruit junior black lawyers. In other words, when one controls for lots of background characteristics, new black lawyers earn seven to nine percent more than other lawyers with comparable backgrounds (I found no similar premium for Hispanic or Asian attorneys). Blacks with high GPAs do extremely well in the market regardless of where they went to school. But there's the ironic rub. Law school preferences create a situation where high-GPA blacks are a rare commodity. Blacks with very low GPAs - or even worse, blacks who have failed a bar exam once or more - are very common, and they are penalized substantially in the job market.

One by-product of this state of affairs is the large concentration of black lawyers in government and in solo practice. Law school surveys show that blacks are as interested as anyone else in working in firms. But, as I show in my new article *The Racial Paradox of the Corporate Law Firm*, blacks are either passed over by private firms or hired with such large preferences that they have great difficulty maintaining their paces in these firms. Black law graduates with grades at the middle of their class or higher tend to have successful careers; blacks as a whole tend to have declining prospects and relative incomes as their careers progress.

My findings about the job market tradeoff between school eliteness and grades have implications for all law students, not just blacks. The implication of my findings is that going to the best law school one gets into - a strategy almost everyone seems to follow - may not be a very good strategy at all. It is important for students to realistically assess how well they will do at the schools that will have them, and to pick a school where they are likely to be at least in the middle of their class. Middle- and low-tier law schools,

under this view, deserve a lot more respect than the very hierarchical world of legal education tends to accord them.

### **What Would the Black Bar Look Like With a Reduction or Elimination of Law School Racial Preferences?**

Perhaps one of the reasons that few legal academics have delved very far into the issue of law school racial preferences is the widespread assumption that, whatever the other costs and benefits of the system, admissions preferences are the only way to racially integrate the bar. The claim that has been repeated many times - and which figured prominently in the Grutter briefs -- is that black enrollment in law school would drop 50 to 90 percent if preferences were abolished. Since a decline of that magnitude seems unimaginable, so does a serious questioning of admissions preferences.

In my research, I found that the usual method academics use to project admissions in a race-neutral world is seriously flawed. Most such projections assume that minority students will continue to apply to the same schools - and only those schools - if preferences disappear. But if preferences are large, and minorities (blacks in particular) take preferential policies into account in deciding where to apply, then it is necessarily the case that minority applications will overwhelmingly be rejected in a race-neutral world.

If one instead asks what proportion of the black applicant pool would be admitted to some law school under a race-blind system, one gets a much rosier result. A 2003 study by Dr. Linda Wightman (who headed LSAC's research operations for many years) found that 86 percent of blacks admitted to law school in 2001 would have qualified for some law school under a race-blind system. That number has risen sharply over the past decade, because of a steady rise in the number of black applicants and a gradual but steady narrowing of the black-white credentials gap.

Now, recall that in my research I found racial preferences tend to systematically lower black performance in law school, black graduation rates, and black rates of success on the bar exam. Only 45 percent of entering blacks under the current system graduate and pass the bar exam on their first attempt; another 12 percent pass the bar on some later attempt. I estimate that the 45 percent figure would rise to 64 to 70 percent under a race-blind regime. If the pool of entering black law students shrinks a little, but their survival rate rises sharply, it's not hard to see why we might well end up producing more, not fewer, black lawyers in a race-blind system. My best guess is that the total number of blacks passing the bar on their first attempt would rise about 22 percent in a race-blind system; the number passing after multiple attempts would rise 9 percent.

The emphasis here should be on the word "guess". Obviously, no one knows what would happen to black interest in attending law school in a world without preferences. There might be a surge of interest in a law school world where blacks perform much better,



have much higher chances of success on the bar, and dispense with any stigma from affirmative action. There could be an erosion of interest if blacks are faced with attending less elite schools or if many blacks view the end of preferences as a signal that they are unwelcome. I would hope that my findings, and those of other researchers, would reassure black applicants that going to less elite schools is an excellent career move for them, but of course no one knows. My simulations make the neutral assumption that the total volume of black applications won't increase or decrease.

The stories I've read about my article almost invariably cite the "9 percent increase in black lawyers" projection and infuse it with an air of artificial precision. That's unfortunate, though perhaps inevitable given the exciting aura such a claim carries with it. I'm really trying to make two other points. First, the end of preferences clearly no longer implies a massive hit to the production of black lawyers. The claims of a 50 to 90 percent decline were misleading nonsense. (My most vocal critics are now suggesting a 25 to 35 percent decline.) I will defend my 9 percent increase as a much better guess, but the important point is that the range of debate has shifted.

Second, there can be no question that in a race-blind system, the black bar would be healthier in a number of ways. The proportion of practicing black attorneys who have failed the bar at least once would fall from 22 percent to less than 10 percent, and black scores on bar exams (even for those who pass the first time) would be dramatically higher. The median earnings of black attorneys (at least for the early career years I have measured) would be significantly higher, and blacks would be distributed across job sectors in a way much more similar to white patterns. And of course, many, many fewer black law students would spend years earning a degree that failed to gain them admission to the profession. With all this said, I am not at all convinced that a total elimination of preferences is the best way to go. It's certainly the cleanest solution, and perhaps the only one that policy-makers could legislate. But I think there are a variety of alternatives worth exploring. Consider, for example, what I call the "4 percent solution." Suppose that all law schools agreed that, if they use racial preferences for blacks, they would not apply those preferences to more than 4 percent of the class. Schools would of course continue to admit all blacks who qualified without preferences, so the 4 percent would be a floor, not a ceiling.

The beauty of the 4 percent approach is that it breaks the cascade effect. The top ten law schools would presumably fully use the 4 percent, and would thereby preserve more racial diversity at the top than we would have (at least initially) in a race-blind system. But the next tier of schools would now have many black applicants who formerly went to top-ten schools; they would be significantly less reliant on preferences. In the third tier and below, preferences would be nearly irrelevant. Enough blacks would have shifted down-market so that schools would have very substantial black enrollments (often larger than current black enrollments) with minimal or no preferences.

This approach has several advantages. It effectively confines the aggressive use of preferences to the top tier of schools, where the academic mismatch is most benign in its effects. It blunts the fear of those who believe that the most talented blacks will shift to

other fields if they are unlikely to attend top-ten schools. It mitigates the diversity impact on the most elite classrooms, and provides some reassurance that pipelines of talented blacks into prestigious clerkships and legal academia remain open.

My hope is that, by developing some rough consensus on how to model the systemic effects of affirmative action, we can have a much richer dialog and can identify and test possible compromises, like the 4 percent solution, that break the ideological logjam.

### **Some Follow-up Research to *Systemic Analysis***

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

My paper tested this idea by comparing the outcomes of whites (who generally receive small or no admissions preferences from law schools) with blacks (who generally receive large, race-based preferences) to compare the outcomes of students who start with similar credentials. My results are robust and, as I’ll discuss in coming days, have withstood criticism pretty well. But I and everyone else agree that it would be preferable to compare blacks with other blacks. In other words, the ideal control group for examining blacks who receive large racial preferences would be a group of blacks who received smaller preferences, or no preferences at all.

As I discuss in my "Reply to Critics," such a comparison group not only exists – we now even have data on their outcomes. After "Systemic Analysis" had gone to press, Ian Ayres and Richard Brooks at Yale pointed out that the Law School Admissions Council, in one of the surveys administered to students in its Bar Passage Study (a major source for my paper), had asked the students in detail about how they applied to, and selected, the law school they attended. About ten percent of the 1800-odd blacks in their study reported that they had chosen to pass up their “first-choice” school even though they had been admitted to that school. Most of these students apparently went to a lower-choice school because of financial aid offers or for geographic reasons. The data suggests that these black “second-choice” students had credentials substantially closer to those of their classmates. Compared to other blacks, these blacks closed nearly half the credentials gap. These “second-choice” students are not a perfect control group, of course – no one was randomly assigned to attend schools offering different levels of racial preference – but it is about as good a chance to test the mismatch theory as we are likely to have for some time. If the theory is right, then the second-choice students should have better outcomes: higher graduation rates and more success on the bar. In the table below, I make predictions about how the blacks going to their second-choice schools should perform,

based on simple linear assumptions (if blacks going to second-choice schools close one-third of the credentials gap with their classmates, they should close a proportionate amount of the outcomes gap, once one controls for index differences).

If the theory is wrong, in contrast, then of course the blacks going to second-choice schools should have about the same outcomes as blacks who took full advantage of the preferences they were offered. In the data presented below, we'd expect the blacks going to second-choice schools to do slightly better, since they have somewhat better index scores than the average black law student (but this difference alone would only close about one-eighth of the gap in outcomes).

The actual outcomes look like this:

Outcome	White Success Rate	Success Rate for Blacks Other Than Those Going to Second-choice school	My prediction of success rates for blacks going to second-choice school	Actual Success Rate for blacks going to second-choice school
Graduate from Law School	92.2 percent	81.1 percent	86.3 percent	89.9 percent
Pass Bar on First Attempt	92.1 percent	59.6 percent	74.8 percent	80.3 percent
Pass Bar Eventually	96.8 percent	77.1 percent	87.6 percent	86.1 percent
Proportion of Original Cohort Becoming Lawyers	83.3 percent	57.0 percent	69.3 percent	69.0 percent

These are pretty remarkable results. The “mismatch” predictions are either right on target or, in some cases, too low. The differences in success rates between black law students generally and those going to their second-choice schools are huge. As with everyone else, the black second-choice students’ outcomes depend heavily on their grades. But these blacks are substantially less mismatched than other blacks, and they get substantially higher grades (they average about ten percentile points higher in their classes – another outcome exactly in line with predictions).

Many critics of *Systemic Analysis*, when they come to the question of why black law students have such low graduation and bar passage rates, either offer no explanation or rather wearily suggest a “something about race” problem. These data offer a very clear example of how well blacks can perform.

There are two sorts of objections one might raise about this data. First, are the samples involved large enough to produce statistically significant, reliable results, or could these results somehow be a fluke? And second, is there some way that the blacks going to

second-choice schools are systematically different (other than their slightly higher credentials) from other black law students? I think the answers are (a) the results are very reliable and (b) there are no alternative explanations for these results.

First, are the results significant and reliable? The database for this analysis includes 1,757 black students entering law school in 1991. Just under one-tenth of these students (171) were admitted to their first-choice law school but chose to go to another school. This is a pretty large sample, and it means that any outcome where the success rate of the two groups of blacks is more than six or seven points apart (e.g., 80 percent vs. 87 percent) will be statistically significant. Pretty much all of the outcomes for black second-choice students are, in fact, better than the outcomes for other black students, by at least that margin (and sometimes by as much as 20 percentage points). So the answer to the first question is a resounding Yes.

Second, are there differences between the black second-choice students, and other black law students, that might account for their different rates of success? There is one important difference – the blacks who chose their second-choice school have, as a group, slightly higher average credentials than other black students. That difference accounts for about one-seventh of their higher performance. Otherwise, the black second-choice students are largely indistinguishable from other blacks at the outset of their law school careers. They are about equally likely to have a parent who attended law school (6 percent for the second-choicers vs. 7 percent for other blacks), to have a “burning desire” to become a lawyer (30 percent vs. 30 percent), to be “very concerned” about getting good grades (89 percent vs. 88 percent), and to believe they experienced discrimination during college (68 percent vs. 64 percent).

The factor that makes second-choice blacks truly different is simply that they are less mismatched with their classmates than other blacks are. Because they have turned down their “first-choice” school, they are at a school where, on average, their “academic index” is only 93 points below the class mean, compared with a 140-point deficit for other blacks. This in turn means that they get significantly higher grades, on average – and that, in all likelihood, makes all the difference for their future outcomes.

Going back to the technical discussion, controlling for differences in entering credentials makes one of the six interesting outcomes for these two groups statistically insignificant (ultimate bar passage). But the other five (first-year grades, third-year grades, graduation rate, first-time bar passage, and rate at which matriculants become lawyers) are significant, and all six outcomes are much higher for the second-choice blacks. One can debate what the proper controls should be – which factors and comparison groups provide the fairest comparison – but I have seen no analysis in which the second-choice blacks do not substantially outperform the comparison black group, and in which at least some of the differences are highly statistically significant.

Moreover, since the findings of the mismatch theory came from an entirely different analysis (comparing blacks and whites), but predict with great precision the actual

improvements in outcomes for the black second-choice students, it would be hard to imagine a more compelling confirmation of its basic theses.

### **What Should Be Done? Policy Choices for the Civil Rights Commission**

I will sketch out here a few initiatives I would encourage the Commission to consider, and will elaborate on these points in revising this testimony after the hearing.

Law schools are not evil institutions. They are not seeking to create policies that deliberately harm minorities. They are, instead, captive to a dominant ideology that has become extremely entrenched. Each law school tends to assume that it is superior to any other school – especially those less elite – and that admitting students who would not qualify through race-blind processes is necessarily in the interest of those students. The dominant ideology also assumes that deliberate racial balancing is necessarily in the interest of all racial groups under all circumstances. School administrators and faculty tend to believe these things so fervently that they have been willing to covertly circumvent the law ever since *Bakke* to further these goals. The key to changing law school behavior is to make their behavior more visible, and to document more clearly the harmful effects of this behavior. Below are several steps that would mightily further this process:

- 1) The disclosure bill proposed by Representative King is entirely in the right direction and would have an enormous impact on this arena. King's bill in essence requires institutions of higher education to do the same things that banks and other financial institutions have been required to do since the 1970s under the Home Mortgage Disclosure Act and the Community Reinvestment Act – that is, document and explain their procedures in areas in which much independent evidence suggests an inappropriate consideration of racial factors.

I have sometimes been asked why I don't think the problems identified in my work are self-correcting. Since blacks can choose what law school to attend, aren't they weighing all of the relevant risks and making the choice that optimizes their future prospects? This might be true if minority law school applicants had accurate information about law school policies and the likely impact of these policies on themselves. But they don't. Law schools go to great lengths to disguise what they are doing. The Grutter case provided plenty to illustrate this pattern, and other law schools have behaved no differently. Indeed, blacks tend to assume that they are more qualified than their white classmates, because they are so assiduously courted by the schools that admit them. Data from the BPS shows clearly that blacks entering law school had higher expectations for their first-year grades than did whites. It would be hard to imagine more compelling proof that minority applicants lack accurate information about school practices and their effects.

I would add to King's proposal a requirement for law schools: that they disclose to their students the overall bar passage rate of all students taking the bar exam in

the school's home state, the correlation of bar passage with law student GPA, and the rate of success on the bar for each decile of students by initial academic index.

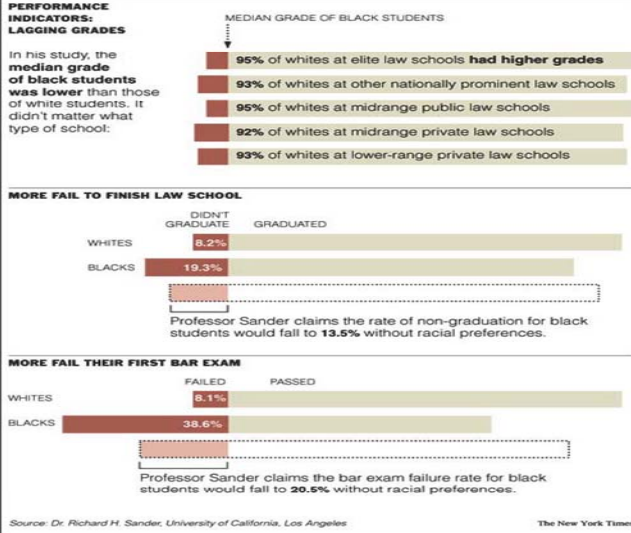
2) The Federal Commission on the Future of Higher Education is currently evaluating a variety of proposals to increase educational quality and set policy directions for universities nationwide. I would encourage the Civil Rights Commission to urge the Federal Commission to adopt recommendations fostering the development of a national exit examination for college graduates. The fundamental question before us at this hearing is whether racial preference policies cause minorities to learn less and thus get inferior educations when they are given large, artificial boosts to higher-ranked schools. We can observe this directly for law students through bar examination results, since nearly all law graduates take the bar. But we have no good way of examining these effects in the much larger realm of undergraduate education. Current studies look at graduation rates or long-term earnings, both of which provide some support for the mismatch theory. But we simply do not know how well colleges educate students, and we have no mechanism for holding them accountable.

3) The Commission can play a critical role by directly fostering research on the mismatch effect. In the wake of my work, many scholars have called for follow-up research to verify and extend my findings. It would be possible to assemble tests of the theory with more comprehensive data that would be credible and perhaps definitive. In any case, the organization of further research in this area, and the validation of existing work, could be of great value in reshaping the hearts and minds of those in the legal academy.

### A Hotly Debated Thesis

A study by Richard H. Sander, a law professor at the University of California, Los Angeles, has stirred outrage among supporters of affirmative action. He suggests that affirmative action in law school admissions sets up many black students for failure, moving them to more elite schools where they are more likely to perform badly.

Professor Sander estimates that 95 percent of black law school students benefit from racial preferences. Without race-based admissions, he believes, most of these students would go to lower-tier schools and get better grades. The basic numbers are not in serious dispute, but critics are challenging Professor Sander's interpretation of them.

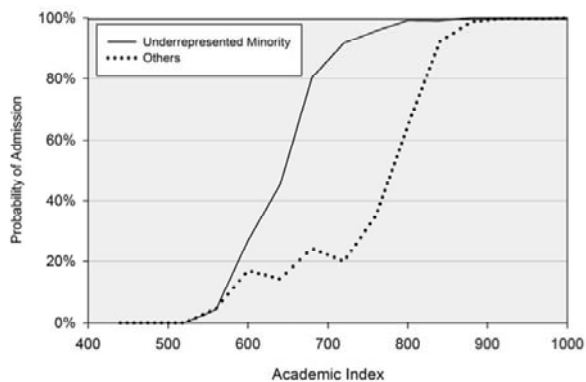


**TABLE 2.1: COMPARATIVE UNDERGRADUATE ADMISSION COHORTS AT THE UNIVERSITY OF MICHIGAN, NONRESIDENTS ONLY, 1999**

Admission Rate for Nonminority Applicants		Admission Rate for Underrepresented-Minority Applicants	
Index	Proportion of Cohort Admitted	Index	Proportion of Cohort Admitted
870 and Above	99.5%	750 and Above	99.3%
810-869	91%	690-749	93%
750-809	52%	630-689	64%
690-749	23%	570-629	29%
610-689	19%	Below 570	2.1%
570-609	10%		
Under 570	2.6%		

Source: Data disclosed by the University of Michigan Undergraduate College in the course of the Gratz litigation, available at <http://www1.law.umich.edu/sander/Data%20from%20ProceedingsSuppAnalysis.htm>. I assigned each applicant to the college an index based on a weighting of high school GPA and SAT I scores. The weights are based on a logistic regression of actual admissions decisions by the college, and give SAT I scores about 50% more weight than high school GPA.

**FIGURE 1: ADMISSIONS CURVES FOR UNDERREPRESENTED MINORITIES AND OTHERS FOR UNIVERSITY OF MICHIGAN UNDERGRADUATE COLLEGE, 1999**



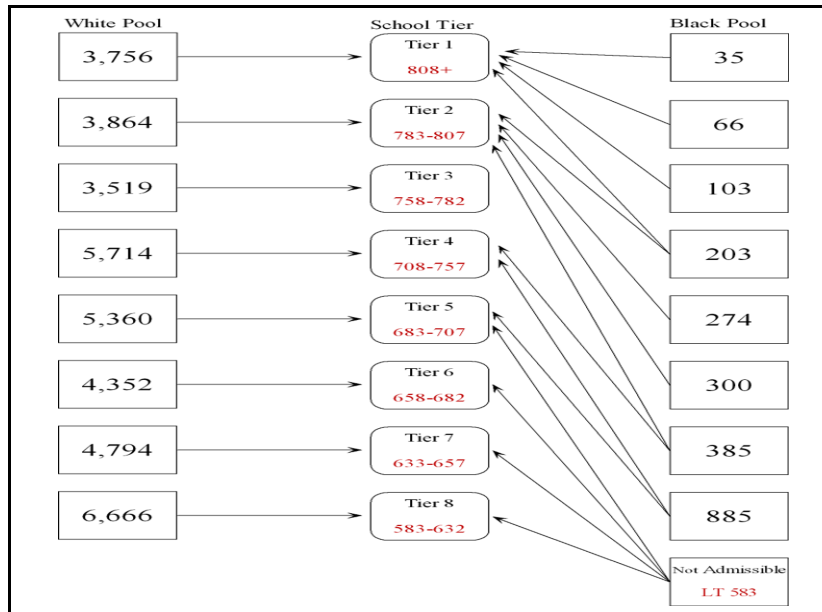
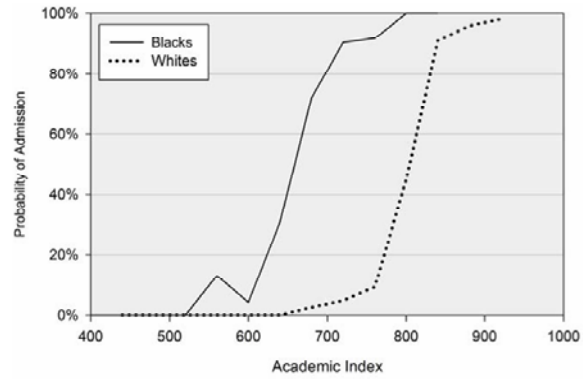
**TABLE 2.2: COMPARATIVE ADMISSION COHORTS AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL, 1999**

Admissions Rate for White Applicants		Admissions Rate for Black Applicants	
Index	Proportion of Cohort Admitted	Index	Proportion of Cohort Admitted
850 and Above	97%	710 and Above	96%
830-849	91%	690-709	90%
810-829	70%	670-689	72%
790-809	44%	650-669	38%
750-789	16%	610-649	22%
710-749	5%	570-609	11%
Under 710	2%	Under 570	0%

Source: Data disclosed by the University of Michigan Law School in the course of the Grutter litigation; available at <http://www1.law.umich.edu/sap/Dea%20and%20Procedures%20and%20Analysis.htm>. Cells of data based on undergraduate GPA and LSAT scores have been converted to a 0-1000 index using the formula:  $(LSAT - 120) * 10 + (UGPA * 100)$ .



**FIGURE 2: ADMISSIONS CURVES FOR BLACKS AND WHITES AT UNIVERSITY OF MICHIGAN LAW SCHOOL, 1999**



**TABLE 3.2: BLACK-WHITE ACADEMIC INDEX GAP IN SIX GROUPS OF AMERICAN LAW SCHOOLS, 1991 MATRICULANTS**

Law School Group	Median Academic Index		Black-White Gap	Standard Deviation in Index for Whites
	Blacks	Whites		
Group 1: Very Elite Schools (n = 14)	705	875	170	74
Group 2: Other "National" Schools (n = 16)	631	805	174	89
Group 3: Midrange Public Schools (n = 50)	586	788	202	75
Group 4: Midrange Private Schools (n = 50)	560	725	165	75
Group 5: Low-Range Private Law Schools (n = 18)	493	665	172	73
Group 6: Historically "Minority" Schools (n = 7)	516	641	125	103

Source: LSAC-BPS Data, supra note 133.

	Original Table 5.2	Chamber's Replication (BPS)	Sander w/ college Quality Controls
zLSAT	.384***	.365***	.377***
zUGPA	.212***	.202***	.000
Asian	-.007	-.025	-.043**
Black	-.007	-.030*	-.023
Hispanic	-.011	-.029*	-.035*
Other Race	-.021	-.040**	-.160**
Race Not Reported	N/A	-.103***	-.100***
Male	.018	.020	.030
National Grade	N/A	N/A	.237***
n	4,258	4,257	3,179
Adjusted R square	.19	.199	.25

All coefficients are standardized.

Data based on 1995 National Study of Law Student Performance

\*=p<.05

\*\*=p<.01

\*\*\*=p<.001

**TABLE 6.1: RELATIVE POWER OF ALTERNATE PREDICTORS OF BAR PASSAGE, 1991-1996**

Factor	Standardized Coefficient	Chi-Square Test Statistic	Chi-Square p-Value <sup>209</sup>
Law School GPA	0.76	808.16	< .0001
LSAT	0.28	158.28	< .0001
Law School Tier	0.17	56.74	< .0001
Undergraduate GPA	0.11	31.00	< .0001
Male	0.05	7.31	.007
Asian	-0.02	1.13	.29
Black	-0.01	0.54	.46
Other Nonwhite	-0.01	0.48	.49
Hispanics	-0.004	0.08	.78
n of Bar-Takers in Model: 21,425			
Somers's D: .763			

Source: LSAC-BPS Data, *supra* note 133.<sup>210</sup> The dependent variable is whether a person passes the bar on one of her first two attempts. For racial variables, whites are the implicit control group. For men, women are the implicit control group. A Wald Chi-Square value over 3.9 is generally considered indicative of some "statistical significance."<sup>211</sup>

**TABLE 6.2: BAR PASSAGE RATES IN THE UNITED STATES FOR WHITES AND BLACKS, 1991-1996**

Index Range	Proportion of Bar-Takers Failing on the First Attempt (for the Entire United States)	
	Whites	Blacks
400-460	52%	71%
460-520	34%	55%
520-580	26%	47%
580-640	19%	34%
640-700	13%	26%
700-760	9%	12%
760-820	5%	12%
Bar-Takers in Sample	19,112	1346

Source: LSAC-BPS Data, *supra* note 133.

**TABLE 7.1: SIMPLE REGRESSION OF EARNINGS OF SECOND-YEAR ASSOCIATE LAWYERS IN PRIVATE FIRMS<sup>252</sup>**

Independent Variable	Raw Coefficient	Standardized Coefficient	t-Statistic
Market Area	0.134	0.408	21.8
School Prestige (2003 <i>U.S. News &amp; World Report</i> Rank Categories)	0.099	0.237	12.8
Law School GPA (4.0 scale)	0.471	0.347	19.1
Asian	0.012	0.007	0.41
Black	0.103	0.056	3.2
Hispanic	0.008	0.005	0.3
Other Nonwhite	-0.030	-0.012	-0.7
Male	0.102	0.11	6.4
n of Second-Year Associate Lawyers in Private Firms: 1778			
Adjusted R <sup>2</sup> of Model: .477			
Median Income of Respondents: \$90,000			

Source: AJD Data, *supra* note 249 (national sample and minority oversample, unweighted).

**Black “Second-choice” Student Outcomes**

Outcome	White Success Rate	Success Rate for Blacks Other Than Those Going to Second-Choice School	My Prediction for Success Rate for Blacks Going to Second-Choice School	Actual Success Rate for Blacks Going to Second-Choice School
Graduate from Law School	92.2%	81.1%	86.3%	89.9%
Pass Bar on First Attempt	92.1%	59.6%	74.8%	80.3%
Pass Bar Eventually	96.8%	77.1%	87.6%	86.1%
Proportion of Original Cohort Becoming Lawyers	83.3%	57.0%	69.3%	69.0%

Predictions of First-Year Class Rank in Law School  
By Prospective Law Students at all Law Schools, BPS, 1991

Class Rank Percentile Range	Proportion of Entering Students Predicting Specified Rank:		
	Whites	Blacks	Hispanics
Top 5% (95-100)	8%	12%	8%
Next 5% (90-94)	25%	27%	24%
Next 15% (75-89)	45%	38%	42%
Next 25% (50-74)	21%	23%	26%
Next 25% (25-49)	1%	1%	1%
Next 25% (0-24)	0%	0%	0%

**Blacks Passing Up Their "First-Choice" School Compared to  
Whites and All Other Blacks in the BPS Database**  
\*\*Adjusted for Index, Grant and Scholarship Aid, Gender, and School Tier\*\*

Outcome	Whites	Blacks Passing Up First Choice School	All Other Blacks
Mean First-Year GPA	.33	-.34*	-.50
+Mean Final GPA	.28	-.42*	-.58
Percent Students Graduating	91%	93%	84%
Percent of Graduates Passing Bar on First Attempt	90%	88%**	70%
Percent of Graduates Eventually Passing Bar	95%	90%	83%
Percent of Entering Cohort Becoming Lawyers	81%	76%*	65%
Number of observations	21,805	171	1,586

Source: BPS data, author's calculations.  
+Imputed using first-year GPA if final GPA was missing.  
\*Difference between the two black groups significant at  $p < .05$   
\*\*Difference between the two black groups significant at  $p < .01$

All the cells were calculated using an analysis of covariance that produced adjusted means after controlling for index, aid, gender and tier. The dichotomous variables were coded 0 or 1 and treated as continuous within the analysis and the resulting adjusted mean was simply interpreted as a percentage. However, the p-values for all the dichotomous variables (those that resulted in percentages) were based on logistic regressions, while the p-value for First-Year GPA and Final GPA was calculated using the actual p-values of the adjusted means.

Total bar passage rate in Colorado:

	1990-94	1995-99	2000-04
All takers	76.8%	74.6%	70.4%
Blacks only	42.8%	39.5%	34.5%

Testing the Interaction of Accepted/Rejected First-Choice by race (p-values control for LSAT, undergraduate GPA and gender)

Dependent Variable	Group	Choice Grouping	Whites	Blacks	p-value of interaction
Passed 1st Bar	Bottom 80%	Second-Choice	71.3%	74.5%	0.0001
		First-Choice	76.0%	58.3%	
	Top 20%	Second-Choice	94.1%	97.7%	0.0001
		First-Choice	94.3%	85.1%	
Passed Bar Eventually	Bottom 80%	Second-Choice	88.9%	83.7%	0.0005
		First-Choice	86.7%	78.2%	
	Top 20%	Second-Choice	97.1%	96.0%	0.091
		First-Choice	97.3%	94.4%	

All p-values are based on logistic regressions but the percentages were estimated using the adjusted means in an Analysis of Covariance using codes of 0 for did not pass bar and 1 for passed bar.

Mean Standardized GPA by Rankings of Index of Incoming Credentials

Index Deciles	Mean GPA
1	-0.65
2	-0.33
3	-0.23
4	-0.1
5	0.1
6	0.08
7	0.11
8	0.25
9	0.3
10	0.52

Based on 1995 National Study of Law Student Performance

**TABLE 2.3: STATISTICS CONCERNING TYPICAL ADMISSIONS PATTERNS AT VARIOUS HIGHER EDUCATION INSTITUTIONS**

Institution and Year of Analysis	Somers's D in Logistic Admissions Model			Percentage of Applicants Admitted	
	All	Whites	Blacks	Whites	Blacks
University of Michigan, Undergraduate College, 1999-2000*	.81	.81	.85	70%	82%
University of Michigan, Law School, 1999-2000	.88	.88	.90	43%	39%
Seven U.S. Public Law Schools, 2002-2004**	.88	.88	.88	23.6%	24.3%

Source: Data disclosed by the University of Michigan Law School and Undergraduate College in the course of the Gruter and Graz litigation, respectively, available at <http://www1.law.umich.edu/~sanders/Data%20and%20Procedures/SuppAnalysis.htm>; data disclosed by public law schools in response to FOIA requests from the author (on file with author).

\* For the college, the racial comparisons are between "underrepresented minorities" (mostly blacks and Hispanics) and everyone else.

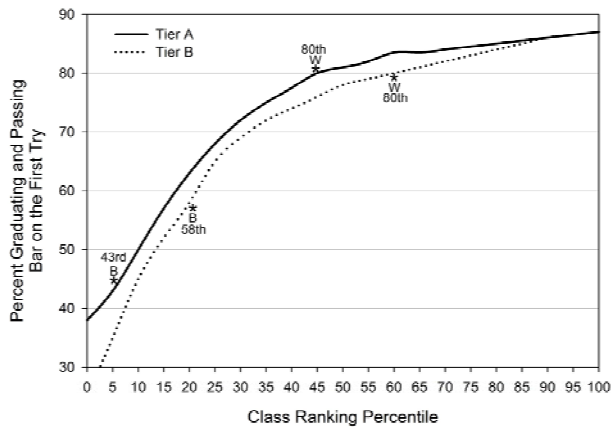
\*\* Somers's D values are medians for the twelve admissions cycles at the seven schools.

**TABLE 5.1: DISTRIBUTION OF FIRST-YEAR GPAS AT "ELITE" SCHOOLS, SPRING 1992, BY RACE**

Class Decile	Proportion of Students in Each Group Whose First-Year GPAs Place Them in Each Decile <sup>170</sup>		
	Black	White	All Others
1st (Lowest)	51.6%	5.6%	14.8%
2nd	19.8%	7.2%	20.0%
3rd	11.1%	9.2%	13.4%
4th	4.0%	10.2%	11.5%
5th	5.6%	10.6%	8.9%
6th	1.6%	11.0%	8.2%
7th	1.6%	11.5%	6.2%
8th	2.4%	11.2%	6.9%
9th	0.8%	11.8%	4.9%
10th (Highest)	1.6%	11.7%	5.2%
Students in Sample	126	1525	305

Source: LSAC-BPS Data, supra note 133.

**Law Student Outcomes as a Function of Class Rank and Law School Tier**



Black moves from 5th percentile in TIER A to 20th percentile in TIER B

White moves from 46th percentile in TIER A to 60th percentile in TIER B



**TABLE 8.1: CHANGES IN THE BLACK APPLICANT POOL  
FOR LAW SCHOOL ADMISSIONS, 1966-2001  
(ABA-ACCREDITED SCHOOLS ONLY)**

Year	Total Black Applicants	Blacks Actually Admitted	Blacks Admitted Under Race-Blind Simulations	Blacks Admitted Under Race-Blind Simulations, as Percent of White Admissions*	Black-White Gap in Mean LSAT**
1966	N/A	400 (est.)	400 (est.)	1.2%	N/A
1976	4299	1697	710	1.8%	1.61
1991	7083	3435	1631	3.9%	1.34
2001	7404	3706	3182	8.5%	1.18

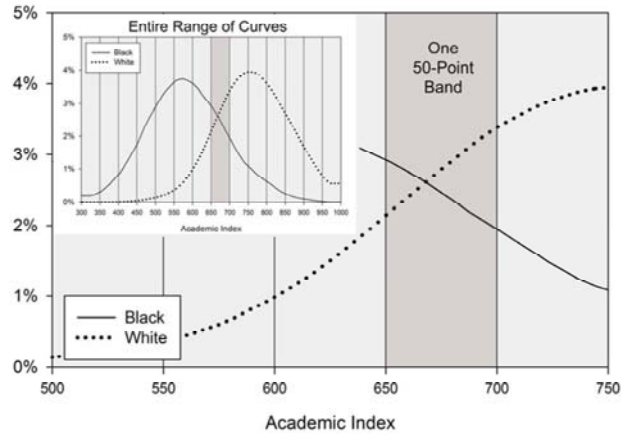
Sources: Evans, *supra* note 46, at 599 tbl.12, 602 tbl.15 (1976 data); Wightman, *Threat to Diversity*, *supra* note 274, at 22 tbl.5 (1991 data); Wightman, *Race-Blindness*, *supra* note 278, at 234 tbl.1, 240 tbl.5 (2001 data); LINDA F. WIGHTMAN, ANALYSIS OF LSAT PERFORMANCE AND PATTERNS OF APPLICATION (LSAC Research Report 94-02, 1994) (1991 LSAT data); author's own calculations from LAW SCH. ADMISSION COUNCIL, LSAC NATIONAL STATISTICAL REPORT, 1997-98 THROUGH 2001-2002, at E13, F13, (2003) (presenting 2001 mean LSAT data).  
 \* The small improvement between 1966 and 1976 in the column concerning black admissions, under race-blind simulations, as a percentage of white admissions is due to the dramatic increase in white applicants (and the quality of applicants) during that decade.  
 \*\* Black-white gap is the number of standard deviations separating black and white median LSAT scores.

**TABLE 8.2: ESTIMATING THE EFFECTS OF ELIMINATING  
RACIAL PREFERENCES ON BLACK ADMISSIONS  
TO LAW SCHOOL—2001 MATRICULANTS**

Stage of the System	Number of Blacks in the System Under Current Policies	Number of Blacks in the System with No Racial Preferences	% Change Caused by Moving to No Preferences
Applicants	7404	7404	—
Admittees	3706	3182	-14.1%
Matriculants	3474	2983	-14.1%
Graduates (2004 or Later)	2802	2580	-8.1%
Graduates Taking the Bar	2552	2384	-6.8%
Passing the Bar, First Time	1567	1896	+20.1%
Passing the Bar, Eventual	1981	2150	+7.9%

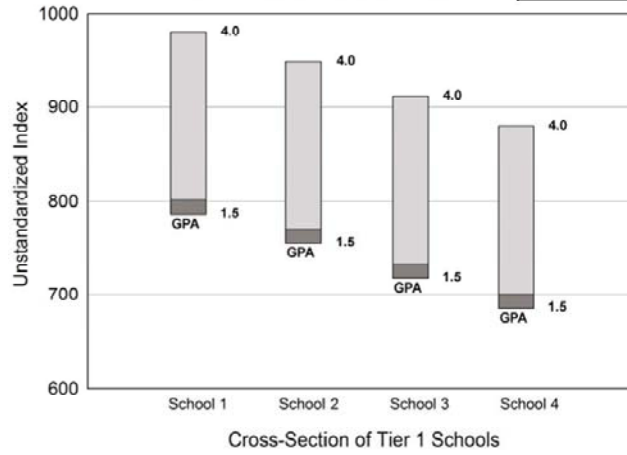
Sources: Wightman, *Race-Blindness*, *supra* note 278, at 243 tbl.7 (first two rows in above table); statistics compiled by the author from the LSAC-BPS data (last four rows in above table).<sup>281</sup>

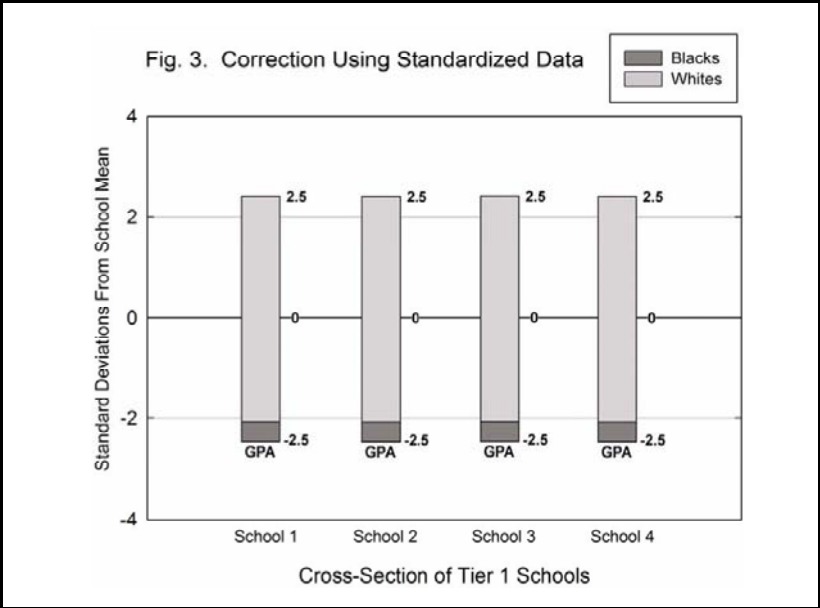
Fig. 1. Illustrating the "Distribution Effect"



Source: Author's calculations from LSAC-BPS data.

Fig. 2. A Simple Stylized Illustration of the Problem of Unstandardized Data





**Table 2**  
**The Effect of Using Unstandardized Data on Race Variables**  
**In Predicting First-Semester Grades**

Variable	Model with LSAT & UGPA Standardized by School		Model with LSAT & UGPA Unstandardized by School	
	Standardized Coefficient	P-value	Standardized Coefficient	P-Value
LSAT	.38	< .0001	.230	< .0001
UGPA	.21	< .0001	.083	< .0001
Male	.018	.20	.030	< .05
Asian	-.007	.61	-.032	< .01
Other	-.020	.14	-.029	< .05
Black	-.007	.63	-.070	< .0001
Hispanic	-.011	.43	-.078	< .0001
Observations: 4,258 Adj. R2: .19			Observations: 4,258 Adj. R2: .10	

Source: National Study of Law Student Performance

**Table 3**  
**Applications to American Law Schools, 1997-2002**

Application Cycle	Total Applicants			Black applicants as % of	
	Black	White	Total	White apps.	Total apps.
1997-98	8,216	46,170	71,726	17.8%	11.5%
1998-99	8,375	47,787	74,380	17.5%	11.3%
1999-00	8,503	48,684	74,550	17.5%	11.4%
<b>2000-01</b>	<b>8,648</b>	<b>51,190</b>	<b>77,235</b>	<b>16.9%</b>	<b>11.2%</b>
2001-02	9,703	59,573	90,853	16.3%	10.7%
Average for five years	8,689	50,681	77,748	17.1%	11.2%

Source: Law School Admissions Council, *National Statistical Report, 1997-98 through 2001-02*

**Table 4**  
**Indicators of Geographic Mobility Among Law Students, 1995**

Group	Percent Attending a Law School Within 50 Miles of Where They Grew Up	Percent Living with Spouse or Partner
Blacks	24%	16%
Whites	26%	28%
All races	27%	25%

Source: National Study of Law Student Performance, 1995

Predictions of First-Year Class Rank in Law School  
 By Prospective Law Students at all Law Schools, BPS, 1991

Class Rank Percentile Range	Proportion of Entering Students Predicting Specified Rank:		
	Whites	Blacks	Hispanics
Top 5% (95-100)	8%	12%	8%
Next 5% (90-94)	25%	27%	24%
Next 15% (75-89)	45%	38%	42%
Next 25% (50-74)	21%	23%	26%
Next 25% (25-49)	1%	1%	1%
Next 25% (0-24)	0%	0%	0%

Testimony for the U.S. Commission on Civil Rights  
*Richard Lempert\* with William Kidder*

In the spring of 2000 David Chambers, Terry Adams and I published an article entitled *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*.<sup>5</sup> The article was published in the refereed journal of the American Bar Foundation, one of the two most prestigious journals in the field of Law and Social Science and it subsequently won the American Sociological Association’s Sociology of Law section’s prize as the best article published in that field over a two year period. In that article, we examine the accomplishments, experiences and views of minority and white graduates of the University of Michigan Law School’s classes of 1970 through 1996, years when Michigan’s classes included students admitted explicitly through affirmative action programs.<sup>6</sup> We paid special attention to the experience and accomplishments of Michigan’s Black, Latino and Native American, alumni (two-thirds of whom were black and the great majority of whom were admitted through affirmative action) both by themselves and in comparison to the experience and accomplishments of the law school’s white alumni.<sup>7</sup> What we find is that although the minority students were admitted with admissions credentials substantially below those of white students and although their law school grade point averages were on average substantially below the mean white GPA, almost no minority admittees flunked out of Michigan, and after graduation they enjoyed substantial success, comparable to that of Michigan’s white alumni. Table One, comparing minority alumni (MA) and white alumni (WA), presents one part of the story:

**Bar Passage Rates by Minority Status and Decade**

		Bar Members	Bar Members, Two or More States
1970s			
	MA	98.5 percent (137)	37.2 percent (137)
	WA	97.9 percent (256)	39.6 percent (256)
1980s			
	MA	95.1 percent** (184)	32.6 percent+ (184)

\* I am the Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan. The opinions expressed herein are my own and not those of the University of Michigan. Mr. Kidder is a Senior Policy Analyst at the University of California, Davis. The points expressed in this testimony reflect his personal views and do not necessarily reflect the views of the UC Davis administration.

<sup>5</sup> 25 LAW & SOC. INQUIRY 395 (2000) (Hereinafter, Lempert et al., *Michigan Law School Study*).

<sup>6</sup> We took special care to check for non-response bias and found considerable evidence that this was *not* a serious concern. *Id.* at 403-407.

<sup>7</sup> In this testimony and in the tables, the term “minority” includes blacks, Hispanics and Native Americans, unless otherwise indicated. Increasing enrollments from these groups was the target of the University of Michigan Law School’s affirmative action program. *Id.* at 505 n.5.

	WA	99.3 percent (202)	43.2 percent (202)
1990s	MA	96.1 percent (204)	26.5 percent* (204)
	WA	97.5 percent (102)	40.0 percent (104)

+p<.1 \*p<.05 \*\*p< .05

We see from this table that virtually every Michigan minority graduate passed the bar, and that although whites graduating in the 1980s passed the bar at rates that were higher than the bar passage rates of minorities to a statistically significant degree, the difference is driven by the almost perfect record of the white graduates and not the poor minority performance, and is of no practical importance. By any measure, Michigan's minority students were highly successful in qualifying to practice the profession they were trained for.

Other results indicate that Michigan's minority graduates received special benefits by attending at Michigan. Minority graduates of the 1970s and 1980s were more likely than white alumni to report that they gained *considerable* career benefits from contacts made through Michigan, from the prestige of the school and from friends made at Michigan, though in the latter category the difference between whites and blacks in the classes of the 1980s was significant at only the .10 level.<sup>8</sup> More than 10 percent of the minority alumni secured judicial clerkships after graduation, including 18.1 percent of those graduating in the 1990s.<sup>9</sup> Minority graduates took jobs across the range of legal work and in firms of all sizes, though their pattern of job choices differed somewhat from those of whites, with fewer minority alumni entering private practice and more taking governmental jobs.<sup>10</sup> Still, the private practice of law was the most common entry-level sector for Michigan's minority graduates with about 7 in 10 graduates during the 1980s and 1990s beginning with law firms.

White students at Michigan also seemed to benefit from the presence of minorities, particularly as the number of women and minority students in the school increased. By the 1990s about 50 percent of Michigan's white alumni, regardless of gender, gave at least a rating of 5 on a 7-point scale when asked about the contribution of *ethnic* diversity to their *classroom* experience, and almost no one indicated there was no contribution.<sup>11</sup>

<sup>8</sup> *Id.* at 419. All differences between minorities and whites noted in the text are statistically significant unless otherwise indicated.

<sup>9</sup> *Id.* at 423. Whites were even more likely than minority students to secure judicial clerkships upon graduation, though the difference was not statistically significant for the 1990s cohort.

<sup>10</sup> *Id.* at 424.

<sup>11</sup> *Id.* at 414. Likewise, a survey of students at two leading American medical schools (Harvard and UC San Francisco) found that strong majority of students of all backgrounds report that that having classmates of different races and ethnicities was a "clearly positive" element of their educational experience. Dean K. Whitla et al., *Educational Benefits of Diversity in Medical School: A Survey of Students*, 78 ACADEMIC MEDICINE 460, 463 fig.1 (2003).

Before that decade white women reported higher classroom benefits from ethnic diversity than white men.

Michigan's minority alumni have also flourished in their careers, both absolutely and relative to whites. Controlling for graduation decade, there is no statistically significant difference between the proportions of white and minority alumni who are partners in their law firms,<sup>12</sup> and when judged by the schools from which other firm lawyers graduated, there is no difference in the apparent eliteness of these firms (as measured by the proportion of lawyers in the firms who graduated from elite law schools), although firm sizes for minorities, especially 1970s graduates, tend to be smaller.<sup>13</sup> Minority alumni also report very high incomes relative to national averages, with mean 1996 incomes (rounded) among 1970s graduates of \$168,000 for those in private practice, \$92,000 if in government and \$184,000 if in business. (Median incomes across these sectors are \$120,000, \$98,000 and \$165,000.) For graduates of the 1990s, the mean 1996 income figures for minority alumni are \$73,000, \$53,000 and \$81,000 across these three sectors. (Medians are \$70,000, \$50,500 and \$75,000). Graduates from the 1980s have incomes that are in between.<sup>14</sup>

Table Two below summarizes a regression analysis of the factors that predict earnings in this data set. On the next page is the regression analysis itself, as it appeared LAW & SOCIAL INQUIRY.

**Table Two: Incremental Variance Explained by Log Income Predictors**

Order of Entry	Change in R Square	F Change
Years since graduation and (years since graduation)	.166	96.452*** (2,967)
Gender and age	.022	13.171*** (2,965)
Minority status	.001	.603 (1,964)
LSAT/UGPA index	.002	2.852 (1,963)
UG major	.009	2.112 (5,958)
Final LSGPA	.048	61.561*** (1,957)
Job sector	.079	22.400*** (5,952)

\*\*\* p < .001 Note: The numbers in parentheses are the degrees of freedom associated with the F statistic for each variable when it is entered.

<sup>12</sup> See Lempert et al., *Michigan Law School Study*, *supra* note 5, at 432.

<sup>13</sup> *Id.* at 433.

<sup>14</sup> *Id.* at 452.



There are several things to note about this table. First the overwhelming determinant of income for Michigan's graduates is simply time out of law school. Earnings rise with years since graduation. The second most important determinant is the job sector in which one works. Those in the business sector earn more than those in private practice. Those in all other sectors earn less. Third, gender matters slightly, as women tend to earn less than men. Grades matter somewhat more, but independently explain less than 5 percent of the variance in income.

**TABLE 31**  
**OLS Regression Coefficients for Logged Income**

	Model 1 (n = 969)		Model 1A (n = 1,033)		Model 2 (n = 969)		Model 2A (n = 1,033)	
	b	Std. Error	b	Std. Error	b	Std. Error	b	Std. Error
Constant	10.870***	.234	10.968***	.232	9.767***	.255	9.849***	.251
Years since graduation	.074***	.013	.069***	.012	.091***	.012	.086***	.011
Years since graduation squared	-.001**	.000	-.001*	.000	-.002***	.000	-.002***	.000
Sex (M = 0, F = 1)	-.235***	.053	-.207***	.051	-.168**	.050	-.143**	.047
Age entering law school	-.013	.008	-.015	.008	-.017 <sup>†</sup>	.007	-.018*	.007
Minority or white (W=0, M=1)	.067	.072			.145*	.067		
Ethnicity (whites omitted)								
Black			.027	.078			.109	.073
Asian			.155	.099			.195	.091
Latino			.074	.084			.137	.078
Native American			.128	.142			.229	.132
LSAT/UGPA index	.001	.001	.001	.001	-.001	.001	-.002*	.001
Undergraduate major (social science omitted)								
Humanities	.091	.058	.077	.055	.133*	.053	.113*	.051
Nat. Sci.	-.091	.117	-.075	.112	-.028	.107	-.026	.103
Engineering	.090	.129	.158	.116	.026	.119	.089	.107
Business/economics	.176**	.065	.175**	.062	.136*	.060	.135*	.058
Other	-.016	.097	-.020	.094	-.023	.089	-.027	.087
Final LSGPA					.005***	.001	.005***	.001
Current job sector (private practice omitted)								
Business/Finance					.166**	.061	.158**	.058
Government					-.339***	.061	-.331***	.059
Legal Svc/Pub Int					-.607***	.135	-.581***	.131
Education					-.608***	.094	-.593***	.090
Other					-.385***	.100	-.364***	.095
		(R <sup>2</sup> =.200), (Adj.R <sup>2</sup> =.191)		(R <sup>2</sup> =.196), (Adj.R <sup>2</sup> =.185)		(R <sup>2</sup> =.328), (Adj.R <sup>2</sup> =.316)		(R <sup>2</sup> =.321), (Adj.R <sup>2</sup> =.308)

\*p < .05. \*\*p < .01; \*\*\*p < .001

Whether one is a minority group member or not has, however, no implications for income, nor do LSAT/UGPA admissions index score. To put this another way, there is no evidence in these data that minority students admitted through affirmative action earn less than whites at the same career stage. Moreover, these null results hold in a model (Model 1 in the regression analysis) that does not include law school grades or practice sector, so the lack of an effect for minority status and the admissions index is not because we are controlling for a propensity of minorities to work in less lucrative practice sectors or because, on average, they received lower grades than white alumni. Even when minority status is allowed to proxy for these variables, it does not affect income. Also, alternative models that look at the specific ethnicities of minority respondents find that blacks, Hispanics and other minorities taken separately do not earn significantly less than whites.

While skeptics may suspect that affirmative action hiring explains the relatively high incomes of Michigan's minority graduates, this does not appear to be the case. One would expect affirmative action hiring to be most important at the start of careers and to matter less in promotions and lateral moves, when a firm has a record of past job performance to scrutinize. Thus, even if Michigan's minority graduates benefited from affirmative action when they were first hired, the benefits would likely have dissipated over time. Consider also the experience of minority lawyers who are on their own or in small firms, a group unlikely to benefit significantly in their current practice from affirmative action. The minority lawyers surveyed from the 1970s who are in solo practice or in small firms had average incomes in 1996 of \$154,400, and their median income was \$95,000. The minority graduates of the 1980s in solo practice and in small firms averaged \$78,500, with a median of \$ 76,000. White graduates from the 1970s in solo practice and small firms average somewhat less than their minority classmates; white graduates from the 1980s average somewhat more.<sup>15</sup>

Similar analyses were done with career satisfaction and service contributions as dependent variables. At Michigan, minorities were no less satisfied with their career outcomes than whites,<sup>16</sup> and minority group members tended to do *more* service than whites.<sup>17</sup> The latter effect is largely due to the fact that black and Native American graduates tended to be more active in service activities than whites. Law school grades and the admissions index had no relationship to job satisfaction, though law school grades did relate to service, as there was a slight tendency for those who had received higher grades in law school to report doing less service, even when ethnicity was controlled. Job sector was also important to service, as those in private practice tended to do more service than those in all other sectors, except the public interest sector.<sup>18</sup>

In response to comments on this article, our analyses of career achievement, satisfaction and service were repeated after eliminating from the analyses those minority group

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<sup>15</sup> Lempert et al., *Michigan Law School Study*, *supra* note 5, at 497-98.

<sup>16</sup> *Id.* at 486.

<sup>17</sup> *Id.* at 488.

<sup>18</sup> The sector effect is almost entirely due to the inclusion in the service index of the amount of pro bono work so long as its pro bono nature was specified in advance of the representation. Lawyers in private practice do much more pro bono work than lawyers in other sectors.

members who might have been admitted to Michigan without affirmative action. The results when confined just to affirmative action admittees were the same as when all minorities were considered together, which is not surprising since the overwhelming bulk of the minority group members at Michigan, during the years studied, had been admitted through affirmative action.

We have dwelled at length on the results of this research not just because it is interesting in its own right and relevant to the concerns of the Commission, but also because it bears importantly on the results of Professor Richard Sander's research. Although Sander never emphasizes this aspect of his research, nothing in his data or in the analyses he presents is inconsistent with what we found when we looked in far greater depth than he is able to at generations of affirmative action graduates from an elite American law school. Rather, in most of his analyses, Sander elides data on students at elite schools with data on students attending less prestigious schools and fails to acknowledge that even if his mismatch theory arguments applied to black (or minority) students at most law schools, they would not apply to black (or other minority) students at schools like Yale, Harvard, Michigan and Columbia. This is true, even if the credential gaps in the nation's most selective law schools are, as they seem to be, similar to what they are in other of his law school tiers.

This is no small matter, because a law degree from an elite law school is a gateway to leadership opportunities in the U.S. legal profession. My co-authors and I found that 60 percent of black law professors at schools accredited by the American Bar Association are graduates of the top twenty law schools, including 48 percent from the top ten ranked law schools.<sup>19</sup> In the judiciary, 40 percent of African American federal judges graduated from top twenty law schools, as did almost half of Latino federal judges.<sup>20</sup> Professors Wilkins and Gulati found that over 75 percent of African American partners at leading corporate law firms were graduates of elite law schools, including 47 percent from Harvard and Yale.<sup>21</sup>

### **Sander's Stanford Law Review Study**

Sander's STANFORD LAW REVIEW study<sup>22</sup> has received widespread publicity since it appeared. It is our view that the scientific quality of this study is such that it does not merit the attention it has received and that it would be a mistake for the USCCR or anyone else to set policy based on it. Indeed, if the article were offered as evidence in a

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<sup>19</sup> 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, 1896 n.145 (2005) (hereinafter Chambers et al., "*Eliminating Affirmative Action*") (analyzing data on 604 African American professors in the 2003-04 AALS Directory of Law Teachers).

<sup>20</sup> *Id.* at 1896-97 n.146; William C. Kidder, Does Affirmative Action Really Hurt Blacks and Latinos in U.S. Law Schools 7-8 (Sept. 2005), Tomas Rivera Policy Institute policy brief, available at [http://www.trpi.org/PDFs/affirm\\_action.pdf](http://www.trpi.org/PDFs/affirm_action.pdf) (last accessed Oct. 20, 2006).

<sup>21</sup> David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, 84 CAL L. REV. 493, 563-64 (1996).

<sup>22</sup> Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

federal trial, it would be hard pressed to meet the test that the Supreme Court set in *Daubert v. Merrell Dow Pharmaceuticals*<sup>23</sup> for the admission of scientific evidence. Although the Supreme Court in *Daubert* did not set out any obligatory rules for judicial gatekeepers to follow, it did suggest four considerations that a court should look to in deciding on the admissibility of scientific evidence.

One of the four, concerning known error rates of a particular scientific technique is not directly relevant to the methods Sander used, but the underlying concern with the precision and reliability of conclusions is certainly a relevant consideration, and Sander's study does not come off well on this score. Some of the fault is not Sander's, but this does not diminish the unreliability of the results he generates. For example, Sander is using for his crucial analyses a dated data set, the Bar Passage (BPS) cohort of students entering law school in 1991, and, for other analyses, data he collected from students in 20 law schools at the end of their first *term* in 1995. But the qualifications of the apparently least qualified black students, and the ones with the most difficulty in graduating and passing the bar, have increased substantially since the BPS data were collected. In the 1991 entering cohort about 22 percent of entering black students had LSAT/UGPA index scores below 500 (on Sander's 1000-point scale). In 2003-2005, only 4 percent to 8 percent of black law students entering ABA accredited law schools had index scores in this range.<sup>24</sup> The BPS data also lack the detail that one would wish for a study that claims to find strong evidence of a mismatch effect.

Sander's own data set is an even weaker reed to rely on. Unlike most surveys of law students, in Sander's 1995 data set an exceptionally high proportion of his respondents (24.6 percent) do not provide information on race/ethnicity, and it appears from other relationships in the data that many of those with missing data are minority students.<sup>25</sup> Also the data set only includes information on first-semester grades, and although Sander makes much of grades in writing assignments, very few African Americans had grades in writing courses, and most of those students attended a single law school with atypical characteristics.<sup>26</sup>

Despite these drawbacks, Sander reports precise results rather than ranges, even in estimating such outcomes as the number of black students who would pass the bar absent affirmative action.<sup>27</sup> The data, even if they were better than they are, cannot support such precision. In this situation, the conventions of responsible social science call for

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<sup>23</sup> 509 U.S. 579 (1993).

<sup>24</sup> Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 52-53 (Feb. 2006), Univ. of Michigan Law School Olin Center Working Paper No. 60, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1061&context=umichlwp> (last accessed Oct. 20, 2006).

<sup>25</sup> Chambers et al., *Eliminating Affirmative Action*, *supra* note 19, at 1878-79 and n. 90.

<sup>26</sup> *Id.* at 1881.

<sup>27</sup> As Ayres and Brooks observe, Sander's estimate that ending affirmative action would increase the supply of black lawyers by 7.9 percent is "not based on a statistical procedure: there are no standard errors of the estimate, no confidence intervals, and no measures of whether the 7.9 percent estimate is statistically different than 0 percent." Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1811 n.12 (2005), available at <http://islandia.law.yale.edu/ayers/AyresBrooksResponse.pdf> (last accessed Oct. 20, 2006).

reporting a plausible range. Indeed, in reporting regression coefficients and other statistical results, the known range of plausible imprecision is the equivalent of a *Daubert* error rate. Had Sander reported standard errors, the range around important estimates would have been so substantial that, even without the other flaws in his analysis, his findings would have far more ambiguous implications for policy than his treatment of them implies.

A second *Daubert* factor is peer review. Sander chose not to publish his work in a recognized peer reviewed social science journal. Though the length of his STANFORD article meant that only a few relevant peer-reviewed journals – LAW & SOCIAL INQUIRY, for example – would have considered it, he has had two years to refine portions of his work and submit them for peer-reviewed publication. To our knowledge, he has not done so. Instead because he submitted his article to the NYU LAW REVIEW which showed it to a faculty member and was, he says, willing to publish it, and because a University Press was willing to publish a book based on his research after reviewing his article, Sander claims that his STANFORD LAW REVIEW article was, in effect, peer reviewed.<sup>28</sup> No social science department considering a faculty member for tenure would, however, regard Sander’s STANFORD LAW REVIEW article or his reply, which he is now relying on for his claims, as having been peer-reviewed.

Moreover, there is no evidence that Professor Sander’s *A Reply to Critics*, in which he offers a new statistical analysis, has been peer reviewed in any sense of the word. As for Sander’s claim regarding the original piece, it relies on a misconception of the nature and value of peer review. Speaking as a former editor of a leading sociolegal journal, a frequent peer-reviewer and receiver of peer reviews, I can affirm that the value of social science peer review lies primarily not in indicating whether an article is worth publishing, but rather in outlining ways a work that a reviewer regards as potentially publishable can be improved for publication. Publication in the peer-reviewed journal that received the article indicates that these improvements have been achieved. There are such serious and obvious flaws in Sander’s work, some of which will be mentioned below, that it appears that neither Sander’s original article nor his subsequent reply to critics was seriously vetted in or improved by anything like a peer review process.<sup>29</sup>

There is, however, one sense in which Professor Sander’s Stanford article has been thoroughly reviewed by peers. After the fact, numbers of social scientists and law professors have looked closely at the article and published their views of it. To my knowledge, every published comment has found it wanting in ways that suggest their authors would never have recommended publication. Some, but by no means all, of the criticism is collected in the May 2005 issue of the STANFORD LAW REVIEW. Apart from me and my coauthors, these critics include Ian Ayres and Richard Brooks, Ph.D.

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<sup>28</sup> Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1982 (2005).

<sup>29</sup> Professor Sander might, in fact, include me as one of his “peer reviewers.” When I read a copy of Sander’s article in the summer of 2005 while it was an unfinished draft I did not tell him the work was unpublishable but rather sent him detailed comments on how his analysis could be checked and improved. After first cordially replying with a “thank you” for my comments and suggestions for further analysis, Professor Sander proceeded to ignore almost all of them.

economists and lawyers on the faculty at Yale Law School, Michele Dauber, a Ph.D. sociologist and law professor at Stanford,<sup>30</sup> and David Wilkins, a Professor at Harvard Law School.<sup>31</sup> We understand that other scholars, including all of Professor Sander’s colleagues on the *After the J.D.* study, sought to have answered Sander as well, but the *Stanford Law Review* did not have space to publish their comments.

Sander has claimed that some social scientists have informally given his work a friendlier reception than those who have published their views, but it appears that even these “friends” have problems with aspects of the analysis.<sup>32</sup> One of them, Professor James Lindgren of Northwestern University, alerted Sander to a serious data problem (which we had independently discovered) in one of the tables that was foundational to his argument. Professor Sander chose to present the uncorrected table, noting Professor Lindgren’s observation and its statistical implications only in a footnote.<sup>33</sup>

A third *Daubert* criteria is whether a theory is testable and whether it has been tested. Professor Sander does present a testable theory, namely that the greater the mismatch in credentials between a black student in a given law school and his or her white peers, the less likely the black student is to graduate and pass the bar. However, Professor Sander’s initial STANFORD LAW REVIEW article only argues for the theory; it never tests its implications in a way that might allow the theory to be refuted. Yet the theory generates an easily testable prediction. If it is true, when one holds credentials constant, law students in lower tier schools should be more successful than those in higher tier schools in graduating and passing the bar. Table Three presents the data from the BPS that tests this prediction. As can be seen, there is no consistency in the direction of relationships. Sometimes students in higher tier law schools do better than similarly credentialed students in lower tiered law schools, and some times they do worse. This inconsistency does not mean the theory is partially proven, rather it means that the theory cannot explain the data. Moreover, consistent with our University of Michigan Law School research, the theory fails utterly when it looks at students attending schools in the most elite tier. Black students at schools in this tier are consistently more successful in graduating and passing the bar than black students in all other tiers (We see a similar pattern when we use finer breaks in index credentials).

**TABLE 3: PERCENTAGES OF AFRICAN AMERICAN MATRICULANTS WHO PASSED THE BAR, BY TIER OF SCHOOL ATTENDED AND ADMISSIONS INDEX AMONG AFRICAN AMERICANS MATRICULANTS<sup>34</sup>**

	Elite	Prestige	2 <sup>nd</sup> Tier Public	2 <sup>nd</sup> Tier Private	Historically Minority	3 <sup>rd</sup> Tier	Total
Index in	*	2 1.4 percent	32.4 percent	42.2 percent	34.4 percent	34.8 percent	35.6 percent

<sup>30</sup> Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005).

<sup>31</sup> David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005), available at <http://ssrn.com/abstract=717962> (last accessed Oct. 20, 2006).

<sup>32</sup> Sander, *A Reply to Critics*, *supra* note 28, at 1986.

<sup>33</sup> Sander, *Systemic Analysis*, *supra* note 1, at 430 n. 175.

<sup>34</sup> Chambers et al., *Eliminating Affirmative Action*, *supra* note 19, at 1884 tbl.3.

<b>lowest 20 percent</b>		(3:11)	(22:46)	(38:52)	(43:82)	(16:30)	(122:221)
<b>Index in 2<sup>nd</sup> lowest 20 percent</b>	*	48.3 percent (14:15)	57.9 percent (55:40)	50.0 percent (49:49)	58.9 percent (42:30)	32.0 percent (8:17)	53.1 percent (171:151)
<b>Index in middle 20 percent</b>	75.0 percent (12:4)	54.0 percent (27:23)	64.8 percent (81:44)	46.9 percent (46:52)	70.7 percent (41:17)	50.0 percent (6:6)	59.3 percent (213:146)
<b>Index in 2<sup>nd</sup> highest 20 percent</b>	92.0 percent (23:2)	67.2 percent (41:20)	76.7 percent (99:30)	65.9 percent (58:30)	75.8 percent (25:8)	*	72.7 percent (250:94)
<b>Index in highest 20 percent</b>	90.3 percent (84:9)	85.9 percent (85:14)	81.7 percent (67:15)	86.6 percent (39:6)	85.7 percent (18:3)	*	86.4 percent (299:47)

Source: Bar Passage Study

Ratios in parentheses are n = eventual known pass to n = known fail + non-graduating black matriculants. Black law school graduates with unknown bar exam results are excluded.

\* = Fewer than 10 cases.

In his STANFORD LAW REVIEW Reply, Sander tries to rescue his mismatch theory from this failure of prediction by arguing that selection bias explains the theoretically inconsistent results. The argument is that higher status schools in deciding whom to admit look beyond a student's index credentials (i.e., LSAT scores and UGPA) for other signs the student will do well, such as strong letters of recommendation, rigorous undergraduate training, etc. If so, the argument runs, students at higher tier schools should be more able than those at lower tier schools, so it is not surprising that they do better in graduating and passing the bar than similarly credentialed students at lower tiered schools. Thus, results like those in Table Three are not inconsistent with the mismatch hypothesis.

There are, however, a number of problems with this argument. The first is that it is inconsistent with other claims Sander has made. In his original article Sander argues that the admission of black students to law school is determined almost entirely by index credentials, with law schools seldom deviating from a policy of admitting those black applicants with the strongest index credentials.<sup>35</sup> If this were true, there would be little danger of selection effects biasing outcomes because the variables that determined selection would have been controlled in the analysis.<sup>36</sup> A second difficulty with the

<sup>35</sup> Sander, *Systemic Analysis*, *supra* note 1, at 409 ("The academic index for applicants -however it might be constructed by individual schools -is always the dominant factor in admissions within each racial group; other 'soft' factors play a prominent role only for those relatively few cases that are on the academic score boundary between 'admit' and 'reject.'").

<sup>36</sup> Lempert et al., *Critical Response to Sander*, *supra* note 24, at 33-34. Although Sander does not recognize it, as he treats selection as a one way street with the law school doing the choosing, since students also choose which laws schools to apply to and since more able students might choose to apply to more selective schools than similarly credentialed less able students, there would still be room for selection



argument is that if this kind of selection is what is going on, and it is what many supporters of affirmative action say does occur, then affirmative action admissions systems are working as they should and, despite credential differences, the degree of mismatch between whites and blacks in these schools is attenuated. In other words, law schools, when admitting black students pursuant to affirmative action, are looking for and identifying factors beyond the index score which indicate that a student is likely to succeed in law school and beyond. In the case of those law schools with the greatest power to select, the nation's elite schools, admissions officers are apparently doing an excellent job. Black students attending these schools do very well in graduating and passing the bar and, as we saw in the Michigan data, in going on to have successful careers. This is true though the average credential mismatch at these schools is, according to Professor Sander's data, similar to the average mismatch gap in schools in lower tiers.

Moreover, from the perspective of the *Daubert* reliability standards, one of the most serious problems with Professor Sander's selection bias argument is simply that he makes it. The point of the testability requirement is that, in the *Daubert* Court's view, a characteristic of good science is that it presents hypotheses that can be tested, meaning that data can be collected which supports or refutes the hypotheses. If the response to data that appear to refute a hypothesis is to shift ground and respond with an argument to explain away the incompatible results, the original hypothesis was not, in fact, open to testing and refutation, at least as originally stated. This is particularly true when the new argument does not show that the test that failed to support the hypothesis was flawed but simply advances a reason why it might have been. In the case of Sander's argument, if the mismatch effect he hypothesizes is a *strong* one, and if index credentials play a significant role in law school admissions decisions (as they do), mismatch effects should have emerged consistently, even if selection bias made them appear less powerful than they in fact are.<sup>37</sup>

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bias even if law schools admitted solely on the basis of index credentials, but the degree of selection effects would surely be attenuated.

<sup>37</sup> Professor Sander has also argued that mismatch effects would be attenuated in the data analysis because the BPS tiers are not a pure quality or selectivity hierarchy but that each tier contains schools that might have plausibly been placed in another tier. This may be true to some degree, but if it were true to too great a degree, the BPS data could not be used to develop a mismatch theory as Professor Sander attempted to do in his original article. In fact, index score averages, published by Sander show considerable separation of elite schools from all other schools for both black and white matriculants. Thus the spread in Sander's mean admission index scores across the six tiers the BPS identifies is 212 points for black students and 234 for white students. The mean index difference between black matriculants in elite tier schools and those in the next lower tier is 74 points, while for whites it is 70 points. Other tiers are likely to have more of an overlap in student and school quality. There is, for example, not much difference among either blacks or whites in the mean index scores found at the lowest range private school tier and the historically minority tier; they are both at the bottom of the selectivity ladder. In addition, the mean admissions index of black matriculants are relatively close (26 points) for students in the BPS third and fourth tiers (mid-range public schools and mid-range private schools) and for white students in the BPS second (other "national" or, as we call them, "prestige" schools) and third tiers (17 points). Because school prestige is largely determined by the quality of a school's white students, this suggests that the second and third tiers and perhaps the fifth and sixth should have been lumped together for some purposes because schools within them no doubt show considerable overlap in other ratings of law school quality, like the *U.S. News* ratings. Interestingly, one sees from Table 3 that it is the relationships across these schools that are most likely to be in the direction

We do not, however, fault Professor Sander for advancing his selection bias hypothesis. Rather, we think his original analysis should not have skirted issues raised by possible selection bias. In his Stanford *Reply*, Professor Sander for the first time highlights the selection bias confound, and he tries to test his core hypothesis in a way that, unlike the original article, met the *Daubert* demand that theories advanced be open to testing and refutation. To do this Professor Sander looked at black students who were admitted to two law schools and chose to attend their second choice rather than their first choice school.

There are, however, numerous serious problems with this second choice analysis, which mean that his results do not warrant the interpretation he gives them. First, it is assumption dependent. Professor Sander assumes that a student's second choice law school will always be meaningfully less selective than the first choice option foregone. But a student whose first choice law school is Columbia because it is in New York City might choose to attend the University of Chicago instead because it offers her a better financial aid package. From the point of view of mismatch theory, there is no meaningful difference between the selectivity of these two schools (typically ranked about fourth and sixth in *U.S. News*).

Second, Professor Sander assumes that the proper control group for black students who attend their second choice school is all other black students. Professors Ayres and Brooks, whose work alerted Professor Sander to the possibilities of the second choice approach, believe the proper control group is the group of black students admitted to more than one school who could have attended a second choice school but chose not to (i.e., Sander's control group includes black law students admitted to only one law school). We believe that the Ayres and Brooks control group is superior because their focal and control groups are more similarly situated, and the results Ayres and Brooks present disagree with those of Sander.<sup>38</sup>

Third, Professor Sander chose to present results only for first-time bar passage rates, though qualification to be an attorney turns on eventual bar passage and not first time success.<sup>39</sup> Had Professor Sander chosen to report when he looked at eventual bar passage rates, an investigation he must have (or should have) conducted, he would have found, as

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predicted by the mismatch hypothesis in that black students in Tier six schools often do better than black students in tier 5 schools when index credentials are held constant and black students in tier three schools often do better than black students in tier two schools when index credentials are held constant. Thus the consistency of these relationships with Professor Sander's mismatch hypothesis may well be an artifact of the failure of the BPS tier scale to accurately separate schools of different quality. Where the separation is clearer, most relationships of relative success are opposite of what the mismatch hypothesis would predict, affirmatively suggesting that not only is there no substance to his hypothesis but that, as Bowen and Bok in *The Shape of the River* and others examining undergraduate education have reported, black beneficiaries of affirmative action fare better when they find themselves in more competitive environments.

<sup>38</sup> Ayres & Brooks, *supra* note 27.

<sup>39</sup> Lempert et al., *Critical Response to Sander*, *supra* note 24, at 33-34.

did both Ayres and Brooks and Daniel Ho, that eventual bar passage rates do not reveal a mismatch effect.<sup>40</sup>

Fourth, and even more important, Professor Sander's approach, in both his hands and in Ayres' and Brooks', does not entirely accomplish what it is designed to do; namely, control for selection bias. As Sander himself noted, further investigation of the second-choice data reveals that the decision to go to a second choice law school seems strongly motivated by the availability of a superior financial aid package: seventy-five percent of blacks who passed up their first-choice schools specified the financial aid package as a reason for choosing their school, compared to 46 percent of other blacks. If law schools offer their most generous financial aid packages to those whom they think will be the most successful law students then, holding index credentials constant, students choosing to attend second choice law schools should be more able than those who had options and chose to attend their first choice schools or who had no options at all.<sup>41</sup> This selection effect biases results, perhaps strongly, in favor of the mismatch hypothesis prediction, which undercuts the support Sander finds for it in his examination of first-time bar passage rates and makes the failure to find a second-choice effect using the Ayres' and Brooks' model (or using Sander's model but with eventual bar passage rates as the dependent variable) even stronger evidence against the theory of mismatch.

Finally, and most importantly, even if none of the above problems existed, Sander's second-choice findings would do almost nothing to undercut the case for affirmative action. This is because it is most unlikely that those who choose to attend second-choice law schools were attending schools much inferior to the first choice school they declined.<sup>42</sup> For example, a higher proportion of second-choice black students (9.4 percent) than first-choice black students (7.8 percent) attended elite schools, and across the six tiers in the BPS, there is no significant difference in how first and second-choice black students are distributed. Hence, black second-choice students are, in most cases, likely to be benefiting substantially from affirmative action, and if they are mostly graduating and passing the bar, they are doing so despite considerable remaining mismatch.

The final *Daubert* factor regarding the reliability of scientific evidence is general or widespread acceptance. Professor Sander's methods are, for the most part, widely accepted as they are ordinary regression methods. However, he makes some claims about what his methods mean and how his data should be interpreted that would not be generally accepted. Moreover, most scientists would not accept the results he achieves using his methods, for not only do these results reflect flawed methods and questionable assumptions, but also, except in the narrowest sense of the term, they have not been replicated by others who have examined the implications of the BPS and other data.

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<sup>40</sup> See Ayres & Brooks, *supra* note 27, at tbls. 1, 2A, 2B, figs. 2-3; Daniel E. Ho, *Reply: Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 YALE L. J. 2011 (2005), available at <http://people.iq.harvard.edu/~dho/research/srep.pdf>; Daniel E. Ho, *Scholarship Comment: Why Affirmative Action Does Not Cause Black Students To Fail the Bar*, 114 YALE L.J. 1997 (2005), available at <http://people.iq.harvard.edu/~dho/research/ho-ylj.pdf>.

<sup>41</sup> See Lempert et al., *Critical Response to Sander*, *supra* note 24, at 33-34.

<sup>42</sup> See *id.* at 39.

An example of claims that are misleading and not generally accepted is Professor Sander's treatment of the concept of statistical significance. When he discusses the relationship between entry credentials and later outcomes, such as graduation or bar passage, Sander invites readers to interpret measures of statistical significance as if they were measures of practical significance. Thus, he writes:

The "t-statistic" tells us how consistent or reliable a relationship is, with a higher t-statistic indicating a stronger, more reliable association. T-statistics generally increase as a function of the standardized coefficient and the size of the sample. T-statistics above 2.0 are usually taken to signify that the independent variable is genuinely helpful in predicting the dependent variable. A t-statistic of less than 2.0 indicates a weak, inconsistent relationship—one that might well be due to random fluctuations in the data.<sup>43</sup>

This guidance is wrong. T-statistics and their associated significance tests do not in themselves tell us whether a relationship is strong or weak or whether, "the independent variable is genuinely helpful in predicting the dependent variable," at least if what one means by "helpful" is that knowing the independent variable will, to some important degree, improve our ability to predict the dependent variable.<sup>44</sup>

Tests of statistical significance can be particularly misleading in large samples where weak relationships can easily be significant. Sander's Table 6.1, in which he uses logistic regression to predict bar passage in a sample of 21,425 cases, provides a striking illustration.<sup>45</sup> Because 95 percent of those in the sample who took the bar passed it, if one simply "predicts" that each person in the sample passed, he will be right 95 percent of the time. If one applies Sander's model, which takes account of factors like law school grades and LSAT scores, the total number of correct predictions increases by 29 cases, so that 95.1 percent of all cases are predicted correctly. In such a large dataset, that miniscule improvement is significant at the .001 level, but Sander is not justified in characterizing Table 6.1 as a "robust test" of the notion that "race seems irrelevant" on the bar exam, and his implication that it gives us a good idea of what distinguishes bar passers from those who never pass is wrong. We know little more about who passes and who fails the bar exam than the fact that most law school graduates pass, which we knew before we ran the regression.

We shall not further belabor those aspects of Professor Sander's claims and statistical analyses that would not meet with general acceptance in the statistical and social science communities but merely refer the Commission to our responses to Sander in the

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<sup>43</sup> Sander, *Systemic Analysis*, *supra* note 1, at 428-29.

<sup>44</sup> In his classic textbook, Blalock explains, "Statistical significance should not be confused with practical significance. Statistical significance can tell us only that certain sample differences would not occur very frequently by chance if there were no differences whatsoever in the population. It tells us nothing about the magnitude or importance of those differences." HUBERT BLAYLOCK, *SOCIAL STATISTICS* 126 (1960).

<sup>45</sup> See Sander, *Systemic Analysis*, *supra* note 1, at 444

STANFORD LAW REVIEW<sup>46</sup> and in a subsequent working paper<sup>47</sup> that provide further examples. Rather we turn to the issue of replication.

Sander claims that his work has been replicated, but he takes a very crabbed view of what is meant by replication.<sup>48</sup> He seems to mean simply that others using the same data, the same models and the same methods he did have duplicated his results; in short, he has made no errors in inputting his data and running his statistical programs. No one, of course, has ever claimed that he did, and if this is the test, even we have more or less replicated many of Professor Sander's results. However, replication so narrowly defined provides little additional reason to have confidence in a person's results. Indeed, if this were what was meant by replication, the evidence ultimately ruled inadmissible in the *Daubert* case would, no doubt, have passed with flying colors, because no one disputed that the *in vitro* and other evidence that the *Daubert* plaintiffs offered to show birth defects was poorly done or that redoing these tests would not also yield evidence of Benedectin's tetrageneity. Rather the trial court on remand excluded plaintiff's evidence because other more persuasive tests, in that case epidemiological evidence, failed to confirm that Benedectin caused birth defects.

In a similar sense, every published article that we know and all unpublished work that we have seen have failed to find in the BPS data reliable evidence for Professor Sander's claimed mismatch effect. These studies include work by us,<sup>49</sup> by Ayres and Brooks,<sup>50</sup> by Daniel Ho,<sup>51</sup> by Jesse Rothstein and Albert Yoon,<sup>52</sup> and by Katherine Barnes.<sup>53</sup> Similarly most studies searching for a mismatch effect of affirmative action at the undergraduate level come up empty or, like Bowen and Bok's *THE SHAPE OF THE RIVER*, find that if anything, black students do better at more selective institutions where credential mismatch is often greater.<sup>54</sup> None of the papers using the same data Professor

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<sup>46</sup> See Chambers et al., *Impact of Eliminating Affirmative Action*, *supra* note 19, at 1868-73.

<sup>47</sup> Lempert et al., *Critical Response to Sander*, *supra* note 24, at *passim*.

<sup>48</sup> See Sander, *Reply to Critics*, *supra* note 28, at 1984-86.

<sup>49</sup> Chambers et al., *Impact of Eliminating Affirmative Action*, *supra* note 19.

<sup>50</sup> Ayres & Brooks, *supra* note 27.

<sup>51</sup> E.g., Ho, *Affirmative Action's Affirmative Actions*, *supra* note 40, at *passim*; Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, *supra* note 40, at *passim*.

<sup>52</sup> Jesse Rothstein & Albert Yoon, *Mismatch in Law School* (Feb. 2006), Northwestern Law & Economics Research Paper No. 881110, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881110](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881110) (last accessed Oct. 20, 2006).

<sup>53</sup> Katherine Barnes, *Towards an Understanding of the Effects of Affirmative Action on Future Black Lawyers* (2006), draft paper available at <http://law.wustl.edu/faculty/documents/barnes/affirmativeactionbarnes06.pdf> (last accessed Oct. 20, 2006).

<sup>54</sup> WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differentials in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294, 309 (2005) (studying the College & Beyond, High School and Beyond and NELS data sets using methods that control for selection bias and concluding, "Minority students' likelihood of graduation increases as the selectivity of the institution attended rises. Our findings, based on three data sets and several analytical methods, suggest that the mismatch hypothesis is empirically groundless for black and Hispanic...students who attended college during the 1980s and early 1990s."); Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, SOCIAL SCIENCE RESEARCH (forthcoming 2006) (using a sample of the 1999 freshmen class at 28 selective colleges and

Sander uses (but employing different assumptions and methods) comes close to replicating his conclusions, and to our knowledge there is no published or unpublished work that does this. The only paper that might give Professor Sander even the slightest comfort is Rothstein and Yoon's sophisticated analysis which reveals no evidence of mismatch among the top 20 percent of black law students but suggests that a small proportion of black law students with credentials below that range may suffer from mismatch effects (and note my earlier comment about how the credentials of black law students are higher today than in the 1991 BPS).

If these problems were not enough to lead the Commission to conclude that it cannot rely on Professor Sander's STANFORD LAW REVIEW article for any policy purposes, it should reach this conclusion from Professor Sander's "A Reply to Critics" in the May 2005 issue of the STANFORD LAW REVIEW. Professor Sander's *Reply*, without ever directly saying so, repudiates his earlier analysis, by pointing to flaws in the BPS data and the model he used to analyze these data. He should but does not repudiate his conclusion; rather he seeks to bolster it with a new approach. However, as my co-authors and I show in our working paper and as I have indicated above, his approach does not correct for the selection bias he seeks to counter but takes advantage of the fact that the selection bias in his analysis works misleadingly to bolster his preferred hypothesis. Even so, Sander's results are not replicated by Ayres' and Brooks' using a similar methodology and do not even replicate using his methods when eventual bar passage and not first-time bar pass rates is the dependent variable.

Sander and we are, however, in accord on one point. Because the issues we debate are for the most part technical in nature, many of those who hear or read our arguments feel they cannot intelligently decide between them and choose to believe whichever conclusion supports their prior predilections. The Commission could perform a service for itself and others if it were to commission a review of our differing claims and an analysis of the BPS data by an econometrician of impeccable credentials, like the Nobel Prize winner James Heckman, or Charles Manski or Daniel Rubinfeld. We are confident that Professor Sander's statistical methods and claims would not withstand such scrutiny.

### **Black Bar Passage and Affirmative Action**

The Commission has requested an evaluation of Professor Sander's estimate of the effects of ending affirmative action on the number of black law school students who graduate each year and pass the bar. Professor Sander's article received perhaps more publicity for its "findings" on this score than on any other, because its counter-intuitive

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finding, "We thus conclude that, despite having both positive and negative implications for minority students, affirmative action policies operate, on balance, to enhance the academic achievement of minority students."); Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?* 25 J. POLICY ANALYSIS & MANAGEMENT 465, 479 (2006) (reviewing several studies, including Bowen & Bok, Datcher Loury & Garman, and Kane, and concluding, "Thus, the combined results of these studies support the notion that, on average, affirmative action in university admissions generates no harm, and probably some gains, in graduation rates and later earnings for minorities who attend more elite colleges and universities.").

claim that without affirmative action the nation's law schools would increase their production of black attorneys by 7.9 percent each year is truly striking. This conclusion rests on foundations that are shaky to the point of unreliability for the reasons described above. Moreover, the conclusion is even weaker than the foundations on which it rests because it fails to acknowledge changes in the law school applicant pool since 2001, the year Sander used for his estimates, and it requires further unsupported assumptions such as the assumption that black bar passage rates would equal the rates of whites with identical credentials absent affirmative action and the assumption that black students' decisions on applying to law school would be unaffected by the abolition of affirmative action.<sup>55</sup>

Professor Sander implicitly recognized the weakness of his estimate in his *Stanford Reply to Critics*, saying we are at our "strongest when discussing the consequences of eliminating racial preferences on the production of black lawyers,"<sup>56</sup> and seeking to distance himself from his estimate by calling it a "side issue"<sup>57</sup> and saying that he "never pretended that the projections [were] more than simulations and speculations about an unknowable future."<sup>58</sup> But he has refused to pull the trigger and say explicitly that his estimates are not just unreliable, but are far off the mark.

Linda Wightman, former vice president at the Law School Admissions Council (LSAC), developed two empirical models to evaluate the likely consequences of ending affirmative action, a "grid model" and a logistic regression model.<sup>59</sup> Under the regression model a greater proportion of underrepresented minority law students would be denied admission than under the grid model. Both models have shortcomings; the "true" picture of the effect of ending affirmative action at American law schools is most likely somewhere between the results of the two models.

Professor Sander's November 2004 *STANFORD LAW REVIEW* article borrows from Wightman's grid model estimate for the 2001 applicant pool, from which Sander concludes that if affirmative action ended today, African American law school enrollments would decrease by a modest 14.1 percent. The grid model derives its name

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<sup>55</sup> See also Roland G. Fryer, Jr. & Glenn C. Loury, *Affirmative Action and its Mythology* pp. 22-23 (July 2005), NBER Working Paper No. 11464, *reprinted in* 19 *J. OF ECONOMIC PERSPECTIVES* (2005) available at <http://www.nber.org/papers/w11464> (stating, with respect to Sander's claim that ending affirmative action would increase the supply of black lawyers, "We are not here endorsing (or disputing) the conclusions in Sander (2005), as they rest on a number of hotly disputed counterfactual hypotheses concerning the behavior of prospective black law students which are difficult to assess.").

<sup>56</sup> See Sander, *Reply to Critics*, *supra* note 28, at 1996.

<sup>57</sup> See *id.*

<sup>58</sup> See *Id.* at 1999. Professor Sander's claim that his estimate of the effect of ending affirmative action in *Systemic Analysis* is a side issue that he always regarded as highly speculative is a bit of revisionist history. His conclusions on this score in *Systemic Analysis* address what he calls a "central question." *Id.* at 468. Moreover, he is hardly tentative about his findings. Rather, he writes that he "can see no reason for revising downward [his 7.9 percent] estimate that the production of black lawyers would rise significantly in a world without racial preferences." *Id.* at 476.

<sup>59</sup> Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 *J. LEGAL EDUC.* 229 (2003); Linda F. Wightman, *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).

from the fact that within each of 90 LSAT/UGPA cells, race-neutral admission probabilities of being offered admission to at least one ABA-accredited law school are calculated for each racial/ethnic group based on the corresponding admission rate of whites in the same LSAT/UGPA cells. In a May 2005 *STANFORD LAW REVIEW* essay and a subsequent working paper, my coauthors (David Chambers, Tim Clydesdale and William Kidder) and I have criticized Sander's estimates for a host of reasons, some of which I will share with the Commission today.

First, using Professor Sander's methods, we performed grid model estimates for all the 1991-2005 admission cycles, and found that in each year since 2001 the results revealed a larger reduction in African American admission offers than in 2001: a 19.1 percent decline in 2002, 24.1 percent in 2003, 32.5 percent in 2004, and 29.4 percent in 2005. This is because the effect of ending affirmative action on black law school admissions is dependent on the number and credentials of white and other students who are competing with black students for law school slots. The number of white law school applicants in 2001 reflects a decrease in the number of white law school applicants that began a few years earlier, perhaps reflecting the attractiveness of positions in the dot com sector. Since 2001 the number of white law school applicants has increased substantially and is similar to what it was near the beginning of the 1990s. Thus, a 14.1 percent decline underestimates the impact on African Americans if affirmative action ended "today" even if one agrees with Sander's choice about which model to use. Moreover, the sensitivity of the model to the number of white and other applicants with higher index scores than black applicants means that without affirmative action the numbers of blacks in a particular law school could fluctuate dramatically within a only a few years. An applicant who might have been one of five black students in a first year section in one year might find herself as the only representative of her race if she were in a different entering cohort just a few years later.

Second, Sander's post-affirmative action graduation and bar passage estimates incorporate a significant departure from Wightman's grid model. Under the grid model, many of the admitted African Americans who would be denied admission under race-neutral policies are in the middle and lower-middle of the black LSAT/UGPA index score distribution. Yet, in his final table, Sander estimates the effect of ending affirmative action by deleting the 14.1 percent of African Americans in the LSAC's 1991 Bar Passage cohort who had the lowest index scores and retaining all the black law students with higher index scores. This error inflates his post-affirmative action bar passage rate for African Americans.

Combining the first and second points, when we used 2004 data and employed the grid model rather than Sander's "cut out the bottom" version of the grid model, yet followed Sander's other methodological steps, we still found that ending affirmative action resulted in a 21 percent net loss in the number of African American lawyers that would be produced that year.<sup>60</sup> Recently, we performed this same calculation for the 2003 and 2005 admission cycles. In 2003 the number of black lawyers would have declined by 11 percent and in 2005 there would have been a decline of 18 percent. Thus, for the three

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<sup>60</sup> See Chambers et al., *Eliminating Affirmative Action*, *supra* note 19, at 1891 n.122.



most recent admission cycles for which data are available, one might expect declines of 11 percent to 21 percent in the number of black lawyers without affirmative action, even if one accepts other aspects of Sander's approach about which we disagree, including: (1) applying whites' bar passage rates to African Americans with equivalent index scores; (2) positing that the grid model is the preferred approach, and (3) assuming, as Sander does, that ending affirmative action would not dampen African American application and matriculation rates at U.S. law schools.

These differences in the estimated impact of eliminating affirmative action exist when we apply Professor Sander's model to more recent data and accept most of his assumptions. We believe, however, that these estimates are too optimistic because Professor Sander failed to heed the warning by Wightman that the grid model's assumptions are unrealistic and likely to underestimate declines in black admissions post-affirmative action. In particular, the model assumes that if affirmative action ended, blacks hypothetically admitted by the model to some schools somewhere would in fact apply to those schools and matriculate at the same rates as whites, even if these were schools that the students had never shown any interest in attending, as evidenced by actually applying in real life.<sup>61</sup> To put this another way, the grid model assumes that a black student from Brooklyn would apply to and attend the University of Wyoming Law School if that were the only school that would have admitted a white student with his credentials.

Wightman's alternative model is a logistic regression model that, unlike the grid model, is anchored to the real applicant pools at ABA law schools. This model estimates how each racial/ethnic group would be affected if admission decisions were based solely on LSAT/UGPA index scores. Using her logistic regression model and BPS admissions year data (the 1991 entering class), Wightman estimated that the number of students of African American descent admitted to law school without affirmative action would have declined by nearly 80 percent.<sup>62</sup> Replicating her approach with 2001 admissions year data, Wightman estimated the drop at 38 percent.<sup>63</sup> Given that there were about 77,000 law school applicants in 2001, compared to between 96,000 and 100,000 in 2003-2005, an estimate of law school admissions under the regression model would reveal a greater decline for African Americans today than Wightman found in the 2001 cycle.

The regression model has its own flaws and clearly overstates the impact of ending affirmative action in that some, and perhaps many, black students would apply to different, lower-ranked schools if race was no longer considered in admissions, and they might be admitted to these schools although they would not have been admitted to any of the schools they actually applied to. The question is how much would things change? In embracing the grid model, Sander essentially assumes that black application behavior would shift dramatically, but there is little real-world evidence to suggest this assumption

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<sup>61</sup> See Wightman, *Threat to Diversity*, *supra* note 59, at 18, 23-25. Moreover, black students typically apply later in the admissions cycle compared to whites and apply to fewer schools on average than whites (4.2 versus 4.7 in 1999-2003), both of which suggest that black law school applicants may be somewhat less committed to attending law school than whites, and provide further reason why the grid model is likely to understate the likely impact on African Americans of ending affirmative action.

<sup>62</sup> See *id.* at 22 tbl.5.

<sup>63</sup> See Wightman, *Consequences of Race Blindness*, *supra* note 59, at 243 tbl.7.

is warranted. In our view neither Wightman's logistic regression model nor her grid model adequately captures what would occur, but it is plausible to assume that they establish upper and lower bounds.<sup>64</sup>

Professor Katherine Barnes, a lawyer with a Ph.D. in statistics on the faculty of the Washington University Law School in St. Louis, has also attempted to estimate quantitatively the effect of ending affirmative action on black and minority students. Working with the BPS data, her estimates are that abolishing affirmative action would reduce the number of black law school graduates each year by 12.6 percent, the number of blacks entering the bar by 9.0 percent, and the number of blacks who succeed in beginning their careers in well-paying jobs (defined as earning \$40,000 or more in 1995 dollars) by 45 percent.<sup>65</sup> Except for the earnings estimate, which no one else has tried to determine, we believe these estimates are low because they assume no black students would be discouraged from applying to law school absent affirmative action. Moreover, Barnes acknowledges that the estimate of a 12 percent decline in black lawyers in her draft paper derives from a "slice out the bottom" version of the grid model rather than a true grid model. Nevertheless, Barnes' estimate of a 12 percent decline is a fair distance from the rosy estimates Professor Sander has produced, and, perhaps not coincidentally, similar to an estimate Ayres & Brooks produced.<sup>66</sup>

These quantitative efforts to estimate the effects of ending affirmative action all leave something to be desired, for they omit factors that tend to exacerbate the effects of ending affirmative action on the production of black and other minority attorneys, as well as factors that might lessen the effects. For example, they overlook the differential impact of ending affirmative action on schools of different tiers. In particular, the number of black and other minority students attending and graduating from law school would diminish more substantially at the nation's most elite law schools than they would at less selective institutions. Yet every study that has been done, including Sander's, indicates that black and other minority law students who attend the so-called elite law schools do very well in graduating, passing the bar and in their subsequent careers. Moreover, as we have pointed out, it is the graduates of these schools, including the minority graduates, who disproportionately populate the ranks of teachers at all law schools, and who become associates and partners in the nation's largest law firms.

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<sup>64</sup> We also believe that other commentators on Wightman's logistic regression model, like Stephen Thernstrom, are correct in criticizing it for ignoring factors beyond index scores that influence law school admissions decisions. Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONSTITUTIONAL COMMENTARY 11 (1998). This is a point that Wightman concedes, for she found that for white applicants index scores explained 60 percent and 70 percent of the variance in admission decisions in 1991 and 2001, respectively, and was lower for other groups. Wightman, *The Consequences of Race-Blindness*, *supra* note 56, at 236 table 2. Sander, we should note, seems closer to the Wightman model than to Thernstrom on this one, for in his "Reply to Critics" discussion of the black-white index score gap, he assumes that 80 percent to 90 percent of admission decisions are explained by index scores alone.

<sup>65</sup> See Barnes, *supra* note 53, at 27-29. The 95 percent confidence intervals around these estimates are  $\pm$  5.3 percent, 3.7 percent, and 33.6 percent, respectively.

<sup>66</sup> See Ayres & Brooks, *supra* note 27, at 1816.

At the University of Michigan Law School, which we studied most closely, we estimated that only about a quarter of the minority students who had attended the school over a 27 year period would have been admitted without affirmative action.<sup>67</sup> Moreover, even this figure is probably an overestimate. When people ask whether a minority student would have been admitted to law school without affirmative action, they usually are asking whether a particular minority student had admissions credentials within the same range of most white admittees, and this is the question we sought to answer. But many such students have index scores where admission for white students, while common, is by no means guaranteed, and many are in index cells where fewer than half of the similarly credentialed whites are admitted. In an affirmative action system black students who fall into these “regular white admit” cells are almost always admitted to the schools to which they apply. In a truly color blind system, their probability of admissions might be 70 percent or 50 percent or 20 percent if they matched the admissions probabilities of similarly credentialed whites. So many black students with index credentials similar to many whites at a particular law school would nonetheless not be admitted to that law school, just as many whites similar to admitted whites do not now gain admission.

There is also the issue of financial aid. The average black student is, not surprisingly, needier than the average white. For example, the Michigan data revealed highly significant differences between the needs and debts of minority and white students. Ninety-six percent of Michigan’s minority alumni in the classes of 1990-96 had education-related debt when they graduated law school compared to 71.6 percent of the school’s white alumni. Moreover, the average debt of these minority students in constant 1996 dollars was \$65,652 compared to an average debt of \$52,665 for white students.<sup>68</sup> These differences exist even though minority students may get relatively more gift scholarship support than white students.

The BPS data similarly show greater need among black students and, indeed, financial reasons appear to be a common reason why blacks drop out of law school and one reason why their drop out rate exceeds that of whites. In an informal survey we found, somewhat to our surprise, that it is not just the nation’s wealthiest law schools which find a way to provide scholarship (as opposed to loan) aid to black students; other schools despite their lack of endowment income, provide whole or partial tuition waivers and other kinds of support. If affirmative action were abolished, no doubt race consciousness in providing scholarship support would have to go as well. This would further diminish the number of blacks who were able to secure legal educations and over the longer run might dampen interest in the profession considerably. Moreover, the benefits to whites from a color-blind distribution of scholarship support would be unlikely to equal the loss to blacks. Schools with little in the way of scholarship support that now waive tuition or find other ways to aid minority applicants to ensure diversity would have little incentive to provide similar support to whites since attracting a particular white student would have no implications for diversity.

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<sup>67</sup> See Richard O. Lempert, David C. Chambers & Terry K. Adams, *Michigan’s Minority Graduates in Practice: Answers to Methodological Queries*, 25 LAW & SOC. INQUIRY 585, 594 (2000).

<sup>68</sup> See Lempert et al, *supra* note 5, at 421.

Cutting the other way, it is predictable that, as happened in Texas after the *Hopwood* case and in California after Proposition 209, schools would seek to find proxies that allowed them to admit black students with weaker credentials than whites without explicitly attending to race.<sup>69</sup> Putting aside the question of where the boundary line is between permissible and impermissible “race-neutral” admission regimes, the fact remains that there are no satisfactory proxies for race in law school admissions, particularly since options like percentage plans that take account of residential racial segregation are not available at the law school level. As Deborah Malamud has convincingly demonstrated,<sup>70</sup> socioeconomic proxies for race work poorly if the goal is to increase black representation. Even if certain factors like low incomes or low parents education are far more characteristic of black families than of white ones, there are so many more whites than blacks in this nation that more whites than blacks gain from decisions based on these proxies. And as Sander has partly conceded in earlier research based on his experience as the architect of UCLA’s class-based affirmative action program, dimensions in which race and class overlap to a greater extent --such as net worth as opposed to parental education level or family income --are often the hardest to capture in the admissions process.<sup>71</sup> These proxies become an even less tenable means for promoting diversity as immigration increases.

The result of applying this class-based affirmative action formula at UCLA was that the socioeconomic diversity improved, but there were still entering classes with proportionally few African Americans, including 1.0 percent in 1999 and 1.6 percent in 2000,<sup>72</sup> which may have contributed to the UCLA Law School faculty’s decision to scale back its class-based affirmative action program in 2001.<sup>73</sup> In the years since Proposition 209, the UCLA and Berkeley Law Schools have tried in many ways to increase their numbers of black matriculants, and they have increased them from the dismal levels they reached in the years immediately following the California affirmative action ban. But

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<sup>69</sup> The argument that follows is true both of proxies that schools seek to develop to enable them to increase their black enrollment without explicitly considering applicant race and features of black applications, like a history of overcoming disadvantage, that all might agree are legitimate considerations in elevating one applicant above another who has higher test and grade credentials. In either case even if the feature is more likely to characterize a black applicant than a white one, numerically many more whites than blacks are likely to benefit from the consideration given that feature because there are so many more whites than blacks in the population.

<sup>70</sup> See, e.g., Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996); Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL. EDUC. 452 (1997).

<sup>71</sup> See, e.g., Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL. EDUC. 472, 483 (1997) response rates to parental net worth as 61 percent for all applicants and 58 percent among applicants with high index scores. By way of contrast, 95 percent of applicants gave information on their father’s education and 96 percent of applicants gave information on their mother’s education.); Richard H. Sander, *Comment in Reply to Professor Malamud*, 47 J. LEGAL. EDUC. 512, 513 (1997) (“The more perfect we could make our SES measures, the more an SES system of preferences would, in the aggregate, increase black enrollments. Thus a foreseeable irony: because SES preferences disproportionately help blacks, imperfections in SES measures disparately harm blacks.”).

<sup>72</sup> See Univ. of California Office of the President, University of California’s Law Schools (Oct. 2005), available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/lawper.pdf> (last accessed Oct. 20, 2006).

<sup>73</sup> See Report of the UCLA School of Law Admissions Task Force 12-13 (Jan. 2001).

they are not near the level that was achieved through affirmative action,<sup>74</sup> and they are sometimes attacked, as Sander has attacked them, for bad faith compliance.<sup>75</sup> The bottom line expectation is thus that we would expect to see schools working to limit any falloff in their black student population should affirmative action be banned and, depending on how closely they are policed,<sup>76</sup> to achieve some success in doing so. Nevertheless, the number of black lawyers produced by the nation's law schools, particularly its most prestigious law schools, might still diminish substantially, and efforts by schools to maintain diversity by identifying proxies for race might be offset by some of the above-described forces that cut the other way.

There is one final matter relating to the difference between the expectations that Professor Sander and we have about the effects of eliminating affirmative action, which merits discussion because it raises an issue that should concern the Commission. One reason why Professor Sander estimates as little harm as he does to the production of black lawyers absent affirmative action is that he believes that the black law students who would not be admitted to law school in a world without affirmative action would be the 14 percent of black law students who have the lowest credentials and the highest rate of failing to graduate law school and/or failing to pass the bar. We have elsewhere shown that the assumption that it would be the weakest black matriculants who would not be in law schools absent affirmative action is mistaken.<sup>77</sup> In addition, the percentage of black students with index scores below 500 has diminished from about 22 percent in the BPS cohort to between 4 percent and 8 percent in the last three years. Thus, other things being equal, if black students at the bottom of the index credential range were denied law school admissions today, the cost in lost black lawyers would be greater, perhaps considerably greater, than it would have been had the poorest credentialed black students in the 1990-1991 admissions cohort not entered law school.

Professor Sander nevertheless maintains his pessimistic view of the proportion of black law students who would pass the bar, arguing that even if the quality of black students at the bottom of the credential range has increased notably, the effects of that increase on the likelihood that more black bar takers would pass has been more than offset by the fact that in recent years many states have increased the bar performance levels that are needed for passing scores. His guess is that significantly fewer than 50 percent of blacks graduating law school today are passing the bar.<sup>78</sup> Recently we have corresponded on this issue and Professor Sander has shared with me data from several states and answered

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<sup>74</sup> In the 2005 entering class at the UC Law Schools (Boalt, Davis and UCLA) African Americans were 2.8 percent of the class, and they were 3.9 percent in 2004 and 4.7 percent in 2003. This contrasts with the last three years with affirmative action (1994-1996), when African Americans were 11.5 percent, 6.5 percent and 6.0 percent of the entering classes at the UC law schools. See Univ. of California Office of the President, University of California's Law Schools, *supra*.

<sup>75</sup> See, e.g., Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003, at B11.

<sup>76</sup> If, for example, schools were required to report the average admissions index scores of their white and black students and any statistically significant difference was cause for investigation, schools might be dissuaded from even considering factors, like overcoming a history of disadvantage, that all might think could be legitimately weighed in determining law school admissions.

<sup>77</sup> See Chambers et al., *Eliminating Affirmative Action*, *supra* note 19, at 1889-90.

<sup>78</sup> See Sander, *Reply to Critics*, *supra* note 28, at 2004.

some questions I had about them. But since he has not shared his data with me, and since he asked me to not share his claims with colleagues who might be in a better position than I to evaluate them, I can only note what he says and not endorse it.

If, however, Professor Sander's data are reliable, and if his claims which focus most heavily on California data, are true of most or all states, two matters that should be of concern to the Commission stand out. The first is that this situation has nothing to do with the mismatch effect and eliminating mismatch will do nothing to solve it. Indeed, for reasons already given, if the number of blacks entering law practice is lower in recent years than in prior years because of higher bar passage standards, then eliminating affirmative action will only make a deteriorating situation worse. Second, if Professor Sander is correct, changes in bar pass standards are having an adverse impact on the diversity of the legal profession and, most likely, are having a disparate impact on black representation within the legal profession. If higher bar pass standards are needed to weed out large numbers of incompetent or unethical attorneys from the bar, they may be justified and even desirable whatever their impact on blacks and other minorities. But if they are more accurately seen as the actions of a cartel designed, whatever their offered rationale, to limit competition among lawyers by limiting new entrants to the profession, their disparate impact on minorities means that recent changes in bar pass standards should be rolled back.<sup>79</sup> Where minorities are adversely affected by changes such as these the nation relies on the USCCR to investigate the matter and to propose remedies if the adverse impact proves to be without justification.

## **Causes and Cures**

The final issue that the Commission wanted addressed is the cause of the relatively poor graduation and bar passage performance of black law students, at least as revealed by the BPS data for the class entering law school in 1991, and the cure. There are certain things that can be said, and much we do not know. Before turning to this issue, however, we should note that this focus on failures and problems is the "half empty" perspective. In 1970 there were 4000 black attorneys; today there are more than 40,000. The great majority of the 40,000 have attended schools that were once nearly all white, and most were beneficiaries of affirmative action in their admission to law school. Black attorneys who went to predominantly white law schools are partners at major largely white law firms; they have founded their own mixed and predominantly black law firms; they sit on many federal and state benches, including the United States Supreme Court; they work at all government agencies, often in leadership positions; they are general counsel and on the staff of general counsel at Fortune 500 companies; they are entrepreneurs who have started their own companies and become rich; they are in military JAG units; they have represented the poor and the downtrodden; they have successfully run for political office. Some of these people would not be lawyers today but for affirmative action; many more would not have been admitted to the law schools they attended without affirmative action. So looking at the big picture and valuing ethnic diversity within all reaches of the

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<sup>79</sup> See William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, passim (2004).

legal profession, affirmative action admissions must be regarded as a positive driver of professional change and a considerable success. Focusing instead on individuals, affirmative action has enabled many blacks and other minorities to live far better lives and make more important social contributions than they otherwise could have aspired to.

It is important to remember these facts when assessing the impact and value of affirmative admission to American law schools. But it is also important not to deny the data that show that a far greater proportion of blacks who start law school than whites, do not finish, and among the blacks who do finish, a higher proportion than whites never pass a bar exam. What are the causes, and what are the cures?

The cause, as our review of Sander's work and the work of numerous scholars has now shown, is not to any important extent a mismatch between students and institutions. Indeed students "mismatched" in the nation's most selective law schools, if anything, benefit from being at institutions that attract the nation's most capable law students. The degree of mismatch should affect most black students' rank in class, for other things being equal class rank is likely to be lower the stronger the students one is competing with. But it appears that, except in relatively rare cases where a student flunks out when he would not have failed at a less selective institution, this effect of mismatch does not manifest itself in increased drop out rates or failures to pass the bar. What then explains the disparities between white and black outcomes?

The explanation must begin with the index score variables, and the fact that they do relate to performance in law school and on the bar. Black students score, on average, more poorly than white students on the LSAT and have lower UGPAs. These lower scores mean that they are predicted to do, on average, more poorly in law school than white students and, by extension, on the bar. Since the index variables have some validity, it is not surprising that their predictions are to some extent borne out. If these predictor variables were perfect predictors of eventual graduation and bar passage, we would have a simple cure for failures in law school. Only those students, white or minority, who were predicted to graduate and pass the bar would be admitted to law school, and with perfect predictors, all who were admitted would become lawyers. But the predictors are far from perfect, even when predicting first year law school grades, which is the only prediction they have been validated for. Many students do better than they were predicted to do by the index variables and many do worse. Some students admitted through affirmative action programs outperform many whites who were admitted without benefit of affirmative action, while other affirmative action admittees flunk out or fail the bar, even though their index credentials suggested that their success was likely. Still other students, white and black, are predicted to have shaky prospects for success and do stumble along the way.

The index predictors do not determine the future performance of any student, black or white. At most, they give some idea of the student's risk of having serious difficulties in law school and beyond. It may be that at some level of risk, schools should refuse to admit law students, because the odds are too heavily against their succeeding, or that students should recognize that they are probably not cut out for law school or the practice

of law and shun a path that is likely to waste career development time and perhaps leave them with crushing debt loads. It may even be that in the 1991 admissions cohort numbers of black students, particularly in the nation's least selective law schools, fell into this "too risky" range and should not have been admitted. But this is a hard call to make when it is the student who bears most of the risk and will pay most of the costs of a wrong decision, and when some black students with the highest predicted risks of failure nonetheless succeed. It is, of course, both relevant and true that when minority students are admitted whose prospects are shaky, some white students with greater promise for success are excluded, but the excluded white students will, for the most part, be those whites who themselves have relatively high risks of failure, and the numbers displaced will be small.

What the association between the differential success of black and white law students and average index score differences suggest is that, on average, black students come to law school with poorer academic preparation, test taking skills and/or other relevant skills than white students. The cure for this contributing cause of black-white disparities in law school graduation and bar passage must begin long before law school, perhaps as early as prenatal nutrition programs and the removal of lead paint from the walls of inner city housing, for what we see in lower black index scores is in some measure an accumulation of prior discrimination and deficits. The cure must include better educational opportunities from pre-school on up, and countering discrimination that may affect learning throughout an educational career. The problem cannot be fully solved and disparities made to entirely disappear only after students have entered law school. But this does not mean that there is nothing that law schools, and colleges before them, can do to ameliorate earlier educational and skill deficits that some students, white, black and others, bring. In the case of blacks and other minorities, ameliorative actions include creating atmospheres free from discrimination and conducive to learning, and affirmative action may itself be part of the cure. In many schools, affirmative action may be necessary to allow the assembly of what has been called a "critical mass;" that is, to have enough black students on a campus, in a school or attending particular classes to ensure that individuals do not feel singled out on account of their race, to counter stereotypes that mistakenly attribute similar views to all members of a particular minority group, to relieve the pressure a person can feel when she believes her entire race will be judged by her performance, and to allow the creation of a culturally comfortable subcommunity or other milieu. Other efforts may include special programs, smaller classes, the creation of mentoring arrangements and the like. I am not an expert on these activities and their effects, but there are people who are experts on improving minority performance. They should be consulted.

An important reason why such a high proportion of the BPS black law school matriculants never passed the bar is that many never finished law school and so could never sit for a bar exam. In some cases, these drop outs were people who, after weeks, months or a year of legal education, decided that law school was not for them. They are no more failures than white students who leave law school for similar reasons. These students may have paid a price, but they also learned a lesson, and perhaps they thought the price worth it. Other students may have left law school because they flunked out, but



the BCS self-report data suggest that this was not a major cause of departures. Low grades may, however, have been an important factor leading students to feel either that law school was not for them or that their job prospects would not be enhanced enough by a law degree to make further investment in a legal education worth their while. Illness and family considerations are other reasons that students give for leaving law school without a degree. But the most common reasons that BPS students give for leaving law school are financial. Costs and income ultimately drive the decision. It is plausible to assume that black law students, far more often than whites, cannot get the support they need to pay for law school, or see themselves getting deeper into debt than a law school degree will be worth or face other financial demands that preclude pursuing their legal educations.

If the primary reason black students have for leaving law school is financial, the obvious answer is to invest more in student support. The increased cost of legal education and the failure to increase available support concomitantly hurts all law students from less than wealthy backgrounds, but the data indicate that it hurts blacks more than whites because, on average, blacks have considerably less family wealth that they or their parents can invest in legal education. As we saw from the Michigan data reported above, even a well-off school that has a capacity for gift scholarship support must insist that most of its students, white and black, finance a considerable portion of their educational costs through loans. This is a sensible investment for most students, given the salaries that many Michigan graduates can start at or aspire to, but at other schools, including schools with total costs that are not much less than Michigan's, such an investment may be fraught with risk. Even if the student graduates and passes the bar, earnings prospects may not justify the borrowing needed to reach this stage, and it may take attending law school and learning more about the job market for lawyers for a student to realize this. Add the potential for labor market discrimination to this mix, and there is very good reason why black students drop out of law school at far higher rates than whites. The best solution might be a system which continues to require students to borrow to pay law school tuition but which forgives portions of loans depending on the amount of post law school income graduates earn. Then the danger of not passing the bar after three years in law school, or not getting a decent job after passing the bar, or taking a while to build a practice, or being discriminated against in a job search will loom less large.

Students who drop out of law school incur substantial costs as we have pointed out, but arguably that is their own business. However, some might argue that they also impose costs on others because if they had not entered law school to later drop out, another student who would have stayed in school, graduated and passed the bar might have been admitted. This is true, and the cost to others should be recognized. However, it is a mistake to think that the bulk of such costs are imposed on others by affirmative action admittees. Even though whites are less likely than blacks to drop out of law school before graduating, there are so many more white students that most of these dropout spillover costs are attributable to white admits rather than to black affirmative action students. Thus Wightman reports that 372 black students in the BPS cohort who were

apparently admitted through affirmative action and 32 black students admissible without benefit of affirmative action failed to graduate, but so did 2,180 white students.<sup>80</sup>

A third reason why black students do worse than white students relates to discrimination and related experiences, such as performance decrements due to stereotype threat or a need to adjust to a culturally uncongenial setting. Some observers of classrooms and campuses, as well as surveys of students, suggest that, intentionally or not, black law students are, and/or feel they are, discriminated against or otherwise disadvantaged.<sup>81</sup> Professor Barnes using the BPS data seeks to quantitatively assess discrimination, and finds that evidence of black performance detriments due to possible discrimination vary considerably with type of school. They are at a maximum among blacks attending midrange private schools where discrimination is arguably the explanation for why black students are 13.4 percent less likely to graduate than their white classmates after controlling for index credentials.<sup>82</sup> Professor Clydesdale's work also suggests that aspects of discrimination like a hostile classroom atmosphere may be part of the explanation for poor black law student performance.<sup>83</sup> In addition, the well documented phenomena of stereotype threat can explain relatively poor black performance on index credentials, law school grades and bar performance, for all turn on the kind of high stakes testing on important matters that is known to trigger performance detriments through the stereotype threat process.<sup>84</sup>

While it is plausible to suppose that dimensions of discrimination and the stress associated with them are responsible for some of the differences we see in black versus

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<sup>80</sup> See Wightman, *Threat to Diversity*, *supra* note 59, at 36. Interestingly there were more whites who apparently benefited from some kind of affirmative action, in the sense that their law school admission would not have been predicted based on their index credentials, who failed to graduate than there were blacks – 408 versus 372. It is easy to lose sight of numbers when discussion focuses on percentages, but the costs paid reflects what happens to how many individuals and not to what percent of them.

<sup>81</sup> See, e.g., Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998); Daniel Solorzano et al., *Keeping Race in Place: Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15 (2002).

<sup>82</sup> See Barnes, *supra* note 53, at 18. Discrimination for Barnes is measured by the effects of race within school types net of individual student credentials. It includes all manifestations of discrimination including such phenomena as a hostile studying environment, stereotype threat and intentional discrimination. Her measure of discrimination might also, however, include factors not measured by the index credentials and associated with race. Thus it is possible that the special financial difficulties blacks face, arguably long term effects of discrimination, are contributors to the decrement Professor Barnes attributes to discrimination. Regardless of what elements are here, the important point is that these are race-associated effects and not effects attributable to mismatch or index credentials. In the midrange private schools, Professor Barnes finds that discrimination may also explain why Asian and Hispanic students were six to seven percent less likely than whites to pass the bar. In midrange public schools, by contrast, the race effect almost disappears, further supporting the suggestion that part of the effect that Barnes attributes to discrimination is attributable to the special difficulty black students have of paying for law school

<sup>83</sup> See 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).

<sup>84</sup> For a summary of the research literature on stereotype threat, see e.g. Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype Threat and Social Identity Theory*, 34 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 379-440 (M. Zanna ed., 2002).

white performance, it is difficult if not impossible to determine the magnitude of their contribution. The cure is similarly hard to come by, for as recent research teaches discriminatory responses to race are deeply ingrained. Experiments with resumes indicate that just having a black sounding name makes being called for an interview less likely. Job audits show that blacks are more seriously harmed than whites by criminal records.<sup>85</sup> And the extensive experimentation with the Implicit Association Test and other methodologies indicates a widespread cognitive tendency to link blacks more readily with negative concepts and whites with positive ones.<sup>86</sup>

One core task of the Commission is to promote the eradication of racial discrimination, but there is no easy or obvious route to doing so. In the law school and other educational contexts, all I can suggest is affirmative steps to create a welcoming atmosphere for minorities, to both respect separate minority communities and to create larger inclusive cross-racial communities, to develop tasks that break down stereotypes by requiring cross-racial cooperation and to secure minority faculty and staff who can serve as positive role models for students of all races. As noted above, affirmative action can be part of the solution, for it is often necessary, in particular in institutions as small as most law schools, to allow the assembly of a critical mass of black or Hispanic students that will show sufficient diversity to break down stereotypes and provide minority students with a comfortable sense of belonging. At the same time affirmative action can contribute to the problem because the perception that black students can get to campus only through affirmative action and that they perform poorly in and after law school can feed negative stereotyping and prejudice. Here I suggest that we strive to keep all the evidence in view, and not just the evidence that Professor Sander and others would have the Commission attend to.

All the evidence includes the huge numbers of affirmative action admittees who have effectively navigated law school and the bar exam and established themselves successfully in careers they would not otherwise have. Information like that which we learned from our study of Michigan law school graduates; namely that almost all blacks who matriculated at the law school graduated and passed the bar, and that controlling for time since graduation and gender Michigan's black alumni had earnings similar to its white alumni, were as satisfied with their careers and did more service, should be more widely disseminated to counter the negative stereotypes some hold of affirmative action's beneficiaries. Most important perhaps is not to feed conflict between the races and fuel resentment of blacks and other affirmative action admittees on campus by suggesting that affirmative action is more costly to the interests of whites and Asians than it in fact is. On this point, information published by Wightman is telling and deserves far more notice than it has received. First, in the 1990-1991 admissions year, 26 percent of white law school applicants were, on the basis of their LSAT/UGPA index, predicted to be admitted

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<sup>85</sup> See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003)

<sup>86</sup> See, e.g., John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes* 33 J. EXPERIMENTAL SOC. PSYCHOL. 510 (1997); Mahzarin R. Banaji, *The Opposite of a Great Truth Is Also True: Homage to Koan # 7* in PERPSECTIVISM IN SOCIAL PSYCHOLOGY: THE YIN AND YANG OF SCIENTIFIC PROGRESS 127 (J.T. Jost et al. eds, 2003); Nilanjana Dasgupta, *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316 (2000).

to law school and 26 percent were admitted.<sup>87</sup> Thus despite widespread affirmative action, whites in aggregate did not suffer. Second, using her logistic regression model and the combined index, she estimated that 2,748 black students were admitted to a law school to which they applied whose admission would not have been predicted based on their admissions index and the standard the school ordinarily applied, while 4,392 whites who could have been expected to have gained admission based on their credentials failed to get into law school. However, 6,321 white applicants who were predicted denials were also admitted to law school.

Had there not been this “affirmative action” for whites, taking such forms as preferences for alumni’s children, every white applicant who might have expected to be admitted to law school based on his or her credentials could have been admitted and there still would have been room to admit 1,929 white students whose credentials did not predict their admission. This residual is 70 percent of the number of blacks who arguably owed their admission to affirmative action, and the total number of “affirmative action” white admits is 230 percent of the number of black affirmative action admittees. Thus, those white students who feel they should have been admitted to law school but were not, need only look to whites who enjoyed exceptional privileges to see why there was no room for them. They need not blame affirmative action. Lawsuits, reports and op-ed columns that suggest that affirmative action is why many qualified whites cannot get into law schools of their choice only serve unnecessarily to fan racial tensions. The Commission should call attention to the widespread privileges many whites enjoy and help to calm these tensions.

## **Conclusion**

To sum up briefly, the Commission in a memorandum accompanying its invitation to me to testify said that it wished to receive information on the:

- The strength of Sander’s findings and those of his critics;
- The possible outcomes of eliminating or reducing racial preferences at law schools;
- The possible reasons for the performance disparities between white and African American law students; and
- The empirical impact of these findings and recommendations on the legal profession.

It is my belief, and I have tried to demonstrate, that Sander’s findings are so poorly grounded in the data and so fraught with analytic problems that they deserve no weight in the policy debate on affirmative action. This conclusion seems to be the unanimous view of scholars who have examined his work closely and published comments on it.

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<sup>87</sup> See Wightman, *Threat to Diversity*, *supra* note 59, at 14.

If affirmative action were eliminated or reduced in the nation's law schools, the number of minority students attending these law schools would drop, with the size of the fall turning on whether preferences were entirely eliminated or merely reduced and on the future interests of whites and minorities in attending law school as well as on the future cost of legal educations and the available financial support. This in turn would reduce the number of black and other minority group attorneys produced each year. It would more substantially reduce the number of minorities graduating from the nation's leading law schools, taking judicial clerkships and becoming law teachers. It also would reduce the classroom benefits that students at and alumni of schools like Michigan say they gain from ethnic diversity.

There are various reasons for possible performance differences between white and minority group students. These include differences in educational backgrounds and skills, differences in the ability to finance a legal education and bar review preparation, differential vulnerability to stereotype threat, different comfort levels with law school and experiencing discrimination. All performance differences are, however, on average, and no one's fate is determined by his or her admissions credentials. Some students perform much better relative to others than credential differences would suggest and some perform much worse. Moreover, at least in the case of schools like Michigan, it appears that whatever differences there are in law school performance are reflected barely, if at all, in the success measures that are relevant once students graduate and enter legal practice.

It is easy to conclude that Professor Sander's findings, whose weaknesses we have shown, should have no effect, empirical or otherwise, on the legal profession. His recommendation that black students be admitted through affirmative action up to a quota of 4 percent, if schools don't achieve that proportion without affirmative action, should be similarly dismissed. His additional recommendation that more information be given to students about their chances of graduating and passing the bar has more to commend it. If it is acted on, however, information provided should be equally available to students of all backgrounds; it should be based on more than just admissions credentials; ethnic group specific information must be limited to the small number of schools that regularly admit enough students of particular ethnicities that reliable information can be provided, and testing is necessary to ensure that the information benefits do not cause harm by promoting discriminatory attitudes or that warnings of risk do not become self-fulfilling prophecies through stereotype threat, increased difficulties in securing loans and other mechanisms.

Let me conclude by saying that I believe that the organized bar can take considerable pride in the support that it has given to law school affirmative action programs over the years and in its success, thanks in large measure to those programs, in opening up what was once an almost lily white profession to minorities of many backgrounds. The faces of the legal profession are still not representative of the faces of America as a whole, but they are far closer than they would be without affirmative action. It would be a tragedy if a Commission devoted to the promotion of Civil Rights should make findings or issue a

report that would threaten to halt nearly thirty years of progress toward a more diverse legal profession.

Opening Statement Before the United States Civil Rights Commission  
*Dean Steven R. Smith*

Fostering diversity in legal education has been a core goal of the ABA and of the Section of Legal Education and Admissions to the Bar for many years. Since 1980, ABA Standards have required law schools to demonstrate “a commitment to providing full opportunities for the study of law and entry into the legal profession” by members of minority groups.

The commitment to law school diversity represents a broad consensus expressed in legal education, and higher education generally, regarding the educational value of diversity in the classroom. We believe all students benefit from exposure to diverse viewpoints and experiences, and racial and ethnic differences often provide the basis for differences in perspective. The U.S. Supreme Court recognized the importance of this diversity in *Grutter v. Bollinger*. Indeed, the Court recognized that fostering diversity in law schools is a matter of compelling importance. “Student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). The Court acknowledged the evidence that the law school presented that diversity “enhance[s] the classroom discussion and the educational experience both inside and outside the classroom” and that it thereby “include[s] students who may bring to the Law School a perspective different from that of members of groups that have not been the victims of such discrimination.” *Id.* at 319 (citing to the trial evidence).

The Court characterized the benefits of law school diversity as “substantial.” It cited the district court’s findings that “‘cross-racial understanding’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Id.* at 330 (internal citations omitted). The Court also noted that “numerous studies show that diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” *Id.* at 330 (citing the record).

Beyond its importance to law school work, diversity is essential for the preservation of democracy in our country and for our nation’s continued ability to compete and lead effectively in world economic and political spheres. The Court in *Grutter* noted that American businesses have “made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints. *Id.* Military leaders have made the same point. *Id.* at 331. The Court also noted the special importance of law schools in our society.

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the education necessary to succeed in America.

*Id.* at 332-333 (internal citations omitted).

The Commission is particularly interested in the recently adopted revisions to the Council's diversity standards that have been placed before the ABA House of Delegates, and I will spend most of the remainder of my statement addressing those issues. I should also note, however, that in addition to accreditation issues, the Section of Legal Education and Admissions to the Bar and the ABA generally have participated in many activities over the years to encourage diversity in law schools and in the profession. Those efforts continue, as do the efforts of other professions to diversify themselves.

Turning then to the revisions in the Standards, I want to cover three matters concerning those revisions, particularly the revisions to Standard 211. First, I will describe the process that the Council undertook with respect to those revisions. Second, I will describe what those revisions require of law schools. Third, I will address several misconceptions concerning those revisions that have appeared in public commentary.

### **The Revision Process**

The Council, which is the major governing body of the Section of Legal Education and Admissions to the Bar, undertook a comprehensive review of the Standards for Approval of Law Schools during the period 2003 through 2006, a review process that the Council undertakes every few years. The proposed revisions to Standards 210-212 and their Interpretations were developed as a part of that process. The Council and its Standards Review Committee were cognizant of the fact that there had not been substantial changes to these provisions since 1994, and that revisions would be particularly appropriate at this time to reflect changes in the law and institutional practices that had occurred since the existing Standards were adopted. They also concluded that a need existed for greater clarity regarding both what is permitted and what is required by the Standards in order to provide better guidance both to law schools and to the Accreditation Committee.

In August 2005, the Council approved distributing for comment the proposed revisions to Standards 210-212 and the Interpretations of those Standards. The proposed revisions



were widely distributed for comment and also were posted on the Section's website. A hearing to elicit comment was held during the Association of American Law Schools Annual Meeting on January 5, 2006, and many individuals and representatives of interested organizations appeared to speak to these proposals at that hearing. Also, a large number of written and e-mail comments were received during the formal comment period. Although the Council received numerous comments to the effect that the proposals did not go far enough toward ensuring diversity in law schools, it is noteworthy that not one comment was received suggesting that the proposals went too far in the direction of fostering diversity.

After considering all of the comments, the Standards Review Committee presented its final recommendations for revision of Standards 210–212 at the Council's meeting on February 11, 2006. The Council approved the recommended changes and adopted the Committee's recommendation concerning Standard 211 without modification. The Council has filed a Report with Recommendations seeking the concurrence of the ABA House of Delegates in these revisions at the House's meeting in August 2006. I have provided the Commission with a copy of this Report.

### **What Do the Revised Standards Require?**

First, revised Standard 210 now states a comprehensive and clear requirement of non-discrimination and equal opportunity in both employment and admissions decisions.

Revised Standard 211 then imposes an obligation to demonstrate, by concrete action, a commitment to having a student body that is diverse with respect to gender, race and ethnicity. These Standards allow law schools the latitude to implement the commitment to diversity in a manner that takes into account each school's individual circumstances. Law schools, notably, may make the required demonstration of a commitment to seeking a diverse student body by methods other than employing race-conscious admissions decisions.

There are a broad range of well known methods for seeking to recruit and enroll a diverse student body, including many that do not include race-conscious admissions decisions. Examples are: admissions recruitment outreach to undergraduate campuses having a substantial population of minority students; "pipeline" efforts to encourage persons from underrepresented groups, even as early as high school, to consider the legal profession as a career; careful consideration of factors in addition to LSAT score and undergraduate grade point average, such as achievements in student leadership, the workplace and graduate education, when making admissions decisions; holding or collaborating in summer programs that assist those of all races and ethnic backgrounds to be better prepared for admission to and success in law school; and enhanced efforts to encourage admitted minority students to enroll. And these are only some examples of the great variety of techniques that might be used to seek student body diversity without using the type of race-conscious admissions selection policies that *Grutter* permits. As far as we know, none of the above techniques have been held incompatible with existing

prohibitions, where they exist, against the use of race in making academic admissions decisions.

For many educational reasons it is important that law schools also have a commitment to diversity in their faculty and staff. The rationales for faculty/staff diversity parallel the reasons for educational diversity in the student body that the *Grutter* Court noted: e.g., faculty and staff diversity enhance “the classroom discussion and the educational experience both inside and outside the classroom” and may “better prepare students for an increasingly diverse workforce and society, and better prepares them as professionals.” In addition, faculty and staff diversity may assist a law school in successfully enrolling, educating, serving and graduating a diverse student body. Thus Standard 211(b) makes explicit the long-standing practice of the Council and the Accreditation Committee under the existing Standards to require schools to demonstrate a commitment to seeking a diverse faculty and staff. As with the requirement concerning diversity of the student body, however, the requirement is that schools demonstrate a commitment to having a diverse faculty and staff. The actual results of a school’s efforts, although relevant, are not dispositive concerning the ultimate issue of commitment. Also, as with the requirements concerning student body diversity, the Standard does not require that law schools consider race in making employment decisions and contemplates that schools may demonstrate the required commitment to seeking a diverse faculty and staff by means other than race-conscious employment decisions.

The ABA is hardly unique in expecting the institutions it accredits to be committed to diversity. The ABA’s core requirement that law schools demonstrate a commitment to having a student body, faculty and staff that are diverse with respect to gender, race and ethnicity is very similar to the long-standing membership requirements of the Association of American Law Schools, to which 168 of the 192 ABA-approved law schools belong. Other accrediting bodies similarly seek to promote diversity. Other recognized accrediting agencies that require the institutions that they accredit to demonstrate efforts toward achieving a diverse student body or faculty include: the Association to Advance Collegiate Schools of Business, the Accrediting Council on Education in Journalism and Mass Communications, the American Library Association, the American Psychological Association, the Liaison Committee on Medical Education, the Middle States Association of Colleges and Schools, and the Planning Accreditation Board.

### **Misconceptions Concerning the Revisions and Their Effect**

In recent months, the ABA has become aware that public discussion concerning the revisions since the Council adopted them in February has been fueled by several misconceptions. For that reason it may be helpful to take the unusual step of discussing what the proposed revisions do not do:

- The proposed revisions do not impose significant new requirements on law schools. Rather, they continue the requirements of the existing

accreditation standards while providing greater clarity and more guidance to law schools.

- The revised Standards and Interpretations do not require law schools to consider race or ethnicity in their admissions decisions. Rather, Interpretation 211-2 states only that law schools “may” use race and ethnicity in their admissions decisions in the manner permitted by the United States Supreme Court in its decision in *Grutter v. Bollinger*.
- The revised Standards and Interpretations do not establish or mandate a system of “quotas” for minority enrollment. In fact, the Council explicitly rejected a recommendation that the Standards require that law schools enroll a “critical mass” of students from underrepresented minority groups. The Council did so in part because such a requirement could be viewed by some as establishing a quota requirement. Rather, the requirement of the Standard is that law schools “demonstrate by concrete action . . . a commitment” to having a diverse student body, faculty and staff. Interpretation 211-3 does indicate that the results that a school achieves in its diversity efforts are “relevant.” “Results,” however, would be only part of a wide range of facts that would be considered, including facts concerning the efforts that a school makes to achieve diversity. Thus, results are not dispositive; the ultimate question to be decided is whether a school meets the requirement of the Standard, which is that a law school must demonstrate a commitment to diversity.
- Finally, the revised Standards and Interpretations do not require law schools to violate state or federal laws prohibiting the consideration of gender, race, ethnicity or national origin in admissions or employment decisions. Because the Standards do not require a school to consider gender, race ethnicity or national origin in its admissions or employment selection policies, Interpretation 211-1 makes the logical point that a constitutional or statutory provision that prohibits the consideration of such factors in admissions or employment decisions still does not relieve a law school of the obligation to comply with the requirements of Standard 211, which is to demonstrate a commitment to having a diverse student body, faculty and staff. The Council never intended this Interpretation to be construed as requiring a law school to violate any applicable constitutional or statutory provisions, and expressly believes that it does not do so. Rather, the Council intended that law schools that are subject to constitutional or statutory prohibitions against using race-conscious selection policies would have to demonstrate the commitment required by the Standard by means other than those prohibited by the applicable constitutional or statutory provision. The Council will consider at its June 2006 meeting an amendment to Interpretation 211-1 that makes it even clearer that the Interpretation is not intended to compel law schools to

violate such constitutional or statutory provisions in order to comply with the Standards.

In closing, I would like to note for the record the ABA's concerns about some events that took place prior to the Commission's current proceeding. I was surprised to learn that during the month of March, five members of the Commission wrote two letters on Commission letterhead (one signed by one member of the Commission and another signed by four other members) to the United States Department of Education. These letters objected to Standard 211 as adopted by the Council and urged that the Department either deny the Council's current petition for re-recognition as an accrediting agency or that the Department grant re-recognition only on the condition that the Council disavow Standard 211.

I am disappointed that these letters reached such strong conclusions and further urged that the DOE take detrimental action without providing the Council an opportunity to be heard. Despite disclaimers that the letters did not represent the official view of the Commission, the use of Commission letterhead in communications with the Department of Education in an important regulatory matter that is before the Department presents a substantial risk of prejudicing the Department of Education's consideration of the Council's petition for re-recognition.

**Appendix 1**

**AMERICAN BAR ASSOCIATION  
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR  
REPORT TO THE HOUSE OF DELEGATES**

**Recommendation**

1           RESOLVED, That the American Bar Association House of Delegates concurs in  
2           the action of the Council of the Section of Legal Education and Admissions to the  
3           Bar in adopting revisions to Standards 210-212, concerning equal opportunity and  
4           diversity, of the Standards for Approval of Law Schools and the Interpretations  
5           thereto dated August 2006.

**STANDARDS FOR APPROVAL OF LAW SCHOOLS  
[MARKED-UP]**

**Standard 210. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY.**

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ~~ground~~ the basis of race, color, religion, national origin, sex, gender or sexual orientation, age or disability.

(b) A law school ~~may~~ shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, ~~sex~~ gender, ~~or sexual orientation, age or disability.~~

~~(c) The denial by a law school of admission to a qualified applicant is treated as made upon the ground of race, color, religion, national origin, sex, or sexual orientation if the ground of denial relied upon is~~

~~(1) a state constitutional provision or statute that purports to forbid the admission of applicants to a school on the ground of race, color, religion, national origin, sex, or sexual orientation; or~~

~~(2) an admissions qualification of the school which is intended to prevent the admission of applicants on the ground of race, color, religion, national origin, sex, or sexual orientation though not purporting to do so.~~

~~(d) The denial by a law school of employment to a qualified individual is treated as made upon the ground of race, color, religion, national origin, sex, or sexual orientation if the ground of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the ground of race, color, religion, national origin, sex, or sexual orientation though not purporting to do so.~~

~~(e)~~ This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff ~~which~~ that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex, ~~or gender~~ sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that ~~they~~ these policies are protected by the United States Constitution. It is administered as if though the First Amendment of the United States Constitution governs its application.

**(fd) Equality** Non-discrimination and equality of opportunity in legal education includes equal opportunity to obtain employment. A law school ~~should~~ shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment. and will avoid objectionable practices such as

- ~~(1) refusing to hire or promote members of groups protected by this policy because of the prejudices of clients or of professional or official associates;~~
- ~~(2) applying standards in the hiring and promoting of these individuals that are higher than those applied otherwise;~~
- ~~(3) maintaining a starting or promotional salary scale as to these individuals that is lower than is applied otherwise; and~~
- ~~(4) disregarding personal capabilities by assigning, in a predetermined or mechanical manner, these individuals to certain kinds of work or departments.~~

***Interpretation 210-1:***

*Schools may not require applicants, students, faculty or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily.*

***Interpretation 210-2:***

*This Standard does not require a law school to adopt policies or take actions that would violate federal law applicable to that school.*

***Interpretation 210-32:***

*As long as a school complies with the requirements of Standard 210(e), the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, it does not require a school to recognize or fund organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.*

***Interpretation 210-43:***

*Standard 210(fd) applies to all employers, including government agencies, to ~~whom~~ which a school furnishes assistance and facilities for interviewing and other placement services. However, this Standard does not require a law school to implement its terms by excluding any employer unless that employer discriminates unlawfully.*

***Interpretation 210-4:***

*The denial by a law school of admission to a qualified applicant is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age or disability if the basis of denial relied upon is an admissions qualification of the school which is intended to*

prevent the admission of applicants on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability though not purporting to do so.

**Interpretation 210-5:**

The denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age or disability if the basis of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability though not purporting to do so.

## **Standard 211. EQUAL OPPORTUNITY AND DIVERSITY EFFORT.**

**(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of underrepresented groups, notably particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.**

**(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.**

**Interpretation 211-1:**

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions.

**Interpretation 211-2:**

Consistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.



**Interpretation 211-3:**

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

**Interpretation 211-1:**

~~This standard does not specify the forms of concrete actions a school must take in order to satisfy its equal employment obligation. The satisfaction of such obligation is based on the totality of its actions. Among the kinds of actions that can demonstrate a school's commitment to providing equal opportunities for the study of law and entry into the profession by qualified members of groups that have been the victims of discrimination are the following:~~

- ~~a. Participating in job fairs and other programs designed to bring minority students to the attention of employers.~~
- ~~b. Establishing procedures to review the experiences of minority graduates to determine whether their employers are affording equal opportunities to members of minority groups for advancement and promotion.~~
- ~~c. Intensifying law school recruitment of minority applicants, particularly at colleges with substantial numbers of minority students.~~
- ~~d. Promoting programs to identify outstanding minority high school students and college undergraduates, and encouraging them to study law.~~
- ~~e. Supporting the activities of the Council on Legal Education Opportunity (CLEO) and other programs that enable more disadvantaged students to attend law school.~~
- ~~f. Creating a more favorable law school environment for minority students by providing academic support services, supporting minority student organizations, promoting contacts with minority lawyers, and hiring minority administrators.~~
- ~~g. Encouraging and participating in the development and expansion of programs to assist minority law graduates to pass the bar.~~
- ~~h. Developing and implementing specific plans designed to increase the number of minority faculty in tenure and tenure-track positions by applying a broader range of criteria than may customarily be applied in the employment and tenure of law teachers, consistent with maintaining standards of quality.~~
- ~~i. Developing programs that assist in meeting the unusual financial needs of many minority students, as provided in Standard 211.~~

***Interpretation 211-2:***

*Each ABA approved law school (1) shall prepare a written plan describing its current program and the efforts it intends to undertake relating to compliance with Standard 211, and (2) maintain a current file which will include the specific actions which have been taken by the school to comply with its stated plan.*

**Standard 212. REASONABLE ACCOMMODATION FOR QUALIFIED INDIVIDUALS WITH DISABILITIES.**

**Assuring equality of opportunity for qualified individuals with disabilities, as required by Standard 210, may require a law school to provide such students, faculty and staff with reasonable accommodations.**

**~~A law school may not discriminate against individuals with disabilities in its program of legal education. A law school shall provide full opportunities for the study of law and entry into the profession by qualified disabled individuals. A law school may not discriminate on the basis of disability in the hiring, promotion, and retention of otherwise qualified faculty and staff.~~**

***Interpretation 212-1:***

*Individual with disability, fFor the purpose of this Standard, and Standard 210, disability is defined ~~in~~ as in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section ~~706-794~~, as further defined by the regulations on post secondary education, 45 C.F.R. Section 84.3(k)(3) and by the Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq.*

***Interpretation 212-2:***

*As to those matters covered by Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, neither this Standard nor Standard 210 ~~is not designed to~~ imposes obligations upon law schools beyond those provided by those statutes.*

***Interpretation 212-3:***

*The essence of proper service to individuals with disabilities is individualization and reasonable accommodation. ~~Each individual~~ Applicants and students shall be individually evaluated to determine if whether ~~he or she~~ they meets the academic standards requisite to admission and participation in the law school program. The use of the term “qualified” in the Standard requires a careful and thorough consideration of each applicant and each student’s qualifications in light of reasonable accommodations. Reasonable accommodations are those that ~~do not fundamentally alter~~ are consistent with the fundamental nature of the ~~program,~~ school’s program of legal education, that can be provided without undue financial or administrative burden, and that can be provided ~~without lowering~~ while maintaining academic and other essential performance standards.*

**STANDARDS FOR APPROVAL OF LAW SCHOOLS  
[RESTATED]**

**Standard 210. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY.**

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender or sexual orientation, age or disability.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal opportunity to obtain employment. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment.

*Interpretation 210-1:*

*Schools may not require applicants, students, faculty or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily.*

***Interpretation 210-2:***

*As long as a school complies with the requirements of Standard 210(c), the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, it does not require a school to recognize or fund organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.*

***Interpretation 210-3:***

*Standard 210(d) applies to all employers, including government agencies, to which a school furnishes assistance and facilities for interviewing and other placement services. However, this Standard does not require a law school to implement its terms by excluding any employer unless that employer discriminates unlawfully.*

***Interpretation 210-4:***

*The denial by a law school of admission to a qualified applicant is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age or disability if the basis of denial relied upon is an admissions qualification of the school which is intended to prevent the admission of applicants on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability though not purporting to do so.*

***Interpretation 210-5:***

*The denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age or disability if the basis of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability though not purporting to do so.*

## **Standard 211. EQUAL OPPORTUNITY AND DIVERSITY.**

**(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.**

**(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.**

***Interpretation 211-1:***

*The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a*

*justification for a school's non-compliance with Standard 211 A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions..*

***Interpretation 211-2:***

*Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.*

***Interpretation 211-3:***

*This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.*

## **Standard 212. REASONABLE ACCOMMODATION FOR QUALIFIED INDIVIDUALS WITH DISABILITIES.**

**Assuring equality of opportunity for qualified individuals with disabilities, as required by Standard 210, may require a law school to provide such students, faculty and staff with reasonable accommodations.**

***Interpretation 212-1:***

*For the purpose of this Standard and Standard 210, disability is defined as in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, as further defined by the regulations on post secondary education, 45 C.F.R. Section 84.3(k)(3) and by the Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq.*

***Interpretation 212-2:***

*As to those matters covered by Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, neither this Standard nor Standard 210 imposes obligations upon law schools beyond those provided by those statutes.*

***Interpretation 212-3:***

*Applicants and students shall be individually evaluated to determine whether they meet the academic standards requisite to admission and participation in the law school program. The use of the term "qualified" in the Standard requires a careful and thorough consideration of each applicant and each student's qualifications in light of reasonable accommodations. Reasonable*

*accommodations are those that are consistent with the fundamental nature of the school's program of legal education, that can be provided without undue financial or administrative burden, and that can be provided while maintaining academic and other essential performance standards.*

## REPORT

As part of the current comprehensive review of the Standards for Approval of Law Schools, the Council of the Section of Legal Education and Admissions to the Bar and its Standards Review Committee during 2004 through 2006 examined Standards 210-212 and the Interpretations of those Standards, which deal with equality of opportunity and diversity. Those provisions had not been substantially reviewed or revised since 1994. The Committee and Council agreed that it was time to re-examine these provisions, especially in light of changes in the law and institutional practices since the existing Standards were adopted. They also concluded that a need existed for greater clarity regarding both what is permitted and what is required by the Standards in order to provide adequate guidance both to law schools and to the Accreditation Committee.

Preliminary discussion of proposed changes was begun at the November 2004 meeting of the Standards Review Committee. The Committee devoted its March 19, 2005, meeting to developing recommendations for presentation to the Council in August. At that time, the Committee already had before it various recommendations for revisions of these provisions prepared by the Section's Diversity Committee, and by Gary Palm ("the Palm proposals") on behalf of himself and other members of the Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT).

In developing its proposals in March of 2005, the Committee established several overarching goals for the proposed revisions:

1. To distinguish the obligations of non-discrimination and equality of opportunity (Standard 210) and the obligations of equal opportunity and diversity (Standard 211).
2. To determine which groups and individuals should be covered by these Standards and Interpretations.
3. To determine what law school activities and actions should be covered by these standards.

In August 2005, the Council considered the Committee's recommendations and the Palm proposals, and the Council approved distributing for comment proposed revisions to Standards 210 – 212 and the Interpretations of those Standards. The proposed revisions were widely distributed for comment and also were posted on the Section's website. A hearing to elicit comment was held during the Association of American Law Schools Annual Meeting on January 5, 2006, and many individuals appeared to speak to these proposals at that hearing. Also, a large number of written and e-mail comments were received during the formal comment period.

At its meeting on January 6, 2006, the Standards Review Committee carefully considered all of the comments that had been received, including the many comments that were made during the January 5 hearing. The Committee presented to the Council its final recommendations for

revision of Standards 210 – 212 for review and action at the Council’s meeting on February 11, 2006. The Council approved the recommended changes with some modification. This Report describes the revisions that the Council approved. Marked-up and restated versions of the approved revisions to Standards 210 – 212 are attached.

### **Misconceptions Concerning the Revisions and Their Effect**

There has been an extensive amount of public commentary concerning the revisions adopted by the Council in February. Unfortunately, much of that commentary – which was not raised during the extensive public comment process that preceded the Council’s adoption of these revisions -- has been misinformed and reflects serious misconceptions concerning the revisions and their effect. Before moving to a section by section description of the revisions, it is necessary to address those misconceptions:

- The revisions do not impose significant new requirements on law schools. Most of the revisions merely provide greater clarity and transparency in the Standards and more guidance to law schools concerning long-standing practices of the Council and the Accreditation Committee in enforcing the current, but more generally phrased, Standards and Interpretations.
- The revised Standards and Interpretations do not require law schools to consider race or ethnicity in their admissions decisions. Interpretation 211-2 states only that law schools “may” use race and ethnicity in their admissions decisions in a manner permitted by *Grutter v. Bollinger*.
- The revised Standards and Interpretations do not establish or mandate a system of “quotas” for minority enrollment. In fact, the Committee and the Council explicitly rejected a recommendation that the Standards require that law schools enroll a “critical mass” of students from underrepresented minority groups and did so in part because such a requirement could be viewed by some as establishing a quota requirement. The requirement of the Standard is that law schools “demonstrate by concrete action . . . a commitment” to having a diverse student body, faculty and staff. Interpretation 211-3 does indicate that the results that a school achieves in its diversity efforts are “relevant”, but results are not dispositive and the requirement of the Standard is that law schools must demonstrate a commitment to diversity.
- The revised Standards and Interpretations do not require law schools to violate state or federal law that prohibits the consideration of gender, race, ethnicity or national origin in admissions or employment decisions. Because the Standards do not require a school to consider gender, race ethnicity or national origin in its admissions or employment selection policies, Interpretation 211-1 makes the logical point that a constitutional or statutory provision that prohibits the



consideration of such factors in admissions or employment decisions does not relieve a law school of the obligation to comply with the requirements of Standard 211, which is to demonstrate a commitment to having a diverse student body, faculty and staff. The second sentence of Interpretation 211-1 makes it clear that law schools that operate under such constitutional or statutory constraints would have to demonstrate the commitment required by the Standards by means other than having race-conscious admissions or employment selection policies. In the admissions context, for example, schools could make, and have made, that demonstration by employing some of a large range of well known methods, other than race-conscious admissions decisions, for seeking to recruit and enroll a diverse student body. A partial list of such efforts would include: admissions recruitment outreach to undergraduate campuses having a substantial population of minority students; “pipeline” efforts to encourage persons from underrepresented groups, even as early as high school, to consider the legal profession as a career; careful consideration of factors in addition to LSAT score and undergraduate grade point average, such as achievements in student leadership, the workplace and graduate education, when making admissions decisions; holding or collaborating in summer programs that assist those of all races and ethnic backgrounds to be more well prepared for admission to and success in law school; enhanced efforts to encourage minority students who have been admitted actually to enroll; etc.

### **Standard 210. Non-Discrimination and Equality of Opportunity**

The revisions to Standard 210 state a comprehensive requirement of non-discrimination and equality of opportunity. “Non-discrimination” has been added to the title of the Standard. Changes throughout the Standard make clear that the two terms are linked and required. Except for a few new requirements that are highlighted below, these revisions are consistent with the manner in which the existing Standard has been applied over many years by the Accreditation Committee and the Council.

Throughout the Standard and Interpretations, “age” and “disability” were added to the categories designated for non-discrimination and equality of opportunity. Although age might be viewed as distinguishable from the other protected categories, the Council decided that age should be included within the protected categories, in part because discrimination on the basis of age is prohibited under federal law. The current prohibition against discrimination on the basis of disability also has been moved to Standard 210 from Standard 212 so that Standard 210 contains a comprehensive statement of the requirements of non-discrimination and equality of opportunity.

To reflect the prevailing terminology, “sex” was changed to “gender” throughout the Standard and Interpretations.

In section (b), “may” was changed to “shall” to be consistent with directive language of section (a).

The Standards Review Committee recommended the deletion of existing sections (c) and (d) as these sections appear no longer to have relevance as the type of de jure segregation to which these sections were directed no longer exists. Some of the comments that were received suggested that it might be a mistake to delete these two provisions, asserting that the underlying principle was still relevant and that deletion of these provisions might send a signal of a diminished commitment to prohibiting discrimination. The Council decided to retain section (c) (2) but as new Interpretation 210-4, and to retain section (d) but as new Interpretation 210-5. For both new interpretations the protected categories included are conformed to the changes made to sections (a) and (b).

Editorial revisions have been made to former section (e) [new section (c)], and revisions consistent with those in sections (a) and (b) also have been made.

In new section (d) [existing section (f)], “should” is changed to “shall” to be consistent with the directive language of sections (a) and (b), thus requiring a law school to communicate to employers who use the school’s placement assistance the expectation that they will observe the principles of non-discrimination and equal opportunity. The illustrations of possible violations of those principles contained in the current Standard have been deleted as unnecessary. Renumbered Interpretation 210-3 continues to provide that a school is not required to exclude from receiving placement assistance an employer that discriminates lawfully.

### **Interpretation 210-1**

Faculty has been added to the list of groups who cannot be required to disclose their sexual orientation.

### **Current Interpretation 210-2**

This interpretation was viewed as unnecessary and was deleted.

### **Renumbered Interpretations 210-2 and 210-3**

These provisions contain minor editing and numbering changes from their predecessors.

### **Standard 211. Equal Opportunity and Diversity**

Standard 211 had been primarily directed to the admission of students, although actions by the Accreditation Committee and Council have applied the same principles to faculty. The revisions make explicit that the Standard also applies to faculty and staff as well as to students. While

equal opportunity and diversity may have different foundations (equal opportunity in social justice and diversity in educational policy), the two have become connected in practice and the revisions to the Standard recognize that connection.

The requirement of the Standard is stated in terms of a commitment that is demonstrated by concrete action. There was extended discussion on this issue, both when the Committee and Council were developing the proposed revisions in 2005 and in the comments on those proposals. Some urged that the Standard be stated in terms of results and also suggested that the Standard should build on the language of the *Grutter* case and require that law schools have a “critical mass” of students from traditionally underrepresented groups.

The Council was persuaded that it would be infeasible to develop and enforce a Standard that is based on requiring schools to attain a “critical mass” of persons from underrepresented groups, both because of the difficulty of defining “critical mass” and because of the widely varying demographics of the markets in which different law schools recruit their student bodies. There also was concern that a “critical mass” requirement could be viewed by some as establishing a quota requirement that might be impermissible under applicable federal or state law. The Council believes that the Standard should require a commitment demonstrable by concrete action. Because the core of the requirement extends beyond mere effort, the term “effort” was deleted from the title of the Section.

The Council also recognized that the results achieved are very relevant, though not dispositive, in evaluating commitment. Thus the second sentence of Interpretation 211-3 provides: “The determination of a law school’s satisfaction of such obligations is based on the totality of the law school’s actions and the results achieved.” The Council understands that this sentence is consistent with the current practice of the Accreditation Committee, which does consider the diversity results that a school has achieved as a factor in evaluating the school’s compliance with current Standard 211.

In section (a) “qualified” has been deleted as unnecessary given other Standards regarding student selection and retention. “Underrepresented” was added to qualify “groups” covered to be consistent with the equal opportunity element. Specific language was added to make it clear that a law school must demonstrate a commitment to having a student body that is diverse with respect to gender, race and ethnicity.

A new section (b) makes clear that a law school must demonstrate a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

#### New Interpretation 211-1

As stated above, the revised Standards and Interpretations do not require law schools to violate state or federal law that prohibits the consideration of gender, race, ethnicity or national origin in admissions or employment decisions. Because the Standards do not require a school to consider gender, race ethnicity or national origin in its admissions policies, Interpretation 211-1 makes

the logical point that a constitutional or statutory provision that prohibits the consideration of such factors in admissions or employment decisions does not relieve a law school of the obligation to comply with the requirements of Standard 211, which is to demonstrate a commitment to having a diverse student body, faculty and staff. The second sentence of Standard 211-1 makes it clear that law schools that operate under such constitutional or statutory constraints would have to demonstrate the commitment required by the Standards by means other than having a race-conscious admissions policy. (See the earlier discussion of possible ways that schools could make, and have made, the necessary demonstration of a commitment to seeking a diverse student body.) The Council understands that this Interpretation is consistent with the practice of the Accreditation Committee in applying the existing Standards.

### **New Interpretation 211-2**

The first sentence relies on *Grutter* for the proposition that a school may use race and ethnicity in its admissions standards. The Interpretation also indicates that, as part of school's effort to satisfy the basic requirements of Standard 211, schools "shall take concrete actions to enroll a diverse student body" that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students better to understand persons of different races, ethnic groups and backgrounds. The Council approved the use of "shall" in order to be consistent with the black-letter, which establishes an obligation ("shall") to have a commitment to having a diverse faculty, staff and student body.

### **New Interpretation 211-3**

The interpretation revises former Interpretation 211-1. It retains the language that meeting the requirements of the Standard will be determined by the totality of the law school's action, but replaces with a more general statement the prior list of actions that might demonstrate commitment to diversity. This change recognizes and encourages flexibility and innovation on the part of law schools in meeting the requirement. As explained above, the addition of the phrase "and the results achieved" at the end of the second sentence is intended to make it clear that the results achieved are relevant, although not dispositive, in determining a school's compliance with the Standard.

### **Current Interpretation 211-2**

This Interpretation has been deleted. The Council agreed with the recommendation of the Standards Review Committee that requiring a law school to prepare a written diversity plan imposed an unnecessary burden on law schools. In addition, conscientious application of the existing diversity plan requirement by the Accreditation Committee has on occasion led to the anomalous result of citing a school for non-compliance with the diversity plan requirement when the school has nonetheless been successful in achieving significant diversity in its faculty and student body. The proposed revised Standard requires that a school demonstrate by concrete action a commitment to diversity, so if a school has not succeeded in attaining a diverse faculty or student body, the absence of a written plan still could be a factor in a determination by the Accreditation Committee that the school had not satisfied the requirements of the Standard.

### **Standard 212. Reasonable Accommodation for Qualified Individuals with Disabilities**

The requirement of non-discrimination against individuals with disabilities has been moved from this Standard to Standard 210. Standard 212 now deals only with the required provision of reasonable accommodations to individuals with disabilities. In this Standard, the term “qualified” was retained to correlate with federal law’s use of this term when considering the rights of persons with disabilities.

#### **Interpretation 212-1**

A reference to Standard 210 is added and an incorrect citation in the current Interpretation is corrected.

#### **Interpretation 212-2**

There has been minor editing to this Interpretation, and a reference to Standard 210 has also been added.

#### **Interpretation 212-3**

The statement of the law school’s obligation is more clearly focused by editing to eliminate some advisory language. The Council made some changes to the existing language of the Interpretation to remove what could have been perceived, though not intended, as negative implications regarding reasonable accommodation.

\* \* \*

The Council respectfully requests that the House of Delegates concur in the revisions of Standards 210-212 of the Standards for Approval of Law Schools and its Interpretations that the Council has adopted.

Respectfully submitted,

Steven R. Smith, Chairperson  
August 2006

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations  
(Please refer to instructions for completing this form.)

Submitting Entity: Section of Legal Education and Admissions to the Bar

Submitted By: Dean Steven R. Smith, Chairperson

1. Summary of Recommendation(s).

That the House concur in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting revisions to Standards 210- 212, concerning equal opportunity and diversity, of the Standards for Approval of Law Schools and the Interpretations thereto.

2. Approval by Submitting Entity.

Approved by the Council of the Section of Legal Education and Admissions to the Bar at its meeting of February 11, 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The revisions provide greater clarity and transparency in the Standards and more guidance to law schools concerning the requirements of the Standards concerning non-discrimination, equality of opportunity, and diversity.

5. What urgency exists which requires action at this meeting of the House?

To promote and assure the smooth functioning of the ABA Standards for Approval of Law Schools and its interpretations, it is useful and important that revisions that are developed, widely discussed and adopted in one academic year be effective at the beginning of the following academic year. This revision was developed in the spring of 2005, circulated extensively for comment in August 2005, and adopted by the Council in

February 2006. The matter is now ready for consideration at the August 2006 meeting of the House.



6. Status of Legislation. (If applicable.)

None.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

The following groups were offered opportunities to comment on the proposed Interpretation: Deans of ABA-approved law schools, presidents of universities with ABA-approved law schools, chief justices of state supreme courts, bar admissions authorities, the Senior Lawyers Division, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Women in the Profession, the deans of unapproved law schools, and leaders of organizations interested in the law school approval process (including the Association of American Law Schools, the National Conference of Bar Examiners, the Law School Admissions Council, the National Association for Law Placement, the Conference of Chief Justices, and the National Conference of Bar Presidents). A hearing was held to hear comments on the proposed revisions in January 2006 and the proposed Interpretation and the memo soliciting comment also were posted on the Section's website. Numerous comments were received at the hearing and by e-mail and letter, and all comments were carefully considered as the final revisions were adopted.

10. Contact Person. (Prior to the meeting.)

John A. Sebert, Consultant on Legal Education	312-988-6746
[At the Meeting, Moana Surfrider	808-922-3111]

11. Contact Person. (Who will present the report to the House.)

Jose Garcia Pedrosa, Esq., Section Delegate	305-243-5813
[At the Meeting, Hilton Hawaiian Village	808-949-4321]

Sidney S. Eagles, Jr., Esq., Section Delegate	919-755-8771
[At the Meeting, Sheraton Waikiki	808-922-4422]

12. Contact person regarding amendments to this recommendation.

(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.) None known at this time.

## EXECUTIVE SUMMARY

### Summary of the Recommendation

That the House concur in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting revisions to Standards 210- 212, concerning equal opportunity and diversity, of the Standards for Approval of Law Schools and the Interpretations thereto.

### Summary of the Issue that the Recommendation Addresses

The revisions provide greater clarity and transparency in the Standards and more guidance to law schools concerning the requirements of the Standards concerning non-discrimination, equality of opportunity, and diversity.

### Explanation of How the Proposed Policy Addresses the Issues

This new Interpretation was adopted by the Council in February 2006 after extensive opportunities for comment by law school deans and others interested in the Standards for Approval of Law Schools and its Interpretations. Concurrence by the House of Delegates is necessary in order for the new Interpretation to be effective.

### Summary of Minority Views or Opposition

None at this time.

## Appendix 2

### **Commentary on Revisions to Standards for Approval of Law Schools 2005-06**

The Council of the Section on Legal Education and Admissions to the Bar has undertaken over the past three years a comprehensive review of the Standards for the Approval of Law Schools. This was, in part, preparation for the United States Department of Education's regular review of the Council's recognition as the accrediting authority for the first-degree programs in law. A brief summary of the comprehensive review is useful to place the revisions that were made in 2005-06 in context.

#### **Revisions Bridging 2003-2004 and 2004-2005**

During the 2003-2004 year the Council focused on Chapters 3 and 4 of the Standards. These chapters address a school's program of legal education (Chapter 3) and faculty (Chapter 4). Work was completed in 2003-04 on Chapter 3, with the Council approving two sets of revisions. The ABA House of Delegates concurred in the first set of revisions at its August 2004 meeting; the second group of Chapter 3 revisions were concurred in by the House in February 2005. Commentary on the set concurred in at the August 2004 meeting of the House were included in the commentary for 2003-04 revisions. The commentary for the set concurred in at the February 2005 meeting of the House was included in the 2004-05 commentary.

#### **Revisions Approved During 2004-05**

Consideration of revisions to Chapter 4 took place in two parts. At its February meeting 2004, the Council approved for comment a number of changes to Standards 401, 402, 403 and 404 recommended by the Standards Review Committee, but it did not approve for comment recommended changes to Standard 405. As a result, at the Council's June, 2004, meeting, the Committee requested the Council to delay sending any proposed changes in Chapter 4 to the House of Delegates for approval until the Committee had the opportunity to consider recommending other revisions to Standard 405. At its meeting on November 12-13, 2004, the Committee reiterated its support for the previously recommended changes to Standards 401, 402, 403 and 404 and recommended new changes to Standard 402 and 405. At its December 4-5, 2004, meeting, the Council adopted changes to Standards 401-404 and approved for notice and comment revisions to Standards 402 and 405. At its June 17-19, 2005 meeting the Council reviewed the recommendations from the Standards Review Committee and the substantial number of comments, and approved changes.

The Standards Review Committee at its September and November 2004 meetings conducted a thorough review of Chapters 1, 6 and 7 to prepare its recommendations to the Council for changes to the Standards and Interpretations for these three chapters. The review of Chapter 1 –

General Purposes and Practices; Definitions – was coordinated with the contemporaneous review of the Rules of Procedure for the Approval of Law Schools that was to be conducted by a separate special committee. For its review of Chapter 6 – Library and Information Resources – the Committee received detailed input from the Law Libraries Committee, which contributed significantly to the Committee’s recommendations for changes. The Technology Committee was consulted regarding the changes to Chapter 6 and Chapter 7 – Facilities.

At its February 12–13, 2005, meeting, the Council of the Section of Legal Education and Admissions to the Bar approved for notice and comment revisions to Chapters 1, 6, and 7. At its meeting on June 17-19, 2005, the Council reviewed the comments and recommendations from the Standards Review Committee and approved changes to these chapters.

At its meeting in Chicago on August 9, 2005, the House of Delegates of the American Bar Association concurred with the changes approved by the Council for Chapters 1, 4, 6 and 7, and upon that concurrence the changes were effective.

### **Continuing Matters**

In addition to the changes that were approved and are described above, the Standards Review Committee and the Council considered other changes to the Standards and Interpretations during 2004-05.

The Standards Review Committee made recommendations to the Council for changes to Standards 210-212 regarding equal opportunity and diversity. At its meeting in August, 2005, the Council approved for notice and comment changes to these Standards and Interpretations with the expectation that the Council would take final action at its February 2006 meeting.

Additional recommendations by the Committee to the Council, stemming from its examination of Chapter 2, addressed the law school self study requirements. These recommendations, which were reported to the Council at its February 2005 meeting, were referred back to the Committee for further review and subsequent recommendations to the Council during 2005-06.

The changes to Chapter 3, that were approved by the Council in August 2004 and concurred in by the House of Delegates in February 2005, included a provision that requires schools to provide substantial opportunities for participation in pro bono activities. After the change became effective in February, a number of questions arose regarding whether the opportunities had to be legal in nature and whether activities for which credit was granted would qualify. In response the Standards Review Committee drafted a clarifying interpretation, which was approved for notice and comment by the Council at its June 2005 meeting. Final action was expected to be taken during 2005-06.

As a result of its review of Chapter 5, which deals with Admissions and Student Services, the Standards Review Committee made several recommendations for changes to these Standards and

Interpretations. All were referred back to the Standards Review Committee for additional review and subsequent recommendations to the Council during 2005-06.

In its review of Chapter 8 the Standards Review Committee recommended to the Council a change to Standard 803. Council referred the matter back to the Committee for further review in 2005-06.

### **Revisions Considered During 2005-06**

#### **Standards 210-212**

The Council of the Section of Legal Education and Admissions to the Bar and its Standards Review Committee during 2004 through 2006 examined Standards 210-212 and the Interpretations of those Standards, which deal with equality of opportunity and diversity. Those provisions had not been substantially reviewed or revised since 1994. The Committee and Council agreed that it was time to re-examine these provisions, especially in light of changes in the law and institutional practices since the existing Standards were adopted. They also concluded that a need existed for greater clarity regarding both what is permitted and what is required by the Standards in order to provide adequate guidance both to law schools and to the Accreditation Committee.

Preliminary discussion of proposed changes was begun at the November 2004 meeting of the Standards Review Committee. The Committee devoted its March 19, 2005, meeting to developing recommendations for presentation to the Council in August. At that time, the Committee already had before it various recommendations for revisions of these provisions prepared by the Section's Diversity Committee, and by Gary Palm ("the Palm proposals") on behalf of himself and other members of the Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT).

In developing its proposals in March of 2005, the Committee established several overarching goals for the proposed revisions:

4. To distinguish the obligations of non-discrimination and equality of opportunity (Standard 210) and the obligations of equal opportunity and diversity (Standard 211).
5. To determine which groups and individuals should be covered by these Standards and Interpretations.
6. To determine what law school activities and actions should be covered by these standards.

In August 2005, the Council considered the Committee's recommendations and the Palm proposals, and the Council approved distributing for comment proposed revisions to Standards 210 – 212 and the Interpretations of those Standards. The proposed revisions were widely distributed for comment and also were posted on the Section's website. A hearing to elicit

comment was held during the Association of American Law Schools Annual Meeting on January 5, 2006, and many individuals appeared to speak to these proposals at that hearing. Also, a large number of written and e-mail comments were received during the formal comment period.

At its meeting on January 6, 2006, the Standards Review Committee carefully considered all of the comments that had been received, including the many comments that were made during the January 5 hearing. The Committee presented to the Council its final recommendations for revision of Standards 210 – 212 for review and action at the Council’s meeting on February 11, 2006. The Council approved the recommended changes with some modification.

Following the Council action there was an extensive amount of public commentary concerning the revisions adopted by the Council. Unfortunately, much of that commentary – which was not raised during the extensive public comment process that preceded the Council’s adoption of these revisions – was misinformed and reflected serious misconceptions concerning the revisions and their effect.

- The revisions do not impose significant new requirements on law schools. Most of the revisions merely provide greater clarity and transparency in the Standards and more guidance to law schools concerning long-standing practices of the Council and the Accreditation Committee in enforcing the current, but more generally phrased, Standards and Interpretations.
- The revised Standards and Interpretations do not require law schools to consider race or ethnicity in their admissions decisions. Interpretation 211-2 states only that law schools “may” use race and ethnicity in their admissions decisions in a manner permitted by *Grutter v. Bollinger*.
- The revised Standards and Interpretations do not establish or mandate a system of “quotas” for minority enrollment. In fact, the Committee and the Council explicitly rejected a recommendation that the Standards require that law schools enroll a “critical mass” of students from underrepresented minority groups and did so in part because such a requirement could be viewed by some as establishing a quota requirement. The requirement of the Standard is that law schools “demonstrate by concrete action . . . a commitment” to having a diverse student body, faculty and staff. Interpretation 211-3 does indicate that the results that a school achieves in its diversity efforts are “relevant”, but results are not dispositive and the requirement of the Standard is that law schools must demonstrate a commitment to diversity.
- The revised Standards and Interpretations do not require law schools to violate state or federal law that prohibits the consideration of gender, race, ethnicity or national origin in admissions or employment decisions. Because the Standards do not require a school to consider gender, race ethnicity or national origin in its admissions or employment selection policies, Interpretation 211-1 makes the

logical point that a constitutional or statutory provision that prohibits the consideration of such factors in admissions or employment decisions does not relieve a law school of the obligation to comply with the requirements of Standard 211, which is to demonstrate a commitment to having a diverse student body, faculty and staff. The second sentence of Interpretation 211-1 makes it clear that law schools that operate under such constitutional or statutory constraints would have to demonstrate the commitment required by the Standards by means other than having race-conscious admissions or employment selection policies. In the admissions context, for example, schools could make, and have made, that demonstration by employing some of a large range of well known methods, other than race-conscious admissions decisions, for seeking to recruit and enroll a diverse student body. A partial list of such efforts would include: admissions recruitment outreach to undergraduate campuses having a substantial population of minority students; “pipeline” efforts to encourage persons from underrepresented groups, even as early as high school, to consider the legal profession as a career; careful consideration of factors in addition to LSAT score and undergraduate grade point average, such as achievements in student leadership, the workplace and graduate education, when making admissions decisions; holding or collaborating in summer programs that assist those of all races and ethnic backgrounds to be more well prepared for admission to and success in law school; enhanced efforts to encourage minority students who have been admitted actually to enroll; etc.

At its May 17, 2006, meeting the Standards Review Committee reviewed these approved changes in light of the comments following the Council’s action to make it even clearer that the Standards do not require law schools to violate state law in order to comply, an additional sentence was added to Interpretation 211-1. The Council approved the addition at its June 10, 2006 meeting.

The ABA House of Delegates concurred in the approved changes to Standards 210-212 at its August 7-8, 2006, meeting, and the revised Standards and Interpretations became effective at the conclusion of the meeting.

#### Standard 210. Non-Discrimination and Equality of Opportunity

The revisions to Standard 210 state a comprehensive requirement of non-discrimination and equality of opportunity. “Non-discrimination” has been added to the title of the Standard. Changes throughout the Standard make clear that the two terms are linked and required. Except for a few new requirements that are highlighted below, these revisions are consistent with the manner in which the existing Standard has been applied over many years by the Accreditation Committee and the Council.

Throughout the Standard and Interpretations, “age” and “disability” were added to the categories designated for non-discrimination and equality of opportunity. Although age might be viewed as



distinguishable from the other protected categories, the Council decided that age should be included within the protected categories, in part because discrimination on the basis of age is prohibited under federal law. The current prohibition against discrimination on the basis of disability also has been moved to Standard 210 from Standard 212 so that Standard 210 contains a comprehensive statement of the requirements of non-discrimination and equality of opportunity.

To reflect the prevailing terminology, “sex” was changed to “gender” throughout the Standard and Interpretations.

In section (b), “may” was changed to “shall” to be consistent with directive language of section (a).

The Standards Review Committee recommended the deletion of existing sections (c) and (d) as these sections appear no longer to have relevance as the type of de jure segregation to which these sections were directed no longer exists. Some of the comments that were received suggested that it might be a mistake to delete these two provisions, asserting that the underlying principle was still relevant and that deletion of these provisions might send a signal of a diminished commitment to prohibiting discrimination. The Council decided to retain section (c) (2) but as new Interpretation 210-4, and to retain section (d) but as new Interpretation 210-5. For both new interpretations the protected categories included are conformed to the changes made to sections (a) and (b).

Editorial revisions have been made to former section (e) [new section (c)], and revisions consistent with those in sections (a) and (b) also have been made.

In new section (d) [existing section (f)], “should” is changed to “shall” to be consistent with the directive language of sections (a) and (b), thus requiring a law school to communicate to employers who use the school’s placement assistance the expectation that they will observe the principles of non-discrimination and equal opportunity. The illustrations of possible violations of those principles contained in the current Standard have been deleted as unnecessary. Renumbered Interpretation 210-3 continues to provide that a school is not required to exclude from receiving placement assistance an employer that discriminates lawfully.

#### Interpretation 210-1

Faculty has been added to the list of groups who cannot be required to disclose their sexual orientation.

#### Current Interpretation 210-2

This interpretation was viewed as unnecessary and was deleted.

### Renumbered Interpretations 210-2 and 210-3

These provisions contain minor editing and numbering changes from their predecessors.

### Standard 211. Equal Opportunity and Diversity

Standard 211 had been primarily directed to the admission of students, although actions by the Accreditation Committee and Council have applied the same principles to faculty. The revisions make explicit that the Standard also applies to faculty and staff as well as to students. While equal opportunity and diversity may have different foundations (equal opportunity in social justice and diversity in educational policy), the two have become connected in practice and the revisions to the Standard recognize that connection.

The requirement of the Standard is stated in terms of a commitment that is demonstrated by concrete action. There was extended discussion on this issue, both when the Committee and Council were developing the proposed revisions in 2005 and in the comments on those proposals. Some urged that the Standard be stated in terms of results and also suggested that the Standard should build on the language of the *Grutter* case and require that law schools have a “critical mass” of students from traditionally underrepresented groups.

The Council was persuaded that it would be infeasible to develop and enforce a Standard that is based on requiring schools to attain a “critical mass” of persons from underrepresented groups, both because of the difficulty of defining “critical mass” and because of the widely varying demographics of the markets in which different law schools recruit their student bodies. There also was concern that a “critical mass” requirement could be viewed by some as establishing a quota requirement that might be impermissible under applicable federal or state law. The Council believes that the Standard should require a commitment demonstrable by concrete action. Because the core of the requirement extends beyond mere effort, the term “effort” was deleted from the title of the Section.

The Council also recognized that the results achieved are very relevant, though not dispositive, in evaluating commitment. Thus the second sentence of Interpretation 211-3 provides: “The determination of a law school’s satisfaction of such obligations is based on the totality of the law school’s actions and the results achieved.” The Council understands that this sentence is consistent with the current practice of the Accreditation Committee, which does consider the diversity results that a school has achieved as a factor in evaluating the school’s compliance with current Standard 211.

In section (a) “qualified” has been deleted as superfluous given other Standards regarding student selection and retention that insure that students are qualified. “Underrepresented” was added to qualify “groups” covered to be consistent with the equal opportunity element. Specific language was added to make it clear that a law school must demonstrate a commitment to

having a student body that is diverse with respect to gender, race and ethnicity.

A new section (b) makes clear that a law school must demonstrate a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

#### New Interpretation 211-1

As stated above, the revised Standards and Interpretations do not require law schools to violate state or federal law that prohibits the consideration of gender, race, ethnicity or national origin in admissions or employment decisions. Because the Standards do not require a school to consider gender, race ethnicity or national origin in its admissions policies, Interpretation 211-1 makes the logical point that a constitutional or statutory provision that prohibits the consideration of such factors in admissions or employment decisions does not relieve a law school of the obligation to comply with the requirements of Standard 211, which is to demonstrate a commitment to having a diverse student body, faculty and staff. The second sentence of Standard 211-1 makes it clear that law schools that operate under such constitutional or statutory constraints would have to demonstrate the commitment required by the Standards by means other than having a race-conscious admissions policy. (See the earlier discussion of possible ways that schools could make, and have made, the necessary demonstration of a commitment to seeking a diverse student body.) The Council understands that this Interpretation is consistent with the practice of the Accreditation Committee in applying the existing Standards.

#### New Interpretation 211-2

The first sentence relies on *Grutter* for the proposition that a school may use race and ethnicity in its admissions standards. The Interpretation also indicates that, as part of school's effort to satisfy the basic requirements of Standard 211, schools "shall take concrete actions to enroll a diverse student body" that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students better to understand persons of different races, ethnic groups and backgrounds. The Council approved the use of "shall" in order to be consistent with the black-letter, which establishes an obligation ("shall") to have a commitment to having a diverse faculty, staff and student body.

#### New Interpretation 211-3

The interpretation revises former Interpretation 211-1. It retains the language that meeting the requirements of the Standard will be determined by the totality of the law school's action, but replaces with a more general statement the prior list of actions that might demonstrate commitment to diversity. This change recognizes and encourages flexibility and innovation on the part of law schools in meeting the requirement. As explained above, the addition of the phrase "and the results achieved" at the end of the second sentence is intended to make it clear that the results achieved are relevant, although not dispositive, in determining a school's compliance with the Standard.

### Current Interpretation 211-2

This Interpretation has been deleted. The Council agreed with the recommendation of the Standards Review Committee that requiring a law school to prepare a written diversity plan imposed an unnecessary burden on law schools. In addition, conscientious application of the existing diversity plan requirement by the Accreditation Committee has on occasion led to the anomalous result of citing a school for non-compliance with the diversity plan requirement when the school has nonetheless been successful in achieving significant diversity in its faculty and student body. The proposed revised Standard requires that a school demonstrate by concrete action a commitment to diversity, so if a school has not succeeded in attaining a diverse faculty or student body, the absence of a written plan still could be a factor in a determination by the Accreditation Committee that the school had not satisfied the requirements of the Standard.

### Standard 212. Reasonable Accommodation for Qualified Individuals with Disabilities

The requirement of non-discrimination against individuals with disabilities has been moved from this Standard to Standard 210. Standard 212 now deals only with the required provision of reasonable accommodations to individuals with disabilities. In this Standard, the term “qualified” was retained to correlate with federal law’s use of this term when considering the rights of persons with disabilities.

#### Interpretation 212-1

A reference to Standard 210 is added and an incorrect citation in the current Interpretation is corrected.

#### Interpretation 212-2

There has been minor editing to this Interpretation, and a reference to Standard 210 has also been added.

#### Interpretation 212-3

The statement of the law school’s obligation is more clearly focused by editing to eliminate some advisory language. The Council made some changes to the existing language of the Interpretation to remove what could have been perceived, though not intended, as negative implications regarding reasonable accommodation.

**SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR  
AMERICAN BAR ASSOCIATION**

**APPROVED CHANGES TO THE STANDARDS APPROVAL OF LAW  
SCHOOLS AND ASSOCIATED INTERPRETATIONS**

**August 2006**

**Standard 212. EQUAL OPPORTUNITY AND DIVERSITY.**

**(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.**

**(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.**

***Interpretation 212-1:***

*The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 212. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 212 by means other than those prohibited by the applicable constitutional or statutory provisions.*

***Interpretation 212-2:***

*Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.*

***Interpretation 212-3:***

*This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these*

*students and that create a more favorable environment for students from underrepresented groups.*

## Standard 211: Unlawful and Unwise

*David E. Bernstein*

My objections to ABA standard 211 are two-fold: first, it requires law schools to act unlawfully; second, it requires law schools to act unwisely, to the great detriment of minority students that it purports to be helping.

The language of Standard 211 itself is sufficiently vague and flexible that I do not find it especially objectionable. The devil, however, lies in the details, in the form of binding “Interpretations” hastily grafted on to the Standard in January 2006 after heavy lobbying by left-wing activist groups within the legal academy. ABA rules specify that these “interpretations” are given equal weight with the standard itself.

Interpretation 211-1<sup>88</sup> says that a constitutional provision or statute that *purports* to prohibit consideration of gender, race, ethnicity, or national origin is not a justification for a school's noncompliance with Standard 211. “Purports” is very odd language, given that there are such constitutional provisions and statutes in California, Florida, and a few other places. The word “purports” suggests that the ABA is implicitly adopting the somewhat wacky view that a constitutional provision or statute that prohibits racial preferences or consideration of race, gender, etc. in admissions is somehow unconstitutional itself. So I think what Interpretation 211-1 is trying to get at is that law schools should ignore laws banning racial preferences in admission because they are really unconstitutional.

But putting the issue of the ABA’s odd constitutional theory aside, the interpretation states that laws banning racial preferences are not an excuse for schools’ noncompliance with Standard 211. ABA officials have been quoted as denying that this means that law schools must use racial preferences to achieve diversity.

I think these denials are not credible. Why? First, ever since the Court decided *Grutter v. Bollinger* in 2003, ABA accreditation officials have been pressuring law schools to use, or increase the use of, racial preferences, using their accreditation authority to blackmail the schools. I have learned this from several sources at several law schools. ABA officials have made it clear that law schools will be put on probation or even disaccredited if they don’t use lower admissions standards for minority students, especially African American students, even if the schools believe that students who meet only the lower standard are not qualified for admission.

Before new standard 211, not only were there no written guidelines suggesting that such preferences were required, but the standard stated that law schools should only admit qualified

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<sup>88</sup> The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

applicants. If ABA officials have been acting *contrary* to their own standards and requiring preferences in admissions for unqualified applicants, imagine what they will do when they have Standard 211 and its interpretations as a written guideline requiring preferences.

The second reason I think ABA officials are not being forthright is the contrast between the original language of the interpretation when the standard was initially drafted, and the replacement language added in January.

The original language said that a law school must pursue diversity, *so long as it does so in a lawful manner*. The new language, as we've seen, states that *the requirements of the law are not a justification* for failure to comply with Standard 211. I think a reasonable observer would conclude that when the ABA replaces language stating that law schools must obey the law with language stating that obedience to the law is no excuse, the ABA is asking law schools to disobey the law. [Under public pressure, the ABA has since amended Interpretation 211-1 to add, "A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions."]

Further evidence that the ABA wants law schools to violate the law can be found in interpretation 211-2, which was also added in January 2006 [and which has not been amended further]. That interpretation says that consistent with the U.S. Supreme Court's decision in *Grutter*, "a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity."

This language misstates the law in two ways. First, this language suggests that law schools may use racial preferences to promote equal opportunity. In fact, the Supreme Court has never held that promoting equal opportunity, as such, is a proper legal justification for racial preferences in education. Quite to the contrary, racial preferences utilized to make up for general societal discrimination are illegal, and, for state universities, unconstitutional.

Second, the standard implies that law schools may use preferences to promote diversity under any and all circumstances, which is simply not true. Rather, the *Grutter* Court reaffirmed the holding of *Bakke* that it would defer to an individual law school's *educational judgment* on the matter.<sup>89</sup> A law school that has not made an educational judgment that diversity is crucial to its educational mission may not use racial preferences, nor may a school use racial preferences to satisfy ABA demands for "diversity."

Finally, we have Interpretation 211-3,<sup>90</sup> which is the last of the three interpretations of the

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<sup>89</sup> The actual language is, "The law school's educational judgment that such diversity is essential to its educational mission is one to which we defer. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions within the constitutionally prescribed limits."

<sup>90</sup> "This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational



Standard. It says that the Standard does not specify the forms of concrete actions a law school must take in pursuing diversity, but the ABA will consider both the totality of a law school's recruitment efforts, *and the results achieved*.

In short, even if we believe the ABA that it is not officially requiring preferences, it is giving law schools two choices: first, a law school may spend hundreds of thousands of dollars on recruiting minority students, and then *hope* the results of these efforts will satisfy the ABA. Or, a law school could simply use preferences to achieve the results the ABA seeks. Any sensible law school administration, looking out for the best interests of the school, will pursue the latter route to avoid the possibility of squandering hundreds of thousands of dollars and risking accreditation by not having the results desired by the ABA. So, even if the Standard 211 does not directly mandate racial preferences, that is its intent, and its inevitable result.

The ABA's decision to mandate racial preferences in law school admissions might be at least understandable if encouraging more preferences was wise. But already, without additional "diversity" pressure from the ABA, 42 percent of black matriculants never become lawyers, either because they fail out of law school, or never pass the bar.<sup>91</sup> At the bottom 2/3 of law schools, approximately 52 percent of black matriculants never become lawyers.<sup>92</sup> Undoubtedly, at the lowest-ranked law schools, especially in jurisdictions with tough bar exams, the statistics are far worse.

Based on conversations with various law school officials over the years, I know that many law schools have an informal LSAT cutoff point for admissions, based on their experience that students below that cutoff rarely make it through law school and the bar exam. That cutoff, however, is often dispensed with in the case of African-American students, in the interests of "diversity".

In theory, ABA standard 501(B) prohibits law schools from admitting students they know are likely not to succeed.<sup>93</sup> In the past, although the ABA rarely enforced this standard, it at least gave law schools that were not inclined to throw out their minimum admissions standards in the name of racial diversity a potential way of contesting ABA pressure to use strong racial preferences.

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opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups."

<sup>91</sup> Data from Bok & Williamson, *Boston Bar Journal*, May/June, 2001. Bok and Williamson ironically use this data as evidence of the success of preferences in law school admissions.

<sup>92</sup> According to Bok and Williamson, at the top 1/3 of law schools, 23.56 percent ( $100 - (.91 \times .84)$ ) of black matriculants never become lawyers. At all law schools, 42.28 percent ( $100 - (.78 \times .74)$ ) of black matriculants never become lawyers. Assuming the top 1/3 of law schools enroll approximately 1/3 of black law students, this means that at bottom 2/3 law schools, approximately 52 percent of black matriculants never become lawyers.

<sup>93</sup> "A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."

However, the ABA is poised to revise the interpretation to this standard so that law schools must ignore it when it comes to matriculating minority students.<sup>94</sup> Put another way, law schools will be required not to admit white and Asian students whom the law schools know have a statistically poor chance to succeed. But they will be *required* to admit black and Hispanic students with similarly poor prospects.

And of course, nothing would anger the ABA accreditation bureaucracy more than actually informing a student admitted based on preferences that if he decides to matriculate, his chances of becoming a lawyer are slim. Thus, many of the alleged beneficiaries of law school admissions preferences have no idea that they are being set up to fail. It's hard to imagine that hard-core racists could come up with a more pernicious policy. If nothing else, I urge the Commission to recommend that law schools be more forthcoming about the prospects of success for students admitted under "special" consideration.

In short, Standard 211 is both unwise and imposes illegal and unconstitutional burdens on law schools.

## **Postscript**

When considering the issue of racial preferences in law schools, we often hear from successful attorneys, law professors, and judges, who believe themselves to be the beneficiaries of affirmative action and who strongly support racial preferences. We rarely hear from those who received a preference and found themselves to be "fishes out of water" at the school they attended. Below is the text of an email one such individual sent to an administrator at the University of Colorado Law School, which has been circulated around the Internet.<sup>95</sup>

Hello Dean Matthew,

Thank you for your concern. Unfortunately, I have no desire to speak with any administrators. I do not believe The University of Colorado School of Law (CU) should have admitted me into this school in the first place. CU has known year after year, decade after decade that underqualified students such as myself consistently fall in the bottom 5 percent of the class and disproportionately fail the Colorado Bar Exam. Nevertheless, CU has done nothing that effectively helps underqualified students receive grades that fall within the "bell curve." CU doesn't offer a summer academic preparation program or even a bar exam review course (both of which are offered at the University of Denver). Not only has CU not made minimally sufficient efforts to assist under-qualified students, but the

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<sup>94</sup> Regardless of Rule 501(b), "A law school's admission policies shall be consistent with Standards 210 and 211." In other words, diversity concerns trump concerns about admitting students who won't succeed.

<sup>95</sup> The text can be found at [http://www.xoxoth.com/thread.php?thread\\_id=363744&mc=249&forum\\_id=2](http://www.xoxoth.com/thread.php?thread_id=363744&mc=249&forum_id=2) (last accessed Oct. 20, 2006).

school admitted underqualified students without any warning regarding their potential at CU. The law school has the data to inform underqualified students about where they will “likely” fall in the class ranking compared to academically-qualified students. Some law schools provide this type of information because it is reasonably clear they have a duty to do so. At the time of my admittance, CU knew how unlikely it would be that I would serve on law journals, participate in moot court competitions, work as a research assistant, obtain judicial clerkships and externships, complete law school in three years or at all, pass the Colorado Bar Exam, etc.

Regarding extracurricular activities, I intended to apply for a summer “diversity” law clerkship. I believed I had a chance to get a clerkship after the Director of Career Services sent an email to potential applicants informing us that we NEED NOT report grades on the application. Shortly thereafter, he sent another email letting us know that we must include our law school transcript in the application package. I chose not to apply for a clerkship due to my low grades. However, academically-prepared Asian, East Indian, Hispanic, and gay people were offered clerkships. I understand that many academically-prepared black students also obtained clerkships over the past few years. Some of these black students have graduated from Ivy League universities and/or come from families where their parents are lawyers, accountants, teachers, and other professionals. I'm sure they always had enough to eat as a child and witnessed their parents reading a book other than the bible.

If my brown skin has helped “advantaged” black and brown students feel less isolated (and I really don't believe they feel isolated) at CU, I am happy for them. If my skin color has helped CU promote itself as a diverse law school and attract more state and federal aid to the University of Colorado, I am happy for the law school. This aid benefits tens of thousands of academically-prepared white students through new human and technical resources. I happy for them as well. The problem, despite my professed happiness, is that CU has used my skin color against me in order to provide benefits to others.

I have spent a lot of time with members of the (African-American) Sam Cary Bar Association and they say that underqualified black students almost never serve on law review and often do not pass the Colorado Bar Exam. I cannot fathom how CU has found these facts acceptable. I should not have been led to believe that I had the same potential as traditional students. I should have had the opportunity to weigh the benefits of receiving a full-tuition, first-year scholarship and admittance into a Tier1 school against the LIKELY consequences of my relatively poor academic background. I have worked very, very hard and have taken advantage of all of the academic support that CU offered. Unfortunately, like many other underqualified students with similar motivation, I am paying tens of thousands of dollars to receive the type of law school education CU knew I was highly unlikely to receive. CU's policy of admitting academically-underqualified students without

any plan to provide them with EFFECTIVE academic support is recklessly negligent. The really sad thing is that I was one of the 95 percent of law students (based on statistics) who believed he or she would be in the top 10 percent of the first-year class.

I understand that if there were no underqualified students here, fifty percent of academically-prepared students would be in the bottom 50 percent of the class. However, it is clear that when all students have comparable academic skills, the deciding factors for GPA differences are LUCK and MOTIVATION to work very hard. Therefore, all academically-prepared students have a reasonable opportunity to be in the top 50 percent. More important, the bottom 50 percent need not receive less than a B-. For example, no one in my first-semester legal writing class received less than a B-. Therefore, no one necessarily has to receive Cs and Ds here. When you have an identifiable group of students who consistently receive Cs and Ds, CU has a problem it needs to address in an ethical and effective manner.

It is true that some CU law students (of all races) from disadvantaged backgrounds with relatively low incoming academic credentials have performed exceptionally well inside and outside of the classroom. Nevertheless, this does not abolish CU's equitable duty to give underqualified students information that is particularly relevant to their situation. Without this information, it is difficult for them to make an informed decision about whether to attend a top law school. In my opinion, the minimum amount of data that CU should give underqualified students prior to admittance is the correlation between LSAT scores and first-year grades.

Dean Matthew, if you are inclined to respond to my email to Professor Calhoun "on behalf of the institution," please do so in writing. Also, please take notice that if any administrator from the University of Colorado School of Law or Pro-Affirmative Action Professor [name deleted] (who I admire and am very fond of), speaks to me about anything (that means please do not say "Hello," . . . nothing), I will consider the interaction to be harassment. The administrators at this law school have harmed me irreparably and I do not want to have anything to do with any of them outside of written correspondence. Had I been properly warned as described above, I would be at a Tier 3 school facing the joy of graduation in May 2006. I do not feel it is an honor to have a law degree from the University of Colorado. If it were possible to do so, I would gladly exchange my CU law degree for one from a Tier 3 school. Unfortunately, I am stuck here until Spring 2007 trying to deal with the hurt and anger CU has recklessly inflicted upon me.

## Appendix

### Standard 211

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

### Interpretation 211-1

The requirements of a constitutional provision or statute that *purports* to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions **is not a justification** for a school's non-compliance with Standard 211.

## Earlier, deleted language

A law school must pursue diversity "**so long as it does so in a lawful manner**"

*Contrast with*

"requirements of a constitutional provision or statute ... is not a justification for a school's non-compliance with Standard 211"

## Interpretation 211-2

Consistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body ....

## What *Grutter* Actually Said

“The **Law School’s educational judgment** that such diversity is essential to its educational mission is one to which we defer.... Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”

## Interpretation 211-3

“This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school’s satisfaction of such obligations is based on the totality of the law school’s actions **and the results achieved.**”

(cont. next slide)

## 211-3 continued

The commitment to providing full educational opportunities for members of underrepresented groups typically includes *a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.*

## What else can law schools do?

- "Law schools, rather than pledging to implement 'equal opportunity and diversity', must now show that they are making adequate attempts to do so, *including things such as appointing a diversity officer, hosting forums or making diversity an integral part of recruitment.*"

William Rakes, chair-elect of the Section of Legal Education and Admissions to the Bar of the ABA



*racial preferences or “demonstrate specific steps they are taking to achieve the goal of diversity, such as recruiting at historically black colleges, offering scholarships to minority or disadvantaged students, or holding summer programs to help potential applicants prepare for law school.”*

John Sebert, ABA consultant on higher education

### ABA Standard 501(b)

- "A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."

## Black Student's Success in Law School

“The figures for law schools are pretty similar, with graduation rates generally lower for blacks, 78% for blacks and 90% for whites except at the top third law schools where the rates are 91% for blacks, and 96% for whites.”

- Bok and Williamson, Boston Bar Journal May/June, 2001

“The bar exam pass rates for minorities have been significantly below those of white students, 74% for blacks according to recent figures, 96% for whites with the gap closing at the top third schools to 84% for blacks and 96% for whites. It seems selective universities have been quite successful in attracting students of color who were qualified to do the work.”

Bok and Williamson, *supra*

## Results

At top 1/3 of law schools, 23.56% ( $100 - (.91 \times .84)$ ) of black matriculants never become lawyers.

At all law schools, 42.28% ( $100 - (.78 \times .74)$ ) of black matriculants never become lawyers.

Assuming the top 1/3 of law schools enroll approximately 1/3 of black law students, this means that at bottom 2/3 law schools,

### **APPROXIMATELY 52% OF BLACK MATRICULANTS NEVER BECOME LAWYERS.**

Obviously, this figure will vary from law school to law school, and depend in part on the difficulty of the bar in any give state.

However, it seems safe to say that *at quite a few law schools, more than 60% of black matriculants never become attorneys.*

## Remember ABA Standard 501(b)?

"A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."

So you would think that this standard would prohibit law schools from using admissions policies that result in 60%+ failure rates for African American students.

But you would be wrong.

## Proposed Interpretation 501(2)

"A law school's admission policies shall be consistent with Standards 210 and 211."

So, it's not only okay, but actually required to admit students whom you know are likely to fail—but only if they are black students.

If ABA was composed of hardcore racists, could they come up with a more pernicious policy?

## Speaker Biographies

### **Richard Sander**

Richard Sander has been a Professor of Law at the University of California at Los Angeles since 1989. During this period, he has examined the reasons behind the American legal profession's explosive growth since the mid-1960s, and the structure and effects of law school admissions policies. In 1990, he designed a new admissions policy (adopted by UCLA's law school) that sought to calibrate objectively the differences in college quality and grading that most graduate programs take into account in evaluating the college transcripts of applicants. After California voters approved Proposition 209 in 1996, Professor Sander successfully argued for the adoption of class-based preferences in the law school's admissions, and published a study on the results of this experiment in 1997. In 1998, Professor Sander and others at the UCLA School of Law founded the Empirical Research Group (ERG), an entity designed to help faculty members undertake ambitious empirical projects and introduce more quantitative and methodological sophistication into their policy-related work. That same year, Professor Sander joined a group of academics and organizations to create "After the JD" (AJD), a large-scale, longitudinal cohort study of the legal profession. AJD secured funding to track a national sample of young lawyers, and published its first findings in 2004. The AJD's databases provide the first detailed, reliable cross-sectional information ever collected on a large sample of attorneys. Some of his publications are: *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STANFORD LAW REVIEW* 367 (2004), *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* (with Ronit Dinovitzer, Bryant Garth, Joyce Sterling and Gita Wilder) (NALP Foundation and the American Bar Foundation) (2004); and *The Happy Charade: An Empirical Examination of the Third Year of Law School*, (with Mitu Gulati and Bob Sockloskie) 51 *JOURNAL OF LEGAL EDUCATION* 235-66 (2001). Professor Sander attended Harvard College in the mid-1970s, and graduated magna cum laude in Social Studies in 1978. Professor Sander attended graduate school at Northwestern University from 1983 to 1988, earning degrees in law (J.D., 1988) and economics (M.A. 1985, Ph.D., 1990).

### **Richard O. Lempert**

Richard O. Lempert is the Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan, on leave as Division Director for the Social and Economic Sciences at the National Science Foundation. The recipient of the Law & Society Association's Harry Kalven Jr. Prize for outstanding socio-legal scholarship and a fellow of the American Academy of Arts and Sciences, Professor Lempert's interest in applying social science research to legal issues is reflected in his work on juries, capital punishment, and the use of statistical and social science evidence by courts. With James Liebman and Sam Gross, he is the author of *A MODERN APPROACH TO EVIDENCE*, now in its third edition. Professor Lempert is also the author (with Joseph Sanders) of *AN INVITATION TO LAW AND SOCIAL SCIENCE*, and co-editor of *UNDER THE INFLUENCE? DRUGS AND THE AMERICAN WORK FORCE*. His recent articles have appeared in the *ST. LOUIS LAW REVIEW*, *VIRGINIA LAW REVIEW*, *LAW AND SOCIETY REVIEW*, and *LAW AND SOCIAL INQUIRY*. Professor Lempert is a graduate of Oberlin College, the University of

Michigan Law School, and holds a Ph.D. in sociology from the University of Michigan. In 2000, Professor Lempert was named founding director of the University's Life Sciences, Values, and Society Program (LSVSP). He continues to direct the program while on leave and travels to Ann Arbor regularly in connection with his LSVSP responsibilities.

### **David E. Bernstein**

David E. Bernstein is a Professor at the George Mason University School of Law in Arlington, Virginia, where he has been teaching since 1995. He was a Visiting Professor at Georgetown University Law Center for Spring 2003 semester, and is a Visiting Professor at the University of Michigan School of Law for the 2005-06 academic year. Professor Bernstein is a graduate of the Yale Law School, where he was senior editor of the *YALE LAW JOURNAL* and a John M. Olin Fellow in Law, Economics, and Public Policy. He is the author of over sixty scholarly articles, book chapters, and think tank studies, including recent or forthcoming articles and review essays in the *YALE LAW JOURNAL*, *MICHIGAN LAW REVIEW* (2), *NORTHWESTERN UNIVERSITY LAW REVIEW*, *TEXAS LAW REVIEW* (2), *GEORGETOWN LAW JOURNAL* (2), *VANDERBILT LAW REVIEW*, and *CALIFORNIA LAW REVIEW*. Professor Bernstein is the author of *YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* (Cato Institute 2003). He is also the co-author of *The NEW WIGMORE: EXPERT EVIDENCE* (Aspen Law and Business 2003), author of *ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (Duke 2001), and co-editor of *PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW* (MIT 1993). He is a past chairperson of the Association of American Law Schools Evidence section.

### **Dean Steven R. Smith**

Dean Steven R. Smith is President, Dean and Professor of Law at California Western School of Law in San Diego. He also served as Dean and Professor of Law at the Cleveland-Marshall College of Law of Cleveland State University. He also served as Deputy Director of the Association of American Law Schools in Washington, D.C. and Professor of Law, Associate Dean and Acting Dean at the University of Louisville School of Law. He was an Associate in Medicine at the medical school at Louisville. He received his baccalaureate degree from Buena Vista College, his law degree from the University of Iowa College of Law and a masters degree in economics from the University of Iowa. Professor Smith has taught a variety of courses, primarily in the areas of law and medicine, mental health law and torts. He has received the Grawemeyer Award for innovative teaching. In addition to teaching in law school, he has taught at the University of Louisville School of Medicine and was a director of the Medical Institute for Law cosponsored by the Cleveland Foundation and the Cleveland-Marshall College of Law. Dean Smith has been involved in a large number of national, state, local and university commissions, committees and working groups. He is particularly active in the American Bar Association and Association of American Law Schools. He currently serves on the Council of the ABA Section of Legal Education and Admission to the Bar. He has served as chair of the Committee on Accreditation of the Association of American Law Schools and serves on the boards of directors of Scribes and the American Board of Professional Psychology. He is a member of the Ethics Committee of the American Psychological Association. He serves as

President of the Cleveland City Club. He has been involved in the American Bar Association's Central and Eastern European Initiative.

## Findings and Recommendations

### Findings

1. Richard Sander's November 2004 article, *Systemic Analysis of Affirmative Action in American Law Schools* in the STANFORD LAW REVIEW, attributed disparities between white and African-American law students in grades, graduation and bar passage rates to an academic "mismatch." Specifically, Professor Sander concluded that large racial preferences employed by law schools in admissions had demonstrably counterproductive effects on their intended beneficiaries. That is, many African-American law school applicants were admitted to law schools for which they were not academically qualified. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]
2. Both Sander's supporters and critics have agreed that there are significant disparities between white and African-American law students in terms of grades, graduation and bar passage rates. However, others disagree with Sander's assertion that academic mismatch is the culprit. Data that would enable researchers to further evaluate the strength of the academic mismatch theory is not widely available. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]
3. Law students may better gauge their likelihood of academic success at a given law school and future career prospects if law schools and the entities responsible for granting admission to the bar publicly disclosed the extent to which they use race in admissions and data on academic performance, bar passage rates, graduation rates, student loan default rates, and grade point averages disaggregated by academic credentials. "Academic credentials," as used in these Findings and Recommendations, shall be defined as cumulative undergraduate grade point average and Law School Admissions Test (LSAT) score. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]
4. The impact of racial preferences in law school admissions is an important matter of public policy. In particular, the public would benefit from further social science research on such preferences' impact on African-American and other minority law students. Admitting students into law schools for which they might not academically be prepared could harm their academic performance and hinder their ability to obtain secure and gainful employment in the legal profession. Law school entails significant investments of time and financial resources, and law students often take out extensive federal and private loans to finance their education. Racial preferences that contribute to any academic mismatch might therefore also contribute to income and



wealth disparities between whites and African-Americans. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]

5. The American Bar Association's Council of the Section of Legal Education and Admissions of the Bar (the Council) adopted Standard 212 in 2006. Under Standard 212, law schools seeking accreditation from the Council must demonstrate by concrete action a commitment to having a student body that is diverse with respect to race, among other aspects of diversity. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez voted in opposition. Commissioner Yaki abstained]

6. The Council also enacted official interpretations to help guide law schools in these demonstrations of concrete action. Interpretation 212-2 permits law schools, "[c]onsistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*," to use race and ethnicity in their admission process to promote equal opportunity and diversity. Interpretation 212-3 states that "[t]he determination of a law school's satisfaction of [these] obligations is based on the totality of the law school's actions and the results achieved." Given these interpretations, it is difficult to see how law schools could satisfy their obligations under Standard 212 without the use of racial preferences. To this extent, some have argued that the standard strongly, although implicitly, encourages the use of racial preferences in admissions. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]

7. The Council grounded Standard 212 in the Supreme Court's 2003 decision in *Grutter v. Bollinger*. The Supreme Court's deference to the University of Michigan Law School's judgment that racial diversity was essential to its educational mission was predicated on the "expansive freedoms of speech and thought associated with the university environment," which give higher educational institutions a "a special niche in our constitutional tradition." *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). The Court recognized traditional judicial deference to the right of colleges and universities to "select those students who will contribute the most to the robust exchange of ideas" as a means to achieve a "goal that is of paramount importance in the fulfillment of its mission." *See id.* Under Standard 212, the Council displaces the judgment of individual law schools to decide the importance of diversity and substitutes its own. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition]

## Recommendations

1. The National Academy of Sciences or another appropriate grant-making entity should fund independent research on the impact of racial preferences on racial disparities in law school academic performance, bar passage rates, graduation rates, student loan default rates, and future income. State bar associations should cooperate with this research. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition]
  
2. Law schools should voluntarily provide disclosure to the public and, at the very least, to potential applicants on student academic performance, attrition, graduation, bar passage, student loan default, and future income disaggregated by academic credentials. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, and Kirsanow voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition. Commissioner Taylor abstained.]
  
3. Congress should enact legislation requiring law schools receiving federal financial assistance to disclose to the public detailed data on the extent to which they take race into account in making admissions decisions. These details should include: (1) whether they take race, color, or national origin into account; (2) the racial, color, and national origin groups for which membership is considered a “plus” or “minus” factor; (3) a description of how group membership is considered, including the weight accorded such membership; (4) whether targets, goals, or quotas are used; (5) a statement explaining why group membership is given weight and its relationship to the diversity rationale; (6) a description of the consideration given to using race -neutral alternatives to achieve those goals; (7) how frequently the need to give weight to group membership is reassessed; (8) what non-racial factors are considered in the admissions process; and (9) an analysis of any correlation between academic credentials to placement in remediation program, graduation rates, and student loan default rates. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]
  
4. As an interim measure, the American Bar Association’s Council of the Section of Legal Education and Admissions of the Bar (the Council) should, pursuant to its accreditation authority, require law schools to disclose the details recommended in Recommendation 2. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]
  
5. States should require the authorities responsible for granting admission to the bar in their jurisdiction to disclose bar passage rates disaggregated by academic credentials. [Chairman

Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]

6. The Council should revise the recently adopted Standard 212 to delete the requirement that law schools seeking accreditation demonstrate a commitment to diversity. The standard should instead be revised to permit law schools, consistent with *Grutter v. Bollinger*, the freedom to determine whether diversity is essential to their academic mission. Accordingly, the Council should repeal Interpretation 212-2 so as to most clearly preserve law schools' academic freedom in the accreditation process. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition.]

7. Law schools should be clear that constitutional and statutory provisions at the federal, state, and local levels remain binding legal obligations for all law schools, even if they conflict or appear to conflict with Standard 212 and its official interpretations. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Braceras, Heriot, Kirsanow, and Taylor voted in favor of this recommendation; Commissioners Melendez and Yaki voted in opposition]

## Statement of Chairman Gerald A. Reynolds on Affirmative Action in American Law Schools

In his 2004 Stanford Law Review article, *A Systemic Analysis of Affirmative Action in American Law Schools*, and in his subsequent testimony before this Commission, Professor Richard Sander goes against the prevailing orthodoxy by offering compelling evidence that racial preferences in admissions may actually cause long-term harm to the future academic and employment prospects of minority law school students. His research suggests that as a result of affirmative action, a significant number of black students enroll in law schools in which they lack the requisite credentials to meaningfully compete.

The statistics to back this “mismatch effect” are telling. Sander’s analysis reveals that when compared with their white counterparts, half of black law school students score in the bottom tenth of their classes at the end of the first year. Additionally, they are 2.5 times more likely than whites never to graduate from law school at all. They were also found to be four times more likely to fail the bar exam on the first try and six times more likely to never pass the exam, despite multiple attempts.

With little to no attention paid to these perhaps unanticipated negative consequences, law schools insist on using race-based affirmative action programs as a means of achieving numerical “diversity.” Indeed, the American Bar Association, through its embrace of results-based policies such as Standard 212, virtually mandates the use of preferences based on race, sex and ethnicity as a condition of accreditation, despite the fact that *Grutter v. Bollinger*<sup>96</sup> left to individual law schools the academic freedom to decide whether diversity is essential to their educational missions. Grounding its analysis in Justice Powell’s view in *Regents of University of California v. Bakke*<sup>97</sup> that academic freedom “long has been viewed as a special concern of the *First Amendment*”<sup>98</sup> the *Grutter* majority noted that its holding “is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally proscribed limits.”<sup>99</sup> In Standard 212, the ABA has substituted its own judgment for that of individual law schools, restricting their freedom to craft their own academic missions.

Law schools, in turn, obscure the extent to which race plays a factor in admissions standards and fail to provide applicants, especially minority applicants, with realistic information about their chances of academic and career success as a result of attending a particular law school. Sander’s testimony revealed that many “blacks tend to assume that they are more qualified than their white classmates because they are so assiduously courted by the schools that admit them” and have far higher expectations for first-year performance than do white students.

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<sup>96</sup> 539 U.S. 306 (2003).

<sup>97</sup> 438 U.S. 265 (1978).

<sup>98</sup> *Grutter*, 539 U.S. at 324 (citing *Bakke*, 438 U.S. at 312, 314).

<sup>99</sup> *Grutter*, 539 U.S. at 329.

By operating in this fashion, law schools and the ABA violate the “do no harm” principle. Race-based admissions do little to remedy the plight of those minority students who have failed to receive a quality education and are therefore limited in their abilities to compete in higher education. But they also have a detrimental impact on those minority students who may have been better served attending law schools for which they are appropriately prepared. Sander’s findings call to mind Frederick Douglass’ admonition, cited by Justice Thomas in his dissent in *Grutter*, to a group of abolitionists in 1865,

“The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us!. . . Your doing with us has already played the mischief with us. Do nothing with us! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is give him a chance to stand on his own legs. Let him alone! . . . Your interference is doing him a positive injury.”<sup>100</sup>

The goal of remedying the effects of past discrimination seems to have been replaced by what Professor Sander refers to as the “diversity imperative,” despite the fact that skin color is a poor proxy for diversity of thought, experiences and beliefs. Law schools’ obsession with achieving a “diverse student body” does a further disservice to minority students by masking the grave racial disparities existing in K-12 education that produce too many minority students who are ill equipped to compete at the undergraduate and graduate levels.

Data from the National Assessment of Educational Progress, “the nation’s report card,” show that an average black high school graduate has the math and reading skills of an average eighth grade white or Asian student. Only a quarter of black 17-year-olds read as well as the average white 17-year-old. More than 90 percent of black 17-year-olds score below the average white 17-year-old in science and nearly 90 percent score below the average white student in math. Many black students emerge from elementary and high school unprepared for college when compared with their white and Asian counterparts. That lack of preparation has a ripple effect—colleges must lower their admissions standards to admit black students in meaningful numbers and the cycle repeats itself at the graduate and law school levels.

If racial disparities in education cannot be remedied merely by eliminating discrimination, Sander’s research and the NAEP statistics taken together demonstrate that encouraging a different kind of discrimination cannot remedy them, either. A true civil rights strategy will focus on these students not once they apply for and arrive at law schools, but much earlier in their educational development.

Furthermore, all students, not just minority students, would be better served by greater transparency and honesty in the law school admissions process. Students go through the considerable time and expense of applying for and ultimately attending various institutions.

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<sup>100</sup> *Grutter*, 539 U.S. at 349-50 (Thomas, J., dissenting) (citing “What the Black Man Wants”: An Address Delivered in Boston Massachusetts on January 26, 1865, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds. 1991)).

They often do so with little knowledge of their probability of competing successfully, graduating, passing the bar or of obtaining meaningful employment once their education is complete—a frightening prospect for those that have incurred sizable student loan debts. Both Professors Sander and Lempert acknowledged that accurate information from law schools with respect to these indicators would better help students assess their probabilities of success at a certain school. It would also assist researchers by providing a more complete body of data against which to test their hypotheses and draw conclusions.

To date, FOIA and survey requests sent to individual law schools have gone largely unanswered and have thus proven unsuccessful in this regard. If the Academy is a place that cherishes and pursues the truth, it has little to gain from continued obfuscation.

Statement of Commissioner Gail I. Heriot  
*Joined by Chairman Gerald A. Reynolds*

I join in the Commission’s findings of fact and recommendations on “Affirmative Action in Law Schools.” Given the importance and sensitivity of the issue, however, I believe that it is appropriate for me to add a few thoughts of my own.

I have no doubt that those who originally conceived of race-based admissions policies—nearly forty years ago—were acting in good faith. By lowering admissions standards for African-American and Hispanic students at selective law schools, they hoped to increase the number of minority students on campus and ultimately to promote minority integration into both the legal profession and mainstream society. Similarly, however, I have no doubt of the good faith of those who opposed the policies. Indeed, their warnings that academic double standards cannot solve the nation’s problems and may well exacerbate them seem especially prescient in light of the controversy before the Commission now.<sup>101</sup>

The real conflict over race-based admissions policies has not been about good or bad faith or about whether we should aspire to be a society in which members of racial minorities are fully integrated into the mainstream. There is no question we should. The conflict is about whether racial discrimination—something that nearly all Americans abhor—is an appropriate tool to achieve that end. Put starkly: Should the principle of non-discrimination be temporarily sacrificed in the hope that such a sacrifice will, in the long run, help us become the society of equal opportunity that we all aspire to?

Justice Stanley Mosk warned of the risks associated with such temporary compromises with principle over thirty years ago, when, writing for the California Supreme Court in *Bakke v. UC Regents* (1976), he held racially discriminatory admissions policies to be unconstitutional:

To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality.<sup>102</sup>

Mosk would probably laugh to hear his view characterized as “conservative” today; far more frequently he was accused of the opposite tendency. But whatever his political persuasion, Mosk had been a staunch ally of the civil rights movement from its beginning.<sup>103</sup> Far from seeing a

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<sup>101</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (hereinafter “Sander”).

<sup>102</sup> 18 Cal. 3d 36, 62-63 (1976).

<sup>103</sup> At a time that it was not fashionable to do so, Stanley Mosk had quit fraternal organizations in protest over their refusal to admit African-American members. As California Attorney General, he established the office’s civil rights division and banned the Professional Golfers Association, which did not allow African-American players, from using state golf courses. As a California Superior Court judge, he outlawed restrictive racial covenants before they

contradiction between his support for the civil rights movement and his opposition to the “minority friendly” race-based admissions policies in *Bakke*, he viewed them as one and the same. His opposition to race discrimination was a matter of principle. And he was unwilling to sacrifice that principle for the “dubious” practical gains promised by preference supporters.

Mosk’s vision of civil rights did not prevail. His opinion in *Bakke* was superseded by the U.S. Supreme Court’s fractured decision in *Regents of the University of California v. Bakke* (1978)<sup>104</sup> and again by the just-as-fractured decision in *Grutter v. Bollinger* (2003)<sup>105</sup> twenty-five years later. Despite Mosk’s warning, race-based admissions policies mushroomed on college and university campuses, and a thriving diversity bureaucracy was established to administer them.<sup>106</sup>

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were held unconstitutional by the U.S. Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948). See Stanley Mosk, 88, *Long a California Supreme Court Justice*, NEW YORK TIMES C-13 (June 21, 2001).

Mosk was not the only judge conspicuously to oppose race-based admissions who was considered both an ally of the civil rights movement and well towards the left side of the political spectrum. Also among the early judicial opponents of race-based admissions was U.S. Supreme Court Justice William O. Douglas. Douglas declared his belief that race-based admissions violated the U.S. Constitution in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), a case concerning admissions policies at the University of Washington School of Law:

There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

Justice Lewis Powell, Jr., whose opinion in *Bakke* at the U.S. Supreme Court level is now much-admired by advocates of racially preferential admissions policies, provides an interesting comparison. As a Richmond School Board Chairman and a member of the Virginia Board of Education during the crucial years following the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the gentlemanly and accommodating Powell did not distinguish himself as an advocate of desegregation “with all deliberate speed.” As Jerome Karabel put it:

Always active in civic affairs, Powell served as chairman of the Richmond School Board from 1953 to 1961 and as a member of the Virginia Board of Education from 1961 to 1969. His own carefully worded assessment of his service in these positions was that it had taken place when the pace of desegregation had been ‘necessarily more measured than civil rights leaders would have liked.’ But this was a rather generous interpretation of his role in the years after the *Brown* decision, for when Powell stepped down as chairman of the Richmond School Board in 1961, after eight years of service, only 2 of the city’s 23,000 black children attended school with white children. And during his two terms with the state Board of Education, Powell’s sympathetic but fair-minded biographer reports that ‘he never did any more than was necessary to facilitate desegregation ...[and] never spoke out against foot dragging and gradualism.’

JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON* 496 (2005), quoting JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 2, 234, 172 (2001).

<sup>104</sup> 438 U.S. 265 (1978).

<sup>105</sup> 539 U.S. 306 (2003).

<sup>106</sup> See Peter Schmidt, *U. of Colorado at Boulder Is Criticized for Its Diversity Expenditures*, CHRON. HIGHER ED. (January 17, 2007) (citing a report that states that “of the \$21.8-million that the campus has reported spending on diversity programs, just \$4-million goes toward student scholarships” and that “Chancellor Peterson has



If Mosk was right, the mistake will be difficult to correct at this late date. It isn't just the iron rule of bureaucracy at work today—that first and foremost, bureaucracies work to preserve themselves. Many distinguished citizens—university presidents, philanthropists, judges and legislators—have built their reputations on their support for race-based admissions. Their jobs are not at stake, but their sense of accomplishment may be. Overcoming that will not be easy.

But if anything can cause supporters of race-based admissions policies to stop and reconsider, it is Dr. Richard Sander's careful study of the effects of race-based admissions on the legal profession. If his findings are correct, there are today approximately 7.9 percent fewer, not more, practicing attorneys as a result of race-based admissions policies. It is unlikely that any but the most evidence-resistant devotee of these policies would want to support them if their effects are precisely the opposite of what was intended.<sup>107</sup> Indeed, if the consequences of race-based admissions policies turn out to be simply a wash—neither increasing nor decreasing the number of practicing attorneys—it is doubtful that many of their current supporters will remain so.<sup>108</sup>

Sander attempts to gauge the consequences of “academic mismatch.” He finds what many who are familiar with law schools already knew: When elite law schools lower their academic standards in order to admit a more racially diverse class, schools one or two academic tiers down feel they must do likewise, since the minority students who might have attended those second- or third-tier schools based on their own academic record are instead attending elite schools. The problem is thus passed to the fourth and fifth tiers, which respond similarly. As a result, there is now a serious gap in academic credentials between minority and non-minority law students at all levels. Up and down the pecking order, the average black student has an academic index that is more than two standard deviations below that of his average white classmate.<sup>109</sup> Only historically minority law schools appear to have escaped the full effect of the cascade.<sup>110</sup>

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acknowledged that the “\$21.8-million figure is ‘not even close’ to a full total for the campus’s diversity expenditures.”)

<sup>107</sup> See Jesse Rothstein & Albert Yoon, *Mismatch in Law School*, SSRN at 1 (February 1, 2006) (“Support for preferences would almost certainly evaporate if they were shown to make black students worse off.”).

<sup>108</sup> For many, the issue is how large an *increase* in the number African American attorneys is necessary to justify the costs (which include a high failure rate for preference beneficiaries) of the racial preference system.

<sup>109</sup> The academic index used by Sander is computed in this manner: Academic Index = 0.4(UGPA) + 0.6(LSAT) with both UGPA and LSAT normalized and made into a one-thousand-point scale. Most if not all law schools use such an index. The particular formula used by Sander is fairly typical. *Sander* at 393.

<sup>110</sup> *Sander* at 416, Table 3.2. The gap at historically minority law schools is still substantial, but smaller than at other institutions.

This size of the gap in law schools is consistent with the gap found in colleges and medical schools in the cases that have reached the Supreme Court. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the University of Michigan’s College of Literature, Science and the Arts added 20 points to the academic index of all African-American applicants for admission—the equivalent, all other things being equal, of an entire letter grade in the applicant’s high school GPA. An African-American student with a high school GPA of 3.00 (straight Bs) would thus be preferred to an Asian-American student with a high school GPA of 3.99 (just shy of a perfect record).

Not surprisingly, such a gap leads to problems. Students who attend schools where their academic credentials are substantially below their fellow students' tend to perform poorly. The reason is simple: While some students will outperform their entering academic credentials, just as some students will underperform theirs, most students will perform in the range that their academic credentials predict.

No serious supporter of race-based admissions denies this. For example, William G. Bowen and Derek Bok, authors of *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* and leading advocates of racially preferential admissions policies, candidly admit that the problem is serious in the undergraduate context: "College grades [for affirmative action beneficiaries] present a ... sobering picture," they wrote. "The grades earned by African-American students at the [schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings."<sup>111</sup>

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*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), was similar in this respect. Allan Bakke, a white, male, Vietnam veteran had been denied admission to UC Davis Medical School despite an undergraduate GPA of 3.46 and MCAT scores in the 97<sup>th</sup> percentile (Science), 96<sup>th</sup> percentile (Verbal), 94<sup>th</sup> percentile (Quantitative) and 72<sup>nd</sup> percentile (General Information) as well as a fine record of community service. In contrast, sixteen minority students had been admitted with an average undergraduate GPA of 2.88 and average MCATs in the 35<sup>th</sup> percentile (Science), 46<sup>th</sup> percentile (Verbal), 24<sup>th</sup> percentile (Quantitative) and 33<sup>rd</sup> percentile (General Information) under a special program that ensured minorities at least sixteen seats in the entering class.

<sup>111</sup> WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 72 (1998) (hereinafter "Bowen & Bok").

The picture is no less sobering in law schools. Sander's research demonstrates that in elite law schools, 51.6 percent of African-American law students had first-year GPAs in the bottom 10 percent of their class as opposed to only 5.6 percent of white students in 1992 (the year for which Sander was able to find national data). Nearly identical performance gaps existed at law schools at all levels (with the exception of historically minority schools). At mid-range public schools, the median African-American student's first-year grades corresponded to the 5<sup>th</sup> percentile among white students. For mid-range private schools, the corresponding percentile was 8<sup>th</sup>, and for lower-range private schools it was 7<sup>th</sup>. With disappointingly few exceptions, African-American students were grouped towards the bottom of their class. Moreover, contrary to popular lore, the performance gap did not close as students continued through law school. Instead, by graduation, it had gotten wider. (The Sander study did not look at Hispanic law students.)<sup>112</sup>

I am not aware of any critic who disputes these figures. Even his most passionate critics—and there are some—have to concede that the relative performance of African-American law students is very discouraging.<sup>113</sup>

Only slightly more controversial is Sander's finding that all this was almost entirely the result of race-based admissions. When African-American and white law students with similar entering credentials competed against each other, they performed very close to the same.<sup>114</sup>

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<sup>112</sup> Sander at 427-36, Tables 5.1, 5.3 & 5.4. As Sander states, "low black performance is not the result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty that blacks in general have with law school. It is a simple and direct consequence of the disparity in entering credentials between blacks and whites at elite schools." *Id.* at 427.

<sup>113</sup> See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1807 (2005) ("Richard Sander's study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student's grades are startlingly low")(hereinafter "Ayres & Brooks").

<sup>114</sup> Sander at 428, Table 5.2. While thirty-five years ago it was common for preference supporters to argue that African-American students will perform better than their entering credentials once they get into an elite school (and that therefore preferential treatment is justified), Sander's critics have argued just the opposite—that African-American students will perform *even less well* than their entering credentials suggest. (Their argument runs this way: Sander paints too rosy a picture of African-American academic performance in law school. In fact, ending race preferences and letting African-American students enroll in schools where their entering credential match those of other students will not cause those African-American students to pass the bar as often as their white or Asian peers. No matter what law school they attend, they will fail at higher rates than white and Asian-American students with identical academic indices. Sander's belief that the problem can be remedied is thus overly optimistic—or so their argument goes.)

It would be understatement to say this is a very odd way to defend race-based admissions. The argument that was made thirty-five years ago was perfectly coherent: Hypothetically, an African-American student from a poor background with a B average in high school might have overcome so much to achieve that B average that one could realistically expect him to "catch up" to his fellow students with an A average in elite schools. It therefore it made sense for an admissions officer to take a chance and admit him.

Race-based admissions, therefore, were creating the illusion that African-American students were destined to do poorly in law schools at every level. The real problem was far less daunting. There were fewer African-American students than anyone would prefer with the entering academic credentials necessary for admission on a color-blind basis to the most elite law schools. But there were many more who would likely do well at mid-tier schools--if they were only attending those schools.

In the past, supporters of race-based admissions often asserted that, despite the likelihood of poor grades, minority students were better off accepting the benefit of a preference and graduating from a more prestigious school. Someone had to be at the bottom of every class; there was no real harm in its being minority students. It is still better to be a Harvard graduate than an honors student at a state university like Texas or Virginia--or so the argument ran.<sup>115</sup> (Interestingly, the best available evidence shows that attendance at an elite college or university does not add to earnings capacity. When students at such schools are matched with students with similar entering credentials who were accepted to an elite school, but chose to be educated elsewhere, the earnings of the elite school enrollees are the same or possibly less.)<sup>116</sup>

The fear among preference opponents, however, is that students actually learn less, not more, when they are grouped with other students who are much better prepared for the course material. (I have little doubt, for example, that I would learn less in a physics class at a school like Cal Tech, which specializes in the training of the best prepared science students,

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Sadly, actual experience did not bear out this theory. The argument made by Sander's critics today is that African-American students with a B average should be admitted to law schools that would ordinarily require an A average, but that they will probably perform below even the level their B average would suggest. This is an uncomfortable argument for a supporter of race-based admissions to have to make.

Sander has replied to this criticism by showing that "all of the available evidence (including the large systematic study by Anthony & Liu) indicates that at least ninety percent of the black-white grade gap is attributable to racial preferences, not black underperformance." Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1997 (2005) (hereinafter "*Sander Reply*"). See Lisa C. Anthony & Mei Liu, Law School Admission Council, *LSAT Technical Report 00-02, Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on the 1996-1998 Entering Law School Classes* 9 (2003) (finding only "very slight" underperformance (one-eighth of a standard deviation) by African-American law students, controlling for preferences). While it is possible that African-Americans underperform their entering credentials by some tiny amount, this phenomenon is swamped by the racial preference effect. No one has disputed Sander's reply on this matter.

For data showing that California's Proposition 209, which banned race-based admissions, all but closed the performance gap between underrepresented minority students and white and Asian-American students at the University of California at San Diego during the period it was most carefully enforced, see Gail Heriot, *The Politics of Admissions in California*, ACADEMIC QUESTIONS 29 (Fall 2001).

<sup>115</sup> See, e.g., Bowen & Bok at 72.

<sup>116</sup> See Stacey Berg Dale & Alan Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, QUARTERLY J. ECON. 1491-1527 (Nov. 2002) (hereinafter Dale & Krueger).

than I would at a university geared to a non-physics major like me.) In addition, in a class in which all students have roughly similar entering credentials, the students who wind up at the bottom of the class are often those who put the least effort into their studies. When grades come out, a valuable lesson can be learned by all: Hard work produces results. On the other hand, when the differences in student performance are a reflection of differences in academic skills and preparation, the lesson to be learned is less clear. It may be easy for students to become demoralized and even resentful of the standards that are being used to measure their performance.

Few advocates of race-based admissions made any effort to demonstrate that preference beneficiaries were in fact better off than they would have been had they attended a school in which their entering credentials matched those of their peers. It was taken on faith.<sup>117</sup> That's

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117. An exception was the work of Bowen and Bok, whose efforts to prove that minority students at the undergraduate level were better off with race-based admissions were marred by a number of methodological difficulties. They attempted to demonstrate that, despite poor grades, minority students who attend highly selective colleges and universities have better graduation rates than students with the same SAT scores who attend less selective college and universities and presumably got better grades. See *Bowen & Bok* at 61, Figure 3.3. Consequently, a minority student who chooses to attend a less prestigious school in order to avoid the mismatch problem is making a mistake at least as far as graduation rates are concerned—or so the argument runs. A closer look, however, demonstrates that their conclusion is unwarranted.

*Bowen & Bok* focused mainly on SAT scores and not on other relevant academic measures of its subjects, like high school GPAs or high school competitiveness. For the most part, the authors assumed that minority students at highly selective colleges or universities are as a group equivalent to minority students at somewhat less selective colleges or universities as a group if their SAT scores were in the same range. (In the appendix to their work, they made a slight effort to take high school performance in account by including a variable for whether a student had graduated in the top 10 percent of his class—obviously a very blunt instrument for measuring overall performance.) This is a mistake. Even colleges and universities engaged in very large preferential treatment for underrepresented minorities ordinarily seek to enroll the minority members with the best academic credentials possible for that group. If a top-tier college enrolled one minority student with a given SAT score and not another, it is not always because the second student chose not to apply or enroll. The first student may have had a better high school GPA (or attended a more competitive high school) than the second student. It is therefore a mistake to assume that if the minority students who attended top tier colleges have better “measurable outcomes,” than other minority students with the same SAT scores, it is simply because they had the opportunity to attend a more prestigious college. It likely isn't. Indeed, the *Bowen & Bok* methodology fails to eliminate the possibility that they were actually worse off as a result of their choice of schools.

In addition, Bowen and Bok employ a methodology that is likely to overstate the value of attending an elite college. By examining SAT scores in bands of 100 (i.e. combined SAT scores of less than 1000, 1000-1099, 1100-1199, 1200-1299 and greater than 1299), they made the students in lower-tier colleges seem more similar to the students at higher-tier colleges than they actually, since students at the higher-tier colleges will tend to group towards the bands, and students from lower-tier colleges will tend to group towards the bottom. For example, if every student at the more-elite colleges had a combined SAT score of 1099 and every student at the less-elite colleges had a combined SAT score of 1000, those students will be grouped together and made to seem the same. If the graduation rates are higher for the students with the higher SATs, it will appear to be on account of their more elite college when it may instead be on account of their higher SAT score.

why the Sander study is so important. Unfortunately, the news he provides tends to bear out the fear that mismatch is hurting African-American students.

Sander notes two important effects of race-based admissions policies. First, African-American students attending law schools failed or dropped out at much higher rates than white students (19.3 percent vs. 8.2 percent).<sup>118</sup> Overwhelmingly, this phenomenon was associated with poor performance and not financial hardship.<sup>119</sup> Since many of these students who left law school would likely have performed better at a less competitive law school, they were, in a very real sense, victims of race-based admissions.

Second, among African Americans who graduated and took the bar, the proportion who passed on their first attempt was not just lower than that for whites, it was lower even when one controls for academic index (LSAT and college GPA). For example, 71 percent of African Americans with an index of 400-460 failed the bar on their first effort, while only 52 percent of whites did. Similarly, 26 percent of African Americans with an index between 640 and 700 failed their first time, while only 13 percent of whites did.<sup>120</sup>

Ultimately, only 45 percent of African Americans who entered law school passed the bar on their first attempt as opposed to over 78 percent of whites. Even after multiple attempts, only 57 percent of African Americans succeeded. The gap was thus never closed.<sup>121</sup>

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Bowen and Bok also attempted to demonstrate that earned income increases when African-American students of a given combined SAT score range attend more selective schools, and the same methodological criticisms apply. Here, however, the data were ambiguous. For example, African-American men with a combined SAT score from 1000 to 1099 were found to earn more when they attended a second- or third-tier school among the very selective schools the authors studied. See *Bowen & Bok* at 143, Table 5.1.

The nearly-uniform praise for Bowen and Bok's work, despite its transparently flawed methodology, provides an interesting contrast to the sometimes over-the-top criticism for Sander's comparatively sophisticated methods. While Sander might yet be proven wrong in his ultimate finding that racial preferences have actually reduced the number of African-American attorneys, it won't be on account of the kind of obvious flaws in Bowen & Bok. See Dale & Krueger (applying a more sophisticated methodology than that used in *Bowen & Bok* to the same database and finding that students in general do not earn more as a result of attending a more elite college or university).

A study by then-law-student William C. Kidder might be viewed as having an indirect bearing on the law school mismatch issue. William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001). That study, however, had very serious methodological errors that I have discussed elsewhere. See Gail Heriot & Chris Wonnell, *A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. L. & POLITICS 467 (2003) (criticizing the Kidder study).

<sup>118</sup> Sander at 437, Table 5.5.

<sup>119</sup> Sander at 439, Table 5.6. The other factors that seemed to matter were the ranking of the law school and part-time status. Both had overwhelmingly more importance than family income, which mattered only very slightly.

<sup>120</sup> Sander at 442, Table 6.2.

<sup>121</sup> Sander at 454.

Something was clearly wrong. When African-American and white law students with similar academic credentials competed against each other at the same school, they earned about the same grades. And when African-American and white students with the same grades from the same tier school took the bar examination, they passed at the same rate. Yet African-American students as a whole had dramatically lower bar passage rates than white students with similar credentials. What could explain this?

As Sander points out, the most plausible answer is that they were not attending the same law schools. The white and Asian-American students were likely to be attending a school that takes things a little more slowly and spends more time on matters that are covered on the bar exam.<sup>122</sup> They were learning while their minority peers were struggling at more elite schools. It is this phenomenon that has been dubbed “mismatch.”

Sander calculates that if law schools were to use color-blind admissions policies, fewer African-American law students would be admitted to law schools (3182 vs. 3706), but, since those who were admitted would be attending schools where they had a substantial likelihood of doing well, fewer would fail or drop out (403 vs. 670). In the end, more would pass the bar on their first try (1859 vs. 1567) and more would eventually pass the bar (2150 vs. 1981) than under the current system of race-based admissions.<sup>123</sup>

Sander’s findings are stunning to anyone who has supported race-based admissions. But this is just one study. Sander himself is happy to concede that his work can be improved upon by further research. That is precisely why the Commission is recommending in this report that more research be undertaken.

The stakes are high. If Sander is right or even partly right, it may fairly be said that almost forty years of race-based admissions at law schools will have been for nothing—or indeed worse than nothing. Just as Justice Mosk warned, the principle of nondiscrimination will have been sacrificed “for the sake of a dubious expediency”—a practical gain that never materialized. Indeed, just the opposite will have happened: Fewer African-American attorneys will have been produced than would have been under a color-blind admissions system. Alas, such irony is hardly unfamiliar in the world of public policy. When principle is sacrificed to expediency, often the results are not what the advocates of expedience are expecting.

But even if Sander’s specific finding that affirmative action has decreased the number of African-American practicing attorneys is proven wrong, his study has raised concerns that must be addressed. Given the hidden risks of academic failure that students with lower academic indices face, I believe law schools have an obligation to give students, of all races and

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<sup>122</sup> Sander was not convinced that the greater attention to the bar exam by itself was important. *Id.* at 449. He noted that “[w]hen we control as best we can for the incoming credentials of students bodies, students at more elite schools have higher, not lower success rates on the bar.” *See* Sander at 444, Table 6.1 & 449.

<sup>123</sup> Sander at 473, Table 8.2.

ethnicities, the information they need to decide for themselves about their future. And the Commission has so recommended.

The dissenting commissioners have expressed concern that requiring each law school to disclose the likelihood that a graduate with a particular range of entering credentials will pass the bar will only discourage minority students with lower indices. I, on the other hand, regard disclosure as both a moral obligation and a matter of simple consumer fairness. Sander's findings that students with low academic indices tend to fare poorly in law school are not disputed. Nor is it disputed that this problem has a disproportionate impact on African-American law students.

A law school education is shockingly expensive--from the most prestigious schools to the least. At the University of San Diego, for example, where I am a member of the faculty, tuition and fees for the 2007-08 school year will be \$37,704 with an additional \$956 for books and supplies and \$800 in student loan fees. With modest living expenses, the University predicts that each student will spend \$57,100 per school year.<sup>124</sup> It is routine for law students to graduate with \$160,000 or more in debt--a huge investment that ordinarily must be recouped by the increased earnings capacity of an attorney.

If the highest-paying law firms hired only from the most prestigious law schools, then prospective students offered an admissions preference might rationally choose to attend even if they knew this entailed significant academic risks. But Sander contends that elite schools confer no such unique advantage, and that getting good grades in law school--not attending the most elite law school possible, no matter what the cost--is more strongly associated with a successful legal career.<sup>125</sup> Abundant anecdotal evidence bears this out. At Hogan & Hartson, which I selected because it is the firm at which I once practiced, associate salaries now start at \$160,000, and fewer than half of the firm's associates graduated from top ten schools. Good grades at mid-tier or even less prestigious law schools can pay off. Many associates there attended law schools with moderate rank in the pecking order such as Albany Law School, the University of Maryland, Santa Clara University, the University of Tennessee, and West Virginia University.<sup>126</sup> On the other hand, a student who fails or drops out of a top school or never passes the bar cannot practice at any law firm.

It is one thing for a student to decide to take a risk and enroll in a more prestigious law school than his academic credentials alone would justify (or indeed enroll in any law school). If he ends up doing poorly, at least he made his choice with his eyes open. It is another thing entirely to be the unwitting victim of affirmative action policies (or any other policy that admits students with

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<sup>124</sup> See University of San Diego School of Law Tuition Summary, *available at* <http://www.sandiego.edu/usdlaw/finadm/finaid/cost/tuition.php> (last accessed July 31, 2007).

<sup>125</sup> Sander at 454-68.

<sup>126</sup> See Alexia Garamfalvi, *Hogan, Akin Gump Fire First Shots in New Round of Salary Wars*, LEGAL TIMES (May 16, 2007), *available at* <http://www.law.com/jsp/article.jsp?id=1179260862448> (last accessed July 31, 2007); Hogan and Hartson Professional Roster, *available at* <http://www.hhlaw.com/professionals> (last accessed July 31, 2007). Hogan & Hartson is better known as the law firm at which Chief Justice John Roberts once practiced.



comparatively low academic credentials). Yet, under current conditions, many students are exactly that—unwitting victims.

Law schools can and routinely do provide potential students with information about their graduates' overall bar passage rate. And it is right that they should. But it is not enough—not when many students are admitted to the class with entering credentials far below those of the average student. For them, the likelihood that the average student will pass the bar is worse than useless. It is entirely misleading. They need to know the likelihood that someone with their particular academic credentials at that school will pass the bar.

The Commission's recommendation is for all law schools, in the interest of fairness to all, to provide students with their bar passage rates analyzed by academic credentials. A potential student should be able to look at statistics indicating the likelihood that someone with similar LSAT scores and college GPA will succeed in law school and pass the bar upon graduation. If law schools are unwilling to adopt this modest reform voluntarily, the Commission recommends that the ABA Council, as the U.S. Department of Education's accreditation agency for law schools, or Congress require disclosure.

### **Support and Opposition to the Sander Study**

Anyone reading the Joint Dissent would assume that Sander had reported a lightning bolt from a clear blue sky: startling to hear about but probably just a mistake. In fact, however, the skies have been clouding up for some time; Sander's study is consistent with an increasing body of research.<sup>127</sup>

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<sup>127</sup> Recently, an article by Jesse Rothstein and Albert Yoon, although couched as a criticism of Sander, actually provides partial (though by no means conclusive) support for Sander's mismatch hypothesis in the law school context. Rothstein & Yoon studied graduation, bar examination and employment outcomes. Not surprisingly, due to widespread hiring preferences, Rothstein & Yoon find that African-American law graduates have better employment outcomes than whites with similar credentials. But with regard to graduation and bar passage rates, they did indeed find what Sander's research predicted they would find: that there are very large, unexplained disparities in graduation and bar passage rates between African-American and white law students with similar entering credentials. Rothstein & Yoon assure the reader that any mismatch effect is confined to the African-American students in the lowest quintile of entering credentials, but later in the article, they admit that 75 percent of all African-American law students are in the lowest quintile. (Sander also found that graduation and bar passage outcome disparities were greater in the lower ranges. *See* Sander at 441.)

Rothstein & Yoon are not ready to attribute this unexplained gap to mismatch (defined narrowly to mean that the affected students would have more likely graduated and passed the bar if they had attended a less-competitive school). *See* Rothstein & Yoon at 29 ("For students in the bottom quintile of the entering credentials distribution, the data are consistent with sizable mismatch effects on black bar passage rates but also with differential selection into law school."). But while that difference in their position puts them at odds with Sander, it does not put them at odds with the Commission's findings and recommendations.

Rogers Elliott, A. Christopher Strenta, et al. have looked at why African-American and Hispanic students are less likely to follow careers in science than white or Asian-American students. In 1996, they published “*The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions,*” in which they found that African-American and Hispanic students at elite colleges and universities are about as likely as white or Asian-American students to start off intending to major in science. But they abandon those intentions in larger numbers. The authors concluded that mismatch probably played a major role:

Why are so many talented minority students, especially blacks, abandoning their initial interests and dropping from science when they attend highly selective schools? The question has many possible answers, but we will begin with the factor we think most important, the **relatively** low preparation of black aspirants to science in these schools, hence their poor competitive position in what is a highly competitive course of study. As in most predominantly-white institutions, and especially the more selective of them, whites and Asians were at a large comparative advantage by every science-relevant measure ..., and on the composite

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Specifically, Rothstein & Yoon, argue that comparing white and African Americans with the same academic index towards the bottom of the law student credential range can be misleading. Particularly among the disfavored whites, many law school applicants in the lower academic index range were never admitted to any law school and hence never became law students. Only those with something extra--like a particularly good undergraduate institution or a particularly tough major (attributes that cannot be detected with the LSAC-BPS data)--make it into the pool. Comparing these specially-selected whites with African-Americans with the same academic index (but who received a preference and are therefore not necessarily as academically qualified as the average member of the white group) may be deceptive. If Rothstein & Yoon are correct on this, one would expect a gap in graduation and bar passage rates between the two groups.

But nothing in Rothstein & Yoon suggests that more research into the mismatch issue is unnecessary. To the contrary, their uncertainty as to whether the 75 percent of African Americans in the bottom quintile of law students are victims of mismatch or simply less qualified than the white law students with similar academic indices is an argument *in favor* of further research. Moreover, even if the Rothstein & Yoon alternative (i.e. that white law students in the bottom quintile have academic qualifications that are not detectable from the LSAC-BPS data set, but which nevertheless cause them to have higher graduation and bar passage rates than African Americans in the bottom quintile) turn out to be correct, that does not detract from the Commission’s recommendation that law schools disclose to all students the likelihood that a student with particular qualifications will graduate and pass the bar examination.

One issue that Rothstein & Yoon do not deal with is how African American and white students in the bottom academic index quintile differ on law school GPA. A key finding of Sander’s was that African-American and white law students with similar academic indices perform about the same when they compete against each other in law school. But when it comes time to take the bar examination, the whites substantially outperform the African Americans. Sander attributes this to the mismatch effect. Rothstein & Yoon give no information about whether the “bottom quintile” whites perform better at law school than “bottom quintile” African Americans when they compete against each other (as their alternative model would suggest) or about the same (as the mismatch model would suggest).

predictor, the Academic Index, they were at a 1.75 [standard deviation] advantage.

That it is the comparative rather than the absolute status of the qualifications is clear from two strands of evidence. First students at historically black colleges and universities (HBCUs) have quite low average SAT scores and high school grades ... but they produce 40 percent of black science and engineering degrees with only 20 percent of total black undergraduate enrollment. For example, with SATM scores averaging 400, half the students at Xavier University are reported to be majoring in natural science; with scores somewhat higher (about 450), Howard University is the top producer of black undergraduate science and engineering degrees....

[T]hat brings us to the other strand of evidence for the competition argument. .... [Our evidence] shows how science degrees are distributed within each institution as a function of terciles of the SATM distribution.... **Put concretely, a student with a SATM score of 580 who wants to be in science will be three or four times more likely to persist at institutions ... where he or she is competitive, than at institutions ... where he or she is not.**<sup>128</sup>

Similarly, in 2003, Drs. Stephen Cole and Elinor Barber published *Increasing Faculty Diversity: The Occupational Choices of High Achieving Minority Students*—a project funded by the Mellon Foundation. The authors' mission was to determine why more minority members are not attracted to careers in academia. Their conclusions, reached after extensively questioning 7,612 high-achieving undergraduates at 34 colleges and universities, pointed to mismatch as the culprit:

The best-prepared African Americans, those with the highest SAT scores, are most likely to attend elite schools, especially the Ivy League. Because of affirmative action, these African Americans (those with the highest scores on the SAT) are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools (colleges, law schools, medical schools, etc.) where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class....

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<sup>128</sup> See Rogers Elliott, A. Christopher Strenta, et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER EDUC. 681, 700-01 (1996) (emphasis supplied).

African American students at the elite schools (the liberal arts colleges and the Ivy League) get lower grades than students with similar levels of academic preparation (as measured by SAT scores) than African American students at the nonelite schools (state universities and HBCUs). **Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.**<sup>129</sup>

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<sup>129</sup> Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High Achieving Minority Students* 124, 212 (2003) (citations omitted) (emphasis supplied).

The dismissive and sometimes intemperate tone taken by certain of the Sander's critics and repeated by Commissioners Melendez and Yaki in criticizing the study is therefore regrettable.<sup>130</sup> In all the tumult, it is important not to lose sight of the fact that Sander does not claim that his study is the final word on the subject. Before final conclusions can be drawn, his calculations must be painstakingly replicated, his underlying data and methodology must be carefully but fairly scrutinized and his conclusions must be tested against other data using other methodologies. The work of his critics must be subject to similar scrutiny. While this process is now well underway (and on the whole, the Sander study seems to be holding up quite well), the process is not over yet.<sup>131</sup>

Given all this, the dissenting commissioners' refusal to join even in the Commission's recommendation that further research be undertaken is baffling. It is difficult to understand how such a position can be justified. Even Dr. Richard Lempert, who appeared as a witness at our briefing as a critic of Sander's, agreed that more research and analysis ought to be undertaken on

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<sup>130</sup> Sadly, intemperate criticisms aimed at those who suggest that race-based admissions policies may be ill-advised have become common, and in comparison to the treatment that some opponents of racial preference have received, the high-handed criticism of the Sander study seems quite mild. Take, for example, Justice Stanley Mosk's treatment following his decision in *Bakke*. Mosk surely knew that he would face protesters on account of the decision he authored, but it is unclear if he was prepared for what came. Hundreds of placard-carrying demonstrators gathered beneath his office window to denounce his decision and demand its reversal. Thousands rallied elsewhere. See *3000 Demonstrate Against Bakke*, THE DAILY CALIFORNIAN 1 (October 10, 1977). When visiting college campuses, Mosk would routinely find himself greeted by picketers and hecklers. And when UC-Davis, no doubt in part as a conciliatory gesture, invited Mosk to give the commencement address in 1978, minority students wrote to him insisting that he decline the honor. When he accepted over their protests, one quarter of the graduating students walked out. But Mosk was undaunted. "Judges in California cannot be intimidated," he said. "Lawsuits are won and lost in courtrooms, not on the streets." See Joel Dreyfuss & Charles Lawrence III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 71 (1979); Harriet Chiang & Bob Egelko, *Stanley Mosk: State Supreme Court Justice Dies at 88*, SAN FRANCISCO CHRONICLE A1 (June 20, 2001). Even in death, Mosk was not forgiven by supporters of racial preferences. In his obituary, critics explained away Mosk's deviations from what later became liberal orthodoxy as efforts to bend with the political winds. See David Kravets, *California's "Giant in Law" Is Dead at 88*, SAN DIEGO UNION-TRIBUNE A1 (June 20, 2001). In fact, Mosk showed backbone rarely found in judges of any ideological persuasion. Whether one agrees or disagrees with his legal opinions, it is difficult to deny that they were the product of his passionate convictions. See also Jeff Jacoby, *How Leftists Debate*, BOSTON GLOBE (May 3, 1999) (reporting that a mob of hecklers calling themselves the "Anti-Racist Organizing Committee" and using the slogan "Protect Free Speech—Shut Connerly Up!" shouted down University of California Regent Ward Connerly when he attempted to speak in opposition to racial preferences at the University of Texas).

<sup>131</sup> Sander's principal results (and all his results in controversial areas) have already been replicated—meaning that others have used his methodology and confirmed that his conclusions are not the result of coding or mathematical errors. See Ayres & Brooks at 1808 n.4 ("Using his methodology, we were able to reproduce the core tables in Parts V, VI, and VIII of his original article ...."); *Sander Reply* at 1984-86 (discussing further replications by other scholars). Some scholars have criticized aspects of Sander's methodology and suggested alternatives. See, e.g., Ayres & Brooks at 1827-28 (arguing that Sander should have compared African Americans who attended more elite schools than their academic index would alone explain with African American students who did not and pointing out existence of data concerning students who were accepted to more than one school and attended their "second choice"). See also Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. (2005) (raising similar concern). Sander, however, has responded by (among other things) accepting the challenge of this suggested methodology and demonstrating that the "second choice" data support the mismatch theory. See *Sander Reply* at 1973-78.

this subject.<sup>132</sup>

Commissioners Melendez and Yaki argue in their dissenting remarks that the Sander study is “uniformly dismissed by experts as inaccurate.”<sup>133</sup> This is simply false. Naturally, given the subject, the study has its often-passionate critics.<sup>134</sup> Social scientists have understandably been

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<sup>132</sup> Briefing Transcript at 17-18.

<sup>133</sup> Joint Dissent of Commissioner Arlan D. Melendez and Commissioner Michael Yaki at 189 (hereinafter “Joint Dissent”). All citations to the Joint Dissent are to the version submitted as final in June of 2007. Since the Commission later extended the time for the submission of commissioner statements, it is possible that changes will be made to that document. Under the Commission’s procedures, it is not feasible coordinate cross-citations except to earlier versions of statements. I believe that I have addressed all of the dissenting commissioners’ major arguments in the June 2007 version of the Joint Dissent.

<sup>134</sup> Not all Sander’s critics dispute his conclusions. David Wilkins, for example, contends that even if Sander is right, he does not (and does not purport to) measure all the benefits of race-based admissions policies. According to the Wilkins, even if it is true that preference beneficiaries tend to be at the bottom of the class, where they are likely to learn less about the law and disproportionately fail the bar examination, those who are able to pass will have developed valuable contacts and will have doors opened to them in their future legal careers. A few years out of law school, no one will even remember that they got poor grades. See David B. Wilkins, *A Systemic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005). Indeed, Wilkins begins his article with an anecdote about a Harvard-educated minority telecommunications mogul who candidly admitted “that he often didn’t have a clue what his legendary professors were talking about—that is, when he bothered to stop in to hear what they were saying” and “that his path from affirmative action admittee to CEO of his own company ... was anything but straight and trouble-free.” *Id.* at 1915. Wilkins uses him as an example of a preference beneficiary who was able to take advantage of his Harvard contacts and who was taken seriously because he was a Harvard graduate and hence became a great success.

I suspect that few would find Wilkins’ argument persuasive. If Sander is right about the high human cost of race-based admissions, few would find the “professional network” gained by those preference beneficiaries who pass the bar to be a sufficient compensating factor. (Moreover, Sander in response provides some persuasive empirical evidence that Wilkins is simply incorrect—that poor grades have a lasting effect on the legal careers of lawyers.) More important for present purposes, however, is that (1) Wilkins doesn’t dispute Sander’s conclusion; and (2) the Commission’s recommendations are in no way inconsistent with Wilkins’ arguments. The Commission’s report simply calls for further research into mismatch and for law schools to publish the information applicants need to make a choice for themselves about which law school to attend (or whether to attend law school). If a law school chooses to admit an applicant whose academic credentials fall short of the school’s norm and the applicant chooses to attend, cognizant of the likelihood of low grades and the effect low grades might have on bar passage, nothing in the Commission’s finding or recommendations will prevent them from doing so. The Commission is simply recommending that potential law students be allowed the dignity of deciding for themselves.

Michele Landis Dauber’s criticisms of the Sander study were the most ardent of those I have seen; she repeatedly compares the interest in it to the media frenzy over cold fusion that took place in 1989. See Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005). But the arguments she has made against the study’s conclusions have all been met (and even if they have not been, they are in no way inconsistent with the Commission’s recommendations). For example, Dauber was generally concerned that Sander’s work had not been peer-reviewed prior to publication—a concern that turned out to be misinformed as the article was twice subject to peer review prior to publication as well as many times thereafter. See *supra* at 10.

The rest of Dauber’s criticisms of the Sander study were aimed at the part of his work that dealt with employment outcomes—a topic that the Commission did not take up. For example, Dauber was concerned about Sander’s finding that grades had a more substantial influence on the earnings of second-year associates at private firms than the

cautious about embracing Sander's work prematurely. But, in fact, he has been cited by leading scholars and his on-going efforts to further explore the issue have received considerable

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prestige of the school from which they graduated. She argued that he should have looked at African Americans in particular rather than at all second-year associates. In his reply, Sander disagreed with her position, but nevertheless performed the regression as Dauber recommended and found that his finding not only held true for African Americans specifically, it was even more true. *Sander Reply* at 1979-81.

Dauber was on her weakest ground when she complained that Sander was acting against social science norms in failing to provide the data necessary for her to evaluate Sander's work on employment outcomes. Sander replied at length:

I wholeheartedly agree with Dauber's general point [concerning the need to make data available]. But in suggesting that I have somehow violated an established norm in this regard, Dauber is simply wrong .... I posted three of the four major data sets on which [my work] relies in October 2004, three months before the article appeared, along with codebooks and programs I used to generate specific tables in the test. That level of accessibility is unusual in the social sciences, and even rarer in legal academia.

It is instructive to compare my practice with those of the two major works most similar to [my work]: *The Shape of the River* and *The River Runs Through Law School*. Bowen and Bok assembled truly extraordinary data sets for *The Shape of the River*, and had an understandable proprietary interest in them. At the time their book was published, none of their data was available to other scholars, and the data is not publicly available to this day. Researchers can apply to the Mellon Foundation for permission to study specific data sets, but the Foundation specifically excludes requests that simply seek to "recheck" Bowen and Bok's research, and the application process is an arduous one that, according to some critics, excludes researchers who are critical of racial preference policies.

Richard Lempert, David Chambers, and Terry Adams have been even more restrictive with the data they assembled for *The River Runs Through Law School*, their study of Michigan graduates. Their study was published in *Law and Social Inquiry* in 2000, and I was one of several academics asked by the journal to write a commentary on the work. When I asked Lempert at the time for a copy of the data, he told me that it was unavailable because of the ongoing litigation involving the University of Michigan's admission procedures (without explaining why data disclosure would not be particularly vital if their findings were being presented to the courts). After the 2003 Supreme Court decisions ..., I re-newed my request. Eighteen months later, after multiple negotiations and missed deadlines, I began to receive the data—but too late to incorporate into this Reply.

I have, in contrast, made all of the data under my control available to anyone who wants it, and I did so months before my article ever appeared. The only data set I have not made publicly available is the "After the JD" (AJD) data, simply because it is not mine to share. In the fall of 2003, the administrators of AJD decided (over my objections, expressed at the time) to restrict access to the data until the end of 2005, although they have put in place a process for interested users to apply for earlier access (in other words, a sort of temporary restriction analogous to the long-term restriction adopted by Bowen and Bok). In the meantime, the AJD data is of course available to all those involved in the project, including one of the contributors to this issue of the *Stanford Law Review* and several other strong supporters of affirmative action. Thus, while I agree with Dauber that stronger data-sharing protocols by scholars and journals are very desirable, her criticism of me on this score is misplaced.

*Sander Reply* at 1983-84 (footnotes omitted).

support.<sup>135</sup> Most recently, a group of prominent legal empiricists, including Theodore Eisenberg and Bernard Black (scholars who would be on any expert's short list of the nation's leading legal empiricists) have assisted Sander in his efforts to obtain further data.<sup>136</sup> In urging the State Bar

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<sup>135</sup> Sander's work is now routinely cited in scholarly works on the effects of affirmative action. See Douglas S. Massey & Margarita Mooney, *The Effects of America's Three Affirmative Action Programs on Academic Performance*, 54 SOC. PROB. 99 (2007); Russell Nieli, *The Changing Shape of the River: Affirmative Action and Recent Social Science Research*, ACADEMIC QUESTIONS 18 (Fall 2004); Roland Fryer and Glenn C. Loury, *Affirmative Action and Its Mythology*, 19 J. ECON. PERSP. 147 (2005). The article by Fryer and Loury is especially noteworthy given the authors' stature in the field of economics. It is pragmatic and ideologically neutral, and seeks to critique, on empirical grounds, shibboleths that have been advanced by both critics and defenders of race-based admissions policies. One entire section of the article critiques the assumption that "affirmative action always helps its beneficiaries." In support of their argument that this is a simplistic view, Fryer and Loury place heavy reliance on Sander's study, noting that it "offers the disturbing possibility that, at least in the context of legal education, affirmative action may actually harm its beneficiaries." After citing and discussing some of the facts documented by Sander, they observe, "We are not here endorsing (or disputing) the conclusions in Sander .... Nevertheless, empirical findings such as this must give a prudent analyst pause and strongly suggest it would be unwise to assume that racial preferences are always helpful for their intended beneficiaries."

<sup>136</sup> Letter dated January 25, 2007 to Ms. Whitney C. Henderson and Mr. Alan S. Yochelson, Co-Chairs, Committee of Bar Examiners, State Bar of California from Bernard Black, Head Regents Chair Professor of Law, University of Texas School of Law, Theodore Eisenberg, Henry Allen Mack Professor of Law, Cornell University Law School, Michael Heise, Professor of Law, Cornell University Law School, John P. Heinz, Owen L. Coon Professor of Law, Northwestern University, Mark Ramseyer, Mitsubishi Professor of Japanese Legal Studies, Harvard Law School, Albert Yoon, Professor of Law, Northwestern University, and Kathryn Zeiler, Associate Professor of Law, Georgetown Law School, available at [http://www.law.ucla.edu/sander/NSF/Letter percent20from percent20Leading](http://www.law.ucla.edu/sander/NSF/Letter%20from%20Leading)



of California to release its data to Sander and his co-authors, these distinguished academics refer to Sander and his co-authors as “well-known and respected scholars” and state:

Research on the mismatch effect raises very serious and important issues about legal education today. All of us are concerned about the large differential in bar passage rates across racial lines. The “mismatch” hypothesis, if true, may explain an important part of this differential.

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percent20Empiricists.pdf (last accessed July 31, 2007). Sander’s co-authors are Dr. Stephen P. Klein, Senior Research Scientist, RAND Corporation, William D. Henderson, Associate Professor of Law, Indiana University (Bloomington), Dr. E. Douglass Williams, Associate Professor of Economics, University of the South, and Vikram Amar, Professor of Law, UC Hastings College of Law.

The statement by the dissenting commissioners that “[e]xperts agree” that “mismatch” is not among “the chief barriers to minorities entering the legal profession” is thus entirely misplaced.<sup>137</sup>

Commissioners Melendez and Yaki accuse the Commission of issuing a report that is “rooted in ... ideology” rather than social science.<sup>138</sup> This is a puzzling accusation. In the Commission’s fifty-year history, it has seldom, if ever, considered social science with a level of sophistication that exceeds that of Sander’s work. Moreover, any accusation that Sander is a conservative ideologue is surely misplaced.<sup>139</sup> It is not that social scientists never allow their own political biases to influence their work. Unfortunately, some do. But Sander was a long-time supporter of race-based admissions, and his political background is not what anyone could call conservative (indeed he calls himself a progressive). Perhaps anticipating that a question concerning his background would arise, Sander included the following summary in his article:

No writer can come to the subject of affirmative action without any biases, so let me disclose my own peculiar mix. I am white and I grew up in the conservative rural Midwest. But much of my adult career has revolved around issues of racial justice. Immediately after college, I worked as a community organizer on Chicago’s South Side. As a graduate student, I studied housing segregation and concluded that selective race-conscious strategies were critical, in most cities, to breaking up patterns of housing resegregation. In the 1990s, I cofounded a civil rights group that evolved into the principal enforcer (through litigation) of fair housing rights in Southern California. 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 doubt and worries of a parent. As a young member of the UCLA School of Law faculty, I was deeply impressed by the remarkable diversity and sense of community the school fostered, and

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<sup>137</sup> Joint Dissent at 193.

<sup>138</sup> Joint Dissent at 189.

<sup>139</sup> Insofar as the dissenting commissioners are directing their criticism primarily at the members of the Commission, it may be useful to point out that, although never an enthusiast, I was once a supporter of race-based admissions policies. It was only after observing the consequences of the policies that I reassessed. I suspect that I am not the only such member of the Commission.

one of my first research efforts was an extensive and sympathetic analysis of academic support as a method of helping the beneficiaries of affirmative action succeed in law school.<sup>140</sup>

The specific criticisms the dissenting commissioners direct at the Sander study are also misinformed:

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<sup>140</sup> *Id.* at 370. Even if Sander had been a lifelong opponent of race-based admissions, it is not clear why those facts would in themselves be sufficient to dismiss his findings out of hand. As president of Princeton University from 1972 to 1988, William G. Bowen along with Derek Bok, who presided over Harvard University from 1971 to 1991, were pioneers in formulating race-based admissions policies. While this is useful to know in evaluating their very pro-racial-preference book, *THE SHAPE OF THE RIVER*, it is not by itself sufficient reason to ignore them. Ultimately, such arguments must be addressed on their own terms.

\* *First Critique*: Commissioners Melendez and Yaki argue that “Sander’s research was never peer-reviewed.”<sup>141</sup> By this, they appear to mean that the article was published in a law journal (the prestigious *Stanford Law Review*) rather than a social science journal. With law reviews, it is the tradition for students to choose articles for publication, while in social science journals, faculty members with expertise in the area usually make those decisions. Consequently, the fact of publication in a social science journal is an indication that at least one expert has reviewed the article and deemed it worthy of publication, while the fact of publication in a law review is not. In this case, however, the tradition is irrelevant, because the article was in fact peer-reviewed. As Sander discusses in his published reply to critics, the editors of the *Stanford Law Review* referred his article to an academic economist to confirm that the quantitative techniques used were appropriate. Similarly, the editors of the *New York University Law Review*, who also offered to publish the piece, had it reviewed by an expert—in their case a New York University Law School faculty member with a Ph.D. in Economics, who advised them to accept it for publication and sent comments to Sander.<sup>142</sup> The article thus had two peer reviews prior to publication. Since then, the *Stanford Law Review* published an entire issue featuring the work of Sander’s critics. In addition, Sander has obtained a book contract from the University of Michigan Press, a distinguished academic press that follows the peer-review conventions of social science journals, has contracted with Sander for a book that will expand and follow up on his *Stanford* piece. At this point, it may fairly be said that few articles in the history of scholarship have received as much scrutiny from both social scientists and legal scholars as Sander’s.

\**Second Critique*: Commissioners Melendez and Yaki complain that the data set on which Sander bases his study is “outdated” and that things may have changed.<sup>143</sup> Sander, however, used the best and most up-to-date information available—a data set collected between 1991 and 1997 by the Law School Advisory Council in connection with its Bar Passage Study. Analyses of the kind he conducted require mountains of data; that kind of information is not collected every year or even every decade. We are thus fortunate to have the LSAC-BPS data.<sup>144</sup>

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<sup>141</sup> Joint Dissent at 191.

<sup>142</sup> *Sander Reply* at 1982.

<sup>143</sup> Joint Dissent at 191-92.

<sup>144</sup> Sander himself describes the data set upon which he based the bulk of his work this way:

From 1991 through 1997, the LSAC gathered systematic data on one national cohort of law students for its Bar Passage Study (LSAC-BPS). The study is remarkable because the LSAC secured the cooperation of about ninety-five percent of the nation’s accredited law schools and most of the state bar examiners. The LSAC was thus able to track some twenty-seven thousand law students from their entry into law school in the fall of 1991 through their eventual success (or failure) in passing the bar two or three years after graduation. The LSAC-BPS collected a wide array of information about the study participants: responses to several questionnaires, data on law school performance, bar passage, and—of immediate relevance here—data on race, LSAT score, and undergraduate GPA. The disadvantage of the LSAC-BPS data is that it is somewhat disguised to prevent researchers from identifying individual institutions. We can only examine schools within “clusters” that correspond roughly to tiers of law school prestige.

Fully aware of the desirability of additional data, Sander has made efforts to locate newer sources. Significantly, however, some of the very same people who have complained that he relies on older data have actively tried to prevent him from gaining access to additional, newer data. A prime example is William Kidder, one of Lempert's three co-authors on the Sander critique and the co-author of Lempert's written testimony before the Commission. Kidder wrote to the State Bar of California's Committee of Bar Examiners recommending that the committee deny Sander and his co-authors access to California Bar Examination data. Among other things, Kidder argued that bar examination scores are a poor "proxy for 'student learning'" and that their disclosure "risks stigmatizing African American attorneys regardless of how successful they may be in legal practice."<sup>145</sup> (Sander, of course, has not requested names or any information that would allow him to identify particular persons.)

Similarly, the Society of American Law Teachers, an organization that describes itself as "a community of several hundred progressive and caring law professors and administrators" has written to the Committee of Bar Examiners opposing disclosure of data to Sander and his co-authors.<sup>146</sup> (Another of Lempert's co-authors, Professor David Chambers, is a former president of SALT.) Indeed, the SALT letter subtly threatens the State Bar of California with future litigation if it turns over the data.<sup>147</sup> It is clear that not all of Sander's critics have an interest in ensuring that he has access to newer data with which to test the mismatch theory. Indeed, given the dissenting commissioners refusal to join in the Commission's recommendation that further research be undertaken, they fall into that category themselves.

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*Sander* at 414-15.

<sup>145</sup> Memorandum dated January 19, 2006 from Bill Kidder to Gayle Murphy, Senior Executive for Admissions, Office of Admissions, State Bar of California at 2, *available at* [http://www.law.ucla.edu/sander/NSF/Critique percent20from percent20William percent20Kidder.pdf](http://www.law.ucla.edu/sander/NSF/Critique%20from%20William%20Kidder.pdf) (last accessed July 31, 2007).

At the time he co-authored the Sander critique with Richard Lempert, David Chambers and Timothy Clydesdale, Mr. William Kidder was employed as a researcher with the Equal Justice Society, an organization that describes its mission as to "marshal our forces to defeat the right wing assault on social and racial justice." See Equal Justice Society Web Site <http://www.equaljusticesociety.org/about.html> (last accessed July 31, 2007). More recently, he has been employed as an administrative staff member at the University of California.

<sup>146</sup> 2007 SALT Equalizer (Issue 1) 3 (February 2007), *available at* <http://www.saltlaw.org/EQ-Mar2007.pdf> (last accessed July 31, 2007). SALT, a long-time supporter of race-based admissions, features a photograph of its C.A.R.E. (Communities Affirming Real Equality) March in support of affirmative action held in San Francisco in January of 1998 on its web site. See <http://www.saltlaw.org/affaction.htm> (last accessed July 31, 2007).

<sup>147</sup> Letter dated January 15, 2007 from SALT Co-Presidents Eileen Kaufman and Tayyab Mahmud to Gayle Murphy, Senior Executive for Admissions, State Bar of California at 2, n. 4, *available at* [http://www.law.ucla.edu/sander/NSF/Letter percent20from percent20SALT.pdf](http://www.law.ucla.edu/sander/NSF/Letter%20from%20SALT.pdf) (last accessed July 31, 2007). The letter states, "Once exam scores are allowed to be equated with how well applicants 'have learned the law' it is not unreasonable to assume the bar exam might metamorphize [sic] into a ranking mechanism. Should this occur, it would open the door to a host of legal challenges."

*\*Third Critique:* Next, the dissenting commissioners argue that “Sander’s analysis makes several false assumptions.”<sup>148</sup> In each case, however, it is the dissenting commissioners who have made the false assumptions.

Their first example appears to be simply a misreading of the Sander study. They assert that Sander assumes that if racial preferences were eliminated, the African-American students denied admission would all be those with the lowest credentials. This, they argue, may not be the case. Presumably what they mean is that if racial preferences were eliminated, some African Americans will choose not to attend law school at all rather than attend a lesser law school (just as some white law school applicants currently choose not to attend law school if they are rejected from the law school of their choice). For example, if preferences are eliminated, a hypothetical married African-American student living in Champaign-Urbana who could have attended the University of Illinois as a preference beneficiary might choose not to apply the University of Southern Illinois on Carbondale, because the commute is too onerous. Instead she might to attend business school at the University of Illinois. If so, she would be an example of an above average law school applicant denied admission to law school when racial preferences are eliminated.

If this is what is troubling the dissenting commissioners, they need not be concerned any longer. Sander makes no such assumption. Like Linda Wightman (to whom they cite approvingly), he uses a method, that assumes that, for each combination of LSAT score and undergraduate GPA, African-American applicants will be admitted to law school at the same rate as white students. If a large portion of white applicants with above average credentials are denied admission to the law schools to which they applied (and do not wish to attend a less-elite school), then Sander’s model will predict that a similar portion of African-American applicants will have this experience. Indeed, his prediction that the number of African-American admittees would fall 14.1 percent tracks Linda Wightman’s methodology and findings exactly.<sup>149</sup> The dissenting commissioners simply misconstrued the methods employed in the Sander study.

Second, they argue that Sander has “overlook[ed] the importance to many students of having ‘critical mass’ in the schools they apply to.”<sup>150</sup> By that, they appear to mean that Sander has failed to consider the supposed fact that if race-based admissions were eliminated and African-American students were considered on the same basis as white or Asian students, even fully

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<sup>148</sup> Joint Dissent at 192-93.

<sup>149</sup> Linda Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. Legal Educ. 229, 243, Table 7 (2003).

<sup>150</sup> Joint dissent at 192.

qualified African Americans might choose not to apply, because they do not wish to attend a law school that enrolls few African Americans.

The dissenting commissioners offer no evidence of their “critical mass” theory, and indeed the empirical evidence flatly contradicts it. After the passage of California’s Proposition 209 and the decision in *Hopwood v. Texas* (1996),<sup>151</sup> race-based admissions policies were prohibited in both California and Texas. Yet research shows that the number of applications from qualified minority members held steady. The only decrease came from minority members whose credentials were insufficient for admission.<sup>152</sup> Under the circumstances, Sander’s assumption appears more than reasonable; there is no evidence to support any other assumption.

Third, the dissenting commissioners fault Sander for using 2001 as his baseline year for predicting the mix of African American and other students who are likely to apply to law school in the future. They cite to Lempert, who argued that 2001 was an aberrant year with proportionally more African Americans towards the top of the pool than usual. Using 2001 may therefore be too optimistic.<sup>153</sup>

In fact, the numbers for 2001 were the median for the period between 1995 and 2004 (the year the study was published), and the only way to classify it as an aberrant year is to classify the whole period of the late 1990s through 2002 as aberrant.<sup>154</sup> Under the circumstances, Sander’s choice of 2001 is not just appropriate; arguably it would have been inappropriate to choose any other year. Of course, no one knows what the future will bring, since these numbers tend to go up and down. Perhaps the number of qualified African American students applying to law school will go up relative to qualified white students; perhaps it will go down. But any criticism of Sander’s methods on this ground is unfair.

\**Fourth Critique*: The complaint by the dissenting commissioners that Sander “overreached” by giving a “very specific estimate of the effects of affirmative action” really amounts to this: Sander can’t be sure that ending race-based admissions will increase the number of African American lawyers by exactly 7.9 percent.<sup>155</sup> It may be more or it may be less. To that complaint, I can only reply that everyone including Sander himself has always acknowledged this. His article is full of

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<sup>151</sup> 78 F.3d 932 (5<sup>th</sup> Cir. 1996).

<sup>152</sup> See David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 10366 2004), available at <http://papers.nber.org/papers/w10366.pdf>. (last accessed July 31, 2007). Another recent study casts doubt on the notion that “critical mass” is necessary for minority members to perform at their best. To the contrary, it found minority law students may perform slightly better in schools where they have fewer fellow minority students. See John R. Lott, Jr. & J. Mark Ramseyer, *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, Harvard John M. Olin Discussion Paper Series (2007), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/581.php](http://www.law.harvard.edu/programs/olin_center/papers/581.php) (last accessed July 31, 2007).

<sup>153</sup> Joint Dissent at 193.

<sup>154</sup> *Sander Reply* at 2002. In response to Lempert and his co-authors argument that should have used the most-recent year for his analysis, Sander stated, “It is fair ... to point out that the numbers bounce around from year to year, but why is it reasonable to claim that we should use the highest figure of the past decade?” *Id.*

<sup>155</sup> Joint Dissent at 193.

such acknowledgments.<sup>156</sup> That is precisely why the Commission is calling for both further study and for full disclosure to the students whose interests are at stake.

In contrast, dissenting commissioners claim to be dead certain of their views. They insist that “[t]he proof that affirmative action works in law schools is overwhelming” and that “the success of the policy” is “unmistakable.”<sup>157</sup> They have therefore dissented both from the Commission recommendation that more research be conducted and from its recommendation that each law school inform law students—of all races and ethnicities—of the likelihood that a student with their particular academic credentials will graduate and pass the bar if she attends that institution. Under the circumstances, it seems odd to accuse Sander of overreach.

*\*Fifth Critique:* Finally, the dissenting commissioners argue that if Sander’s mismatch theory is correct, it should lead to “an easily testable hypothesis: African American students with the same academic credentials should have a higher bar passage rate if they attend a lower-tier school, *other things being equal*.”<sup>158</sup> The dissenting commissioners are apparently unaware that Sander did such a comparison in his “Reply to Critics” and found confirmation for the mismatch theory.<sup>159</sup> It is not clear to me how the dissenting commissioners were able to miss this.

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<sup>156</sup> See Sander at 479 (“These numbers are simply estimates, resting on assumptions I have detailed . . .”).

<sup>157</sup> Joint Dissent at 188. The proof offered for this by the dissenting commissioners is that the number of African-American attorneys rose from 4,000 in 1970 to an estimated 44,800 in 2006, which they evidently believe could only have been caused by preferential treatment. This increase in the numbers of African-American attorneys coincides with an explosion in lawyers and judges generally, who numbers have quintupled over the last generation (*compare* Statistical Abstract of the United States at Table 337 (1970) *available at* <http://www2.census.gov/prod2/statcomp/documents/1970-03.pdf> (last accessed July 31, 2007) *with* Statistical Abstract of the United States at Table 602 (last revised December 15, 2006) *available at* <http://www.census.gov/prod/2006pubs/07statab/labor.pdf> (last accessed July 31, 2007)). It also coincides with the end of the era in which law schools could discriminate against African-American applicants without legal penalty and the beginning of the era in which African-American students were increasingly graduating from high school and later from college. It is in no way inconsistent with Sander’s conclusion that racial preferences have decreased the number of practicing African-American attorneys.

<sup>158</sup> Joint Dissent at 193 (emphasis supplied).

<sup>159</sup> The Joint Dissent acknowledges the point that, as a result of the danger of selection bias, it would not have been appropriate for Sander simply to compare the bar passage rates of African-American students at higher-tier law schools and African-American students at lower-tier law schools (controlling for academic index). The African-American law students at the higher-tier schools were chosen by the higher tier school and thus likely have something about them that makes them especially desirable (such as a more prestigious undergraduate school or a more difficult major) that is not disclosed in the LSAC-BPS data base, because such information was not gathered. See *Sander Reply* at 1992, Table 6 (demonstrating that such selection bias does indeed exist). The dissenting commissioners state themselves that African-American to African-American comparisons are only appropriate “all things being equal,” and ass things are most assuredly not equal with a straight tier-to-tier comparison.

What Sander needed was a way to compare African-American students who could have attended a more elite law school but chose not to with African-American students who did indeed attend a more elite school. Fortunately, the “second choice” cases in the LSAC-BPS data base, which Ayres and Brooks brought to Sander’s attention, allowed Sander to make such comparisons. It is unclear how the dissenting commissioners could have missed this.

As Ayres and Brooks point out, the LSAC-BPS data has information on a number of African-American students who attended their “second choice” law school even though they were admitted to their “first choice.” Sander assumed that most of these “second choice” cases involve law students who passed up the chance to attend a more prestigious law school when they were given a financial or other incentive to attend a somewhat less prestigious school. When he analyzed the data, he found that African-American students who passed up their first choice school did indeed do much better on all performance measures than African-American law students who attended their first choice school (or African-American students who were accepted to more than one school and attended their first choice). For example, African Americans who passed up their first choice passed the bar on their first attempt 80.4 percent of the time. The



A final note on the Sander study: Commissioner Yaki expressed some understandable exasperation during the briefing and admitted that he has “a deep aversion to math of all types.” “[A]s a former policy maker,” he stated, “I sort of subscribe to the theory or the old saw that there is lies, damned lies, and then there’s statistics.”<sup>160</sup> He then came close to suggesting that the results of social science inquiry don’t really matter—that “we sit here and we spend all of this time and people throwing stats back and forth at each other and this study and that study, the battle of the studies,” when that is not “what this Commission is all about.”<sup>161</sup> At one point he cut off Sander, who was trying to tell the Commission about research that indicated that differential bar passage rates are not the result of lack of access to bar review courses by African-American law graduates, with the comment “Can we stop this study war going on?”<sup>162</sup>

I certainly sympathize with Commissioner Yaki’s frustration with “the battle of the studies.” And I agree with him insofar as he was suggesting that sometimes the Commission’s job is to uphold the principle of civil rights even in the face of arguments of expediency. But I am perplexed by the implication of his statement--that racially preferential policies in particular are so fundamental to our legal and political culture that evidence of their harmfulness to minority students doesn’t matter. Ordinarily, it is color blindness that is regarded as the bedrock principle; race-based admissions policies are the deviations from principle that we allow only if we are convinced the consequences will be beneficial. That is the notion behind *Grutter v. Bollinger*’s twenty-five-year time limit on race-based admissions. As Justice O’Connor recognized, race-based admissions are only barely tolerable in a society dedicated to equal protection under the law. Is it Commissioner Yaki’s view that the benefits of diversity are so overwhelming that the system must be maintained even if we have to sacrifice the interests of African American students to do it?

In my view, getting to the bottom of the mismatch issue is not optional. There are many arguments for and against race-based admissions policies in law schools, not all of which lend themselves to the kind of scientific inquiry available for the mismatch issue. But the case in favor is built on the foundation that these policies will turn out more, not fewer, African-American attorneys. Even those who oppose race-based admissions policies usually assumed that the policies succeeded at some level in increasing the numbers. If it is not true (or even if it is not as true as we once thought), the U.S. Commission on Civil Rights is obligated to help the American people find out.<sup>163</sup>

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figures for otherwise equivalent African Americans who attended their first choice or African Americans who were accepted by more than one school and attended their first choice were 60.0 percent and 65.5 percent. *Sander Reply* at 1994.

Law student Daniel E. Ho also made the argument that African-American students should be compared to African-American students in Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005). The title of the piece is somewhat inapt, since it does not otherwise purport to prove that mismatch is not a problem; instead it purports to demonstrate that Sander has not proven that it is a problem. In any event, the “second choice” data goes a long way towards answering Ho’s concerns. See Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 YALE L.J. 2005 (2005).

<sup>160</sup> Briefing Transcript at 92.

<sup>161</sup> Briefing Transcript at 95.

<sup>162</sup> Briefing Transcript at 90.

<sup>163</sup> For the same reason, I cannot agree with the sentiment expressed by Commissioner Yaki during the briefing that the controversy over race-based admissions policies is simply a struggle over opposing contenders for a scarce commodity--seats in law school classes. As he put it, “it comes down to the fact that people are upset that they didn’t get one of the 275 slots [at] Yale Law School and one of the 550 seats at Harvard Law School ....” I would submit that the issue is both

## The ABA's New Diversity Standards for Law Schools

In view of the robust controversy over mismatch, the decision of the ABA to generally tighten its diversity requirements for law schools was remarkably ill-timed.

It is important to note that the ABA does not come to this issue with a blank slate. It has had accreditation standards on diversity for decades. And there is strong reason to believe that it has not been lax in their enforcement. In the 1990s, fully 31 percent of law schools admitted to political scientists Susan Welch and John Gruhl that they “felt pressure” “to take race into account in making admissions decisions” from “accreditation agencies.”<sup>164</sup>

Law schools must take pressure from the ABA seriously. As the U.S. Department of Education's designated law school accreditation agency, the ABA, through its Council of the Section on Legal Education and Admissions to the Bar, has the power to decide whether a law school will be eligible for federal funding. Unless the ABA approves, for example, a law school's students will be ineligible for student loans. And that is just the beginning. Most states do not allow the graduates of non-

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more complex and more important than that. With only 45 percent of African Americans who enter law school graduating and passing the bar on their first attempt (and only 57 percent passing after multiple attempts), the human cost of law school failure is very high. If Sander is right that a large portion of problem is the result of mismatch, then the educational interests of minority students are being unthinkingly sacrificed.

<sup>164</sup> Susan Welch & John Gruhl, *Affirmative Action in Minority Enrollments in Medical Schools and Law School* 80 (1998). Respondents were asked if they had felt pressure from groups other than the federal and state governments. If they answered “yes,” they were then asked to specify which groups, and 24 percent of medical school respondents and 31 percent of law school respondents volunteered that accreditation agencies had done so. Although the Welch & Gruhl study did not inquire into pressure for preferential treatment based on race or gender in faculty hiring, there is anecdotal evidence that the ABA has been active in that area as well. Professor David Barnhizer of Cleveland-Marshall College of Law wrote:

Let me offer one example of what I consider institutional intimidation and abuse of power by the two primary accrediting powers governing American law schools. Not long ago I was asked to be a candidate for dean at another law school. After thinking about it ... I asked the chair of the dean search committee to send me some background materials. The materials were sent and included the most recent ABA and AALS accreditation reports and follow-ups relating to the law school. I read them with interest because the law school struck me as one that had significant potential for development. After reading the reports I withdrew my name from their search. The reason I withdrew had nothing to do with the law school but with the AALS/ABA accreditation report and the degree to which the culture of soft repression had reached inside the accreditation mechanisms of those two institutions.

... Two main criticisms were voiced as serious concerns by the AALS/ABA report to the extent that immediate action was needed to avoid a negative final accreditation report. One criticism was that of twenty-three faculty members, only eight were women. It was expected that something must be done immediately to fix this problem. ... [T]he school had added women to a previously largely male faculty at a substantial pace. Since 1983, eighteen faculty members had been hired with ten being men and eight women. While perhaps it could have been ten women and eight men, it still seemed to me the school should be commended for its commitment rather than threatened and condemned. ...

... [B]ecause the law school was eager to solidify its status with the AALS/ABA, it was particularly vulnerable to the pressure. The result was that it hired a woman only one year out of law school who would otherwise probably not have been hired at that point in her legal career.

David Barnhizer, *A Chilling Discourse*, 50 ST. LOUIS L.J. 361 (2006).

ABA-accredited law schools even to sit for the bar examination. A law school that is not in the good graces of the ABA is thus not a law school at all.

While nowhere in the ABA's diversity standards (either old or new versions) does it specifically demand that law schools maintain relaxed admissions standards for minority applicants, it has already publicly admitted that diversity in law schools can only be maintained through such double standards. That was the thrust of the ABA's amicus curiae brief in *Grutter v. Bollinger*.<sup>165</sup>

Specifically, the ABA told the Supreme Court that “[r]ace-[c]onscious [a]dmissions [a]re [e]ssential to [i]ncreasing [m]inority [r]epresentation in the [l]egal [s]ystem.” “[I]t is unquestionable,” the ABA wrote, “that the improvement in minority participation in our law schools, and thus in our legal system, has been achieved largely by the use of race-conscious admissions policies such as those under attack here.” According to the ABA, prohibiting racially preferential admissions policies nationwide, as California and Washington have done statewide, would cause “a precipitous decline in minority participation in the institutions of our legal system” and “undo much of what has been accomplished in the last several decades.”<sup>166</sup>

This was not a minor issue in that litigation. It is scarcely conceivable that the Supreme Court would have allowed the University of Michigan to engage in preferential treatment for minority applicants if it had found such treatment to be simply one among many plausible methods to enroll a racially-diverse class. Nearly everyone agreed that a racially-diverse class could not be enrolled at the University of Michigan (or any law school given the fierce competition for minority law students) without either preferential treatment for minority students or a drastic across-the-board lowering of the law school's entry requirements.<sup>167</sup>

It is against this background that the ABA's changes to its diversity standards (which were apparently drafted in response to what was perceived as a green light given to preferential treatment in *Grutter*) must be evaluated. The full text of both the old and new versions of the standards is available elsewhere in this report. Here I will simply highlight some of the changes that apply to student diversity.<sup>168</sup>

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<sup>165</sup> In addition, Professor David Bernstein testified at the briefing that the ABA's diversity standards give law schools a false choice. “Essentially ..., a law school has the choice of just engaging in racial preferences ... or spending hundred of thousands of dollars every year [in minority recruitment].” Bernstein noted that not all law schools could afford such a choice. Briefing Transcript at 131.

<sup>166</sup> Brief for the ABA as Amicus Curiae, *Grutter v. Bollinger*, 539 U.S. 306 (2003), at 18-21.

<sup>167</sup> Justice O'Connor conceded that the University of Michigan Law School's racially discriminatory admissions policy was subject to strict scrutiny. It would therefore have been insufficient for the University of Michigan simply to demonstrate that its need for racial diversity in the classroom is compelling. Unless its policy of preferential treatment was narrowly tailored fulfill that need, it would not have survived that scrutiny.

<sup>168</sup> The ABA Council also amended its diversity standards as they apply to faculty and staff. The old standards required law schools to both practice equal opportunity for law school applicants and admit a diverse student body. In contrast, the standards for faculty and staff required only equal opportunity. The new version has been amended to include the requirement that law schools have a diverse faculty and staff with respect to gender, race and ethnicity. The ABA has asserted that this and other amendments to the standards was not a real policy change at all, but simply a codification of its longstanding informal practice of monitoring law schools hiring practices and intervening when it was thought that an insufficient number of woman and minorities had been brought on board. All this may be so, but if it is, it is hardly comforting. Under 34 C.F.R. § 602.18, the Department of Education may recognize an accrediting agency only if, among other things, the agency “[b]ases decisions regarding accreditation ... on the agency's published standards.” If, in the past,

a. The title of the standard on student diversity was changed from “Equal Opportunity Effort” to “Equal Opportunity and Diversity,” making it clear that the emphasis will no longer be on “effort.”<sup>169</sup> Numerical results will matter. This theme is made even more concrete in the official interpretations that accompany the standard. The original version stated that “[t]he satisfaction of [each law school’s] obligation is based on the totality of *its actions*.” The new version expands the basis on which law schools will be judged to add “and the results achieved.”<sup>170</sup>

b. The new interpretations inform law schools for the first time that they “may use race and ethnicity” in their admissions decisions.<sup>171</sup> A clause in the original text of the standards that stated “a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students” for diversity purposes was deleted.<sup>172</sup> The implication is that law schools may well be obligated to do so.<sup>173</sup>

c. One of the more jarring changes was the deletion of the word “qualified.” Previously, the standards had required law students to provide opportunities for the study of law to “qualified members” of minority groups. The new version requires them to provide opportunity to “members” of those groups.<sup>174</sup>

d. By far the most troubling of the changes, however, was the addition of Interpretation 212-1 concerning state law (which has since been modified in response to public criticism). As originally proposed, the new interpretation read: “The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school’s non-compliance with Standard 212.”<sup>175</sup>

To many, this proposal appeared to be a requirement that law schools break the law. If so, the fact that the ABA was acting under the authority of the U.S. Department of Education made it especially troubling.<sup>176</sup>

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the ABA had been requiring law schools to have a diverse faculty and staff despite the lack of a written, published diversity requirement, it was not qualified to act as an accrediting agency on behalf of the federal government.

<sup>169</sup> Compare old Standard 211 to new Standard 212.

<sup>170</sup> Compare old Interpretation 211-1 to new Interpretation 212-3 (emphasis supplied).

<sup>171</sup> See new Interpretation 212-2.

<sup>172</sup> See old Standard 211.

<sup>173</sup> See *infra* at 17-21 (the example of George Mason University).

<sup>174</sup> Compare old Standard 211 to new Standard 212.

<sup>175</sup> See new Interpretation 212-1.

<sup>176</sup> The curious deletion of old Interpretation 211-2 is some evidence for this interpretation. That provision originally stated that each law school shall “prepare a written plan describing its current program and the efforts it intends to undertake relating to compliance with Standard 211” and “maintain a current file which will include specific actions which have been taken by the school to comply with its stated plan. It is conspicuously absent from the new version. The uncomfortable implication is that the ABA has learned by experience that such documents almost inevitably fall into unsympathetic hands when lawsuits are filed.

Another interpretation of the originally-proposed new Interpretation 212-1, however, is possible. Unfortunately, it reflects no better on the ABA. Rather than simply urging law schools to break the law, the ABA may have been doing something a bit more complicated. It may have been attempting to use the authority conferred upon it by the Department of Education’s recognition to thwart the will of the voters of California, Washington State and more recently Michigan. All three states have adopted popular initiatives that, among other things, prohibit state colleges and universities from

Whatever the original reason for this provision, the ABA added an additional sentence after controversy erupted in the newspapers.<sup>177</sup> The additional sentence reads, “A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standards 212 by means other than those prohibited by the applicable constitutional or statutory provision.” This sentence would provide greater reassurance, however, if the ABA had not already conceded in its *Grutter* amicus brief the necessity of racial preferences for law schools that wish to enroll a racially diverse class.

All in all, it difficult to avoid the conclusion that these changes were intended to increase the pressure on law schools to engage in race-based admissions policies. When applied to more traditional accreditation issues, such increased pressure might not, by itself, be inappropriate. In some sense, all

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engaging in discrimination or preferential treatment based on race, sex, color, ethnicity or national origin in their admissions policies. All three initiatives, however, contain an exception for “action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.” See Cal. Const. art. I, sec. 31; Mich. Const. art. I, sec. 26; Wash. Rev. Code 49.60. Could the ABA have been taking the mantle of federal authority upon itself for the purpose of invoking that exception?

Was this an effort to threaten law schools with a termination of federal support so as to trigger the exception? If so, it was reckless. The Department of Education’s well-earned reputation for sensitivity to state authority may have resulted in the ABA’s reprimand or its termination as an accreditation agency.

Another item of evidence for the first interpretation, though again not conclusive, is the 1999 ABA site evaluation report for UC-Hastings College of Law. As a part of the University of California system, UC-Hastings is governed by Proposition 209, which forbids discrimination or preferential treatment based on race, ethnicity or sex in public education. According to the report, “[s]tudents of color make up 30.4 percent of [the school’s] student body,” but the number of African-American students specifically was on the decline. While 4.2 percent of the third-year class and 5.9 percent of the second-year class was African American, only 1.9 percent of the first-year class, which was selected after Proposition 209 went into effect, was. Dean M. Michael Sharlot, Professor Richard Schmalbeck, Professor Claire M. Germain, Professor Patrick I. Baude, the Honorable Peter J. Messitte, Professor Judith Wegner, Professor Blake Morant, Office of the Consultant on Legal Education to the ABA, Report on University of California, Hastings College of the Law dated October 10-13 1999 at 25, 54, *available at* [http://www.ceousa.org/pdfs/ABA\\_5.pdf](http://www.ceousa.org/pdfs/ABA_5.pdf) and [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

The report goes on to suggest that credit may be due Hastings’ special program for disadvantaged students, eligibility for which is premised on “criteria related to economic, social or educational disparity” rather than race, ethnicity or sex, for maintaining the school’s level of racial diversity. *Id.* at 25-26.

The most interesting part of the report comes in the summary: “The adoption of an anti-affirmative action posture by the Regents of the University of California, reinforced by the success of Proposition 209 with the California electorate, poses very real issues for maintaining a diverse student body. ... Given the school’s tradition and aspirations, it may be essential to reconsider the level of risk it is willing to bear to achieve a larger representation of [African Americans].” *Id.* at 53-55.

Is the ABA site evaluation team suggesting that Hastings incur legal risk by skirting the requirements of Proposition 209? Or is it suggesting that Hastings incur more academic risk on behalf of it disadvantaged students? Either would be cause for serious concern. The former would be advocating illegal conduct; the latter evidences a cruel lack of concern for the educational and financial welfare of disadvantaged students. While the report does not make the direct comparison, a few simple calculations make it clear that the gap in California bar passage rates between regular students and students admitted under the disadvantaged students program is already almost 20 points—95.8 percent vs. 76.5 percent (figures which presumably do not take into consideration students who enrolled at Hastings but failed or dropped out). *Id.* at 28. Any expansion of the program would only increase that gap—probably substantially.

<sup>177</sup> See, e.g., David Bernstein, *Affirmative Blackmail: The ABA Orders Law Schools to Practice Racial Preference—Even If They Have to Break the Law*, THE WALL STREET JOURNAL (Feb. 15, 2006). See also Valerie Strauss, *U.S. Education Officials Question Diversity Standard*, WASHINGTON POST A4 (Jan. 7, 2007).

accreditation standards are intended to pressure schools to engage in conduct that the accreditation agency regards as desirable—whether it is the hiring of competent faculty or the purchase of an adequate number of books for the library. But diversity requirements have always been special. Unlike most issues that confront accreditation agencies, they have always been controversial—not just among the general public but among academics as well.<sup>178</sup> No doubt this is at least part of the reason former Secretary of Education (now Senator) Lamar Alexander began questioning them more than a decade ago. Why insist upon a uniformity of approach on such an issue?<sup>179</sup>

Two circumstances have changed in recent years that make accreditation standards relating to diversity even more inappropriate. The first is the increasing controversy over mismatch—with contributions by Elliott, Strenta et al., Cole & Barber and now Sander. Now more than ever, reasonable law faculties may differ about whether or to what extent to engage in racially preferential admissions policies. Eliminating a one-size-fits-all solution to the problem of diversity is almost certainly an improvement over the current practice of letting the ABA decide what level of diversity is best.

The second change in circumstances may be even more important—the decision in *Grutter v. Bollinger*. At its foundation, the majority opinion in *Grutter* is about academic freedom and the notion that “universities occupy a special niche in our constitutional tradition.”<sup>180</sup> It accords individual colleges and universities the right to make academic judgments free from the concern that a court or other legal or political institution will intervene to impose its own view. Writing for the majority, Justice O’Connor cited several cases in which the Court had arguably treated a university’s academic judgment with special deference. The most directly applicable of those cases involved refusals to intervene when a student failed out of school. In each such case the defendant university had been held to have the right to determine which students had succeeded at their studies and which had not.<sup>181</sup> The *Grutter* decision extended that concept of institutional academic freedom to a controversy over racially discriminatory admissions that would otherwise have been subject to strict scrutiny. “Our holding today,” Justice O’Connor stated, “is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”<sup>182</sup> She cited Justice Lewis Powell’s opinion in *Bakke*, which had stated, “The freedom of a university to

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<sup>178</sup> See Carl Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233 (1988). Paul M. Sniderman and Thomas Piazza, perhaps the nation’s leading experts on public opinion on affirmative action, have stated, “the new racial agenda is politically controversial precisely because most Americans do *not* disagree about it. The distribution of public opinion on ... affirmative action (understood as involving either preferential treatment or racial quotas ... is unmistakable. ... [T]here is scarcely any support among whites.” PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 130 (1993) (emphasis in original).

<sup>179</sup> Alexander asked rhetorically in 1991, “Should ... [an] accrediting agency dictate to institutions whether or how they should balance their students, faculty, administration and governing boards by race, ethnicity, gender or age?” The obvious answer is no.

<sup>180</sup> *Grutter* at 329.

<sup>181</sup> *Grutter* at 328-39. See *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (deferring to medical school decision to drop student who performed poorly on examination); *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (deferring to medical school decision to dismiss student who performed poorly during clinical rotation).

<sup>182</sup> *Grutter* at 328. The opinion does not attempt to distinguish *Sweatt v. Painter*, 339 U.S. 629 (1950), in which the University of Texas Law School’s exclusion of African American students was held to violate equal protection. The *Sweatt* Court made no suggestion that deference to UT’s whites-only admissions policies would be appropriate.

make its own judgments as to education includes the selection of its student body.”<sup>183</sup> Note that Powell used the term “a university” rather than “higher education collectively.”

Whether one is persuaded by the *Grutter* opinion or not, its special rule of academic freedom does not apply to the ABA. The ABA is not a college or university. It is made up of practicing lawyers, judges, a law student, a university president, a non-lawyer journalist, a non-lawyer former president of the League of Women Voters and others. Although several law school professors are on the ABA Council, they are not a majority.<sup>184</sup> Far from being entitled to academic deference, the ABA, like the Department of Education, is precisely the kind of institution academic freedom is supposed to protect colleges and universities *from*.

If law schools are to have the academic freedom accorded to them in *Grutter*, they must have the academic freedom to choose *not* to employ race-based admissions policies. It is each individual law school and not the ABA that has been accorded “the right to select those students who will contribute most to the ‘robust exchange of ideas.’”<sup>185</sup> Uniformity of approach is both unnecessary and undesirable.

Under *Grutter*, therefore, some schools may choose heavy racial preferences and some may choose lighter ones. Some may choose no racial preferences at all and instead pursue students with a diversity of political or philosophical perspective. Some may simply choose the students with the highest college grades or the best records of public service. The fundamental point is that individual law schools are to have the discretion to choose, not the ABA.

### **George Mason University: A Case Study in Undue Pressure**

Contrary to the suggestions by the dissenting commissioners, the evidence indicates that under current practices, it is the ABA and not individual law schools that controls admissions and diversity policies. Last year, for example, a new law school in South Carolina—Charleston School of Law—unexpectedly failed to win accreditation from the ABA Council after a favorable recommendation from the Accreditation Committee.<sup>186</sup> According to news reports, the ABA’s concerns focused in part on diversity. Final accreditation was not awarded until the dean had declared that “[w]hatever we have to do [to win accreditation], we’ll do it’ and a new “director of diversity” was publicly announced.<sup>187</sup>

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<sup>183</sup> *Grutter* at 329 (quoting *Bakke* at 312).

<sup>184</sup> See <http://www.abanet.org/legaled/section/council.html> (last accessed July 31, 2007). Nor would it be wise policy to make law professors a majority. Accrediting agencies wield tremendous power to limit competition. Just as a committee dominated by practicing lawyers has an incentive to limit the number of new lawyers who can enter the profession, a committee dominated by law professors has an incentive to wield its power to require higher salaries and better working conditions for law professors like themselves. Similarly, a committee dominated by university administrators has an incentive to benefit themselves. The solution to this problem that the ABA has agreed to (at the behest of the Antitrust Division of the U.S. Department of Justice) is to staff itself with a mix of interest groups, no one of which dominates the committee.

<sup>185</sup> *Grutter* at 329 (quoting *Bakke* at 313 (quoting *Keyishian* at 603)).

<sup>186</sup> James T. Hammond, Charleston School of Law: New School Fails to Win Accreditation So Students Can Take Bar, *The State* (Columbia, S.C.) (July 12, 2006).

<sup>187</sup> *Id.*; College Notes: Charleston Law Taps Diversity Director, *The State* (Columbia, S.C.) B3 (August 13, 2006).

A clearer example concerns George Mason University Law School in Arlington, Virginia, whose treatment by the ABA during its recent re-accreditation process can only be termed abusive.<sup>188</sup> At one point, the ABA Accreditation Committee summoned the university president and law school dean to appear before it personally and threatened the institution with revocation of its accreditation on account of its supposed lack of diversity.<sup>189</sup> For a law school, that would be the death penalty.

The story began with the ABA's site evaluation team visit in early 2000. The site evaluation report that was submitted thereafter stated:

[T]he Law School has not been very successful in recruiting minority students and the number has actually declined recently. In the full-time division[,] 15 (11.1 percent of class) minority students started at George Mason in 1997. In 1998, 12 (10.4 percent) started and in 1999, 7 (6.5 percent) started. In the part-time division 10 (12.8 percent) minority students started in 1997. In 1988 [sic.] there were 18 (19.1 percent) and in 1999, 10 (9.5 percent) started.<sup>190</sup>

Significantly for the ABA's contention that it does not require law schools to engage in racially preferential admissions, George Mason's problem was not lack of outreach, as the site evaluation report amply demonstrated:

At first blush, one is struck by these relatively low numbers of minority students for a school in a large metropolitan area like the District of Columbia. Yet the Self-Study describes a very active effort to recruit minorities in the past three years and this was confirmed in interviews with the Admissions Office staff. Specifically, George Mason has sent representatives to all of the national forums sponsored by the LSAC. They have also attended several regional and individual recruiting fairs, including many events at historically black colleges in the D.C. and Virginia areas. Current minority students often participate in these visits. The office also engages in targeted mailings to qualified minority applicants and minority pre-law advisors throughout the country and advertises in publications that are likely to be consulted by minority candidates. George Mason supports the CLEO program and will reconsider an applicant who was denied admission but then successfully completes a CLEO program. Finally, George Mason has its own three week "testing in" summer admissions program called the PAST program. In this program, the school invites applicants who have generally good admission credentials but for one weakness, often the LSAT score, to participate in a special three week pre-law program. At the end of the intensive program, the

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<sup>188</sup> See also ABA Accreditation Materials for the College of William and Mary School of Law, available at [http://www.ceousa.org/pdfs/ABA\\_1.pdf](http://www.ceousa.org/pdfs/ABA_1.pdf) (last accessed July 31, 2007), [http://www.ceousa.org/pdfs/ABA\\_2.pdf](http://www.ceousa.org/pdfs/ABA_2.pdf) (last accessed July 31, 2007), [http://www.ceousa.org/pdfs/ABA\\_3.pdf](http://www.ceousa.org/pdfs/ABA_3.pdf) (last accessed July 31, 2007), [http://www.ceousa.org/pdfs/ABA\\_4.pdf](http://www.ceousa.org/pdfs/ABA_4.pdf) (last accessed July 31, 2007), [http://www.ceousa.org/pdfs/ABA\\_5.pdf](http://www.ceousa.org/pdfs/ABA_5.pdf) (chronicling in detail the accreditation problems of William & Mary School of Law's over faculty diversity) (last accessed July 31, 2007).

<sup>189</sup> Action of the Accreditation Committee dated June 2003 at 3, available at [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

<sup>190</sup> Dean May Kay Kane, Professor Jim Meeks, Professor Joyce Saltalamachia, Dean Thomas F. Guernsey, Justice Fred L. Banks, Dr. Robert Glidden, Associate Dean Peter A. Winograd, Office on the Consultant on Legal Education to the ABA, Report on George Mason University School of Law dated February 27 - March 1, 2000 at 32, available at [http://www.ceousa.org/pdfs/ABA\\_7.pdf](http://www.ceousa.org/pdfs/ABA_7.pdf) (last accessed July 31, 2007).



students are evaluated and may be offered admission. For example, in 1999, 135 applicants were invited to participate in PAST, of whom 27 percent were minorities. Of the 135, 31 attended, of whom 19 percent were minorities. Of the 31, 26 were admitted, of whom 12 percent (3) were minorities.<sup>191</sup>

The report gave the following explanation for why these extensive outreach efforts were not more successful:

There appear to be several possible reasons why, despite these efforts, the Law School has not been more successful in recruiting minority students. (1) George Mason makes virtually no need-based scholarship grants, to minority or any other applicants; essentially, only federal loan money is available. In the current market for recruiting minority students, this obviously puts George Mason at a significant disadvantage. (2) **George Mason has been unwilling to engage in any significant preferential affirmative action admissions program.** There are doubts, according to one member of the Law School administration, regarding the legality, at least in the Fourth Circuit, of such a policy. The reluctance to compromise normal admission quality standards appears to be particularly present regarding the full-time program. There appears to be slightly more flexibility regarding the part-time program. ... (3) Finally, the view was expressed that the program at George Mason with its emphasis on economic analysis, and its general reputation as a conservative law school, probably hurts its recruitment efforts among minority candidates.<sup>192</sup>

The end of the site evaluation report nevertheless reported that there were “serious concerns about the opportunities offered to minorities, both in faculty recruitment and in student enrollment.” It complained that “there appears to be no concrete plan of how to address the situation, other than to expand outreach to student applicants.”<sup>193</sup>

Site evaluation teams do not make official findings and conclusions in their report. That is the province of the Accreditation Committee and the ABA Council.<sup>194</sup> But the team’s view could not have been clearer if they had said it outright: We don’t think efforts that include only outreach without preferential admissions standards are good enough. Why else would the team claim that there was no concrete plan? Why is a plan to expand outreach not considered a concrete plan?

Over the next few years, the Accreditation Committee issued repeated “action letters” to the Law School requiring that certain action be undertaken before the school would be re-accredited. Each letter had the same theme. Some stated that the Committee had “reason to believe” that the law school “has not established that it is in compliance with the [diversity] standards,” despite the extensive outreach efforts catalogued by the site evaluation team; the rest used language at least as strong or stronger.<sup>195</sup> All the letters declined to renew the schools accreditation until its diversity

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<sup>191</sup> Id. at 32-33.

<sup>192</sup> Id. at 33 (emphasis supplied).

<sup>193</sup> Id. at 52.

<sup>194</sup> Id. at 1.

<sup>195</sup> Action of the Accreditation Committee, dated June, 2001 at 2, *available at* [http://www.ceousa.org/pdfs/ABA\\_7.pdf](http://www.ceousa.org/pdfs/ABA_7.pdf) (last accessed July 31, 2007); Action of the Accreditation Committee, dated June, 2002 at 2, [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

issues were resolved to the Committee's satisfaction. It seemed clear that the committee members agreed with the site evaluation team that no amount of outreach would be enough unless it produced the racial results that they favored.

The first of these annual letters complained that George Mason has "not engaged in any significant preferential affirmative action program" and that it "makes virtually no need-based scholarship grants to minority or any other applicants."<sup>196</sup> This letter and the two that followed it demanded reports and data "regarding actions taken to bring the school into compliance" with diversity standards.<sup>197</sup>

In an apparent effort to satisfy the ABA, the law school reported back that its entering class minority enrollment had climbed from 10.98 percent in 2001 to 16.16 percent in 2002. George Mason had increased its scholarship money awarded to minority students to \$94,404 in academic year 2001-02, which represented approximately 50 percent of the total of scholarship funds available. The next year, it upped the amount to \$95,416 and was able to "offer[] employment to an African-American student, amounting to a 'subvention of \$50,000 per year.'" The school had increased the number of minority recruiting events in which it participated and the number of targeted mailings in which it was engaged. It also increased the involvement of minority students and alumni in recruiting.<sup>198</sup>

Yet none of this was enough. A few weeks after the Supreme Court decided *Grutter v. Bollinger*, the ABA issued its fourth and most aggressive action letter—the one that threatened to recommend revocation of accreditation. It stated: "The Committee requests that the President of George Mason University and the Dean of the School of Law appear at a hearing before the Committee, in accordance with Rule 11(b), on April 23, 2004 at 9:30 a.m., at the Committee's meeting in Baltimore, Maryland, to show cause why the School should not be placed on probation or removed from the list of approved law schools. If the Law School and University do not present a reliable plan for bringing the Law School into compliance with Standard 211, the Committee, at its April 2004 meeting, will recommend to the Council that the Law School be placed on probation or be removed from the list of approved law schools."<sup>199</sup>

George Mason, its leaders probably frantic at this point, reported back that its entering class of 2003 had reached 17.3 percent minority and its entering class of 2004 was 19 percent minority. In the meantime, it had appointed an assistant dean to serve as the school's first minority coordinator and established an outside "Minority Recruitment Council, which ha[d] met with a newly-constituted faculty committee to explore and implement efforts to increase the number of minority students."<sup>200</sup>

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<sup>96</sup> Action of the Accreditation Committee, dated June, 2000 at 4, *available at* [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

<sup>97</sup> Action of the Accreditation Committee, dated June, 2001 at 3, *available at* [http://www.ceousa.org/pdfs/ABA\\_7.pdf](http://www.ceousa.org/pdfs/ABA_7.pdf) (last accessed July 31, 2007); Action of the Accreditation Committee, dated June, 2002 at 2-3, [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

<sup>98</sup> Action of the Accreditation Committee dated June 2003 at 1-3, *available at* [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

<sup>99</sup> *Id.* at 3. Although the date of the report leaves it ambiguous whether it was written before or after the *Grutter* decision, the cover letter makes it clear that it was not sent until after that decision. *See* Letter from Barry A. Currier to President Alan Merton and Dean Mark Grady dated July 23, 2003, [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf). (last accessed July 31, 2007).

<sup>100</sup> Action of Accreditation Committee dated October 2004 at 2, *available at* [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007).

Even so, the fifth ABA action letter continued to insist that the ABA had “reason to believe that the School has not established compliance” with diversity standards for students and began to raise diversity question for faculty too. This letter complained in particular of what it regarded as low numbers of African-American students. “Of the 99 minority students in 2003, only 23 were African American; of 111 minority students in 2004, the number of African Americans held at 23.” It should be noted that this was not because few offers of admission were made to African-American students. In 2004, for example, 63 African Americans had been offered admission.<sup>201</sup>

In response, George Mason pointed out that it had increased the number of minority students by 60 percent in the past five years. From 1999 to 2005, scholarship aid had been increased from \$234,049 to \$700,000 with more than 25 percent of that amount going to minority students. “The Admissions Office spends 65 percent of its travel budget on minority recruiting events,” and “[t]he Career Development Office offers, sponsors, and/or participates in dozens of minority placement events.” The school continued initiatives like “LSAT fee waivers, CLEO support, and academic support programs.” “Student organizations with a focus on diversity have been encouraged, and have increased in number.”<sup>202</sup>

Finally, the ABA relented and gave George Mason a clean bill of health on diversity—just in time for the next round of seven-year re-accreditation process. But it concluded its sixth action letter with this admonishment: “The Committee directs the attention of the President of the University and the Dean of the School of Law, to the need to continue efforts to increase the diversity of the Law School student body and faculty. In addition, the Committee requests that the next regular site evaluation team that is scheduled to visit the School direct particular attention to the School’s efforts with respect to these issues.”<sup>203</sup>

Under the circumstances, the dissenting commissioners’ argument that the ABA does not pressure law schools to engage in race preferences seems naive at best. I am at a loss for another explanation for the ABA’s record at George Mason.

## Conclusion

I began these remarks by acknowledging the good intentions of those who initiated race-based admissions policies decades ago. But the good intentions of those men and women do not give those who support and administer admissions policies today a permanent moral free ride. Good faith requires a willingness to re-examine policies carefully from time to time.

Even the most optimistic view of the data shows that racial preferences in law school admissions come at a heavy cost—a cost that disproportionately falls upon African Americans. Students who are admitted to law school without the entering credentials required of other students, whether it is on account of race, ethnicity or family clout, are going to drop out, fail out, or fail the bar examination in

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<sup>101</sup> Id. at 2-3.

<sup>102</sup> Action of Accreditation Committee, October 2005, *available at* [http://www.ceousa.org/pdfs/ABA\\_6.pdf](http://www.ceousa.org/pdfs/ABA_6.pdf) (last accessed July 31, 2007)..

<sup>103</sup> Id. at 2 (citations to ABA Standards omitted).

greater proportions than their law school peers. Now Sander's mismatch study suggests that, in addition, racial preferences may have decreased the absolute numbers of African-American attorneys. Any way one looks at it, the story is troubling.

The Commission's recommendations are modest. We ask, for example, that more independent research be funded by the National Academy of Sciences and other grant-making entities and that state bar associations cooperate in this research. We ask that law schools voluntarily disclose to law school applicants the information necessary to make their own judgments about whether and where to attend law school and that Congress, the ABA and state authorities require such disclosures. (I note that disclosure is prudent regardless of whether Sander's conclusions on mismatch are shown to be true or false. No law school applicant can make an informed judgment without knowing the likelihood that someone with his or her entering academic credentials will succeed in law school and ultimately pass the bar examination.) In addition, we ask the ABA to allow law schools the freedom to determine their own diversity policy rather than have a particular diversity policy forced upon them.

Hardly anyone is naive enough to expect complete consensus among the eight members of our bi-partisan commission. The civil rights issues that we face today aren't easy; if they were they'd have been solved long ago. But a complete inability to agree on even the most innocuous of these recommendations or propose alternatives bespeaks a lack of seriousness on the part of the dissenting commissioners.

## Joint Dissent of Commissioners Arlan D. Melendez and Michael J. Yaki

We respectfully, but vehemently, disagree with the findings, recommendations, and focus of this report issued by the Commission's conservative majority and (misleadingly) entitled *Affirmative Action in American Law Schools*.

In a misguided attempt to regain influence in civil rights policy, the Commission majority has, for the past two years, has ceased holding formal investigative hearings in favor of informal briefings. Their apparent goal is to influence decision making, free of the pesky quality control procedures and thorough background research that hearing reports require. Agency reports have focused on affirmative action programs and education, reactively advocating an end to all race-conscious policies.<sup>204</sup> Briefing reports like this one are typical, containing predetermined findings and recommendations that target a particular policy while turning a blind eye to scientific and legal evidence that contradict that policy.

This report is a sterling example of the lack of serious scholarship that marks these new briefing reports. No attempt was made by the Commission to assess the consensus positions of the scientific or legal community on these issues. No independent research was done by the Commission on these issues, nor did they perform a comprehensive review of others' research. This report does not even fairly reflect the testimony of the informal briefing that is the only basis of this report—the statements of two of the four speakers appear to have been ignored in developing these findings and recommendations. The agency's process for drafting reports is fundamentally broken.

In place of scholarship, the Commission has gamesmanship. In an unprecedented act, after having voted to publish this report with all dissenting and concurring opinions submitted by May 29, 2007, the Commission majority reopened the record on this report at its May 1, 2007 meeting. Upon motions by Commissioners Taylor and Heriot, the Commission majority postponed publishing this report for two months and allowed all Commissioners to resubmit new opinions. Why? Commissioner Heriot, after first stating she had an unspecified ethics issue that she wanted a chance to look into and change her comments, tacitly admitted that she wanted a chance to add to her comments in response to our dissent.<sup>205</sup> As with so many votes on our nominally bipartisan Commission, procedures were set aside on a 6-2 vote to allow the six Republican-appointed Commissioners an opportunity to write or rewrite their concurrences to attack our dissent. Such is the integrity and respect for basic procedures at work in generating the agency's reports.

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<sup>204</sup> See, e.g., U.S. Commission on Civil Rights *Federal Procurement After Adarand* (Sept 2005); *Disparity Studies as Evidence of Discrimination in Federal Contracting* (May 2006), available at <http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf>; *The Benefits of Racial and Ethnic Diversity in K-12 Education* (Nov 2006); *Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status* (forthcoming, August 2007); *Educational Effectiveness of Historically Black Colleges and Universities* (forthcoming, August 2007); *Racially Concentrated School Districting in Omaha, Nebraska* (forthcoming); *School Choice, Blaine Amendments, and Anti-Catholicism* (forthcoming); *No Child Left Behind and Supplemental Educational Services* (forthcoming).

<sup>205</sup> U.S. Commission on Civil Rights *Business Meeting Transcript*, pg. 35 (June 1, 2007) (“Commissioner Heriot: Yes, but there is some new issues being brought up that I didn’t expect to be brought up. There are all sorts of things in here. Commissioner Yaki: What do you mean by new issues? do you mean by new issues? Commissioner Heriot: Your extensive comments about procedures. Commissioner Yaki: I don’t see how that was a new issue at all. We talked about it ad nauseum during many of the hearings, Commissioner Heriot.”)

We regret our fellow Commissioners' suggestion in this report that diversity is neither essential to law school education nor a compelling interest of our country. Though our fellow Commissioners' extreme views may differ, public sentiment and the law of the land is that student body diversity is a distinct, compelling government interest for this nation's educational institutions.<sup>206</sup> We also regret the majority's attempt to cast doubt on the dramatic success already evident thanks to affirmative action policies in law school admissions. Their personal anger with the American Bar Association's law school policies notwithstanding, it is sad to see the Commission majority taking fringe positions that a bipartisan Congress has already rejected 337-83.<sup>207</sup> We fear the Commission majority has lost touch with this agency's mission to carefully and thoughtfully investigate and report on the country's civil rights challenges, rising above narrow partisan politics.

To set the record straight, we are compelled to speak first, in Section 1, about the outstanding success of affirmative action in law schools and flag the remaining barriers to minorities entering the profession—the topics this Commission should have focused on in a report entitled *Affirmative Action in American Law Schools*. Following that, Section 2 of this dissent briefly addresses Professor Sander's academic "mismatch" argument. Section 3 discusses the position of the law schools' accrediting body on affirmative action policies. Finally, Section 4 explains how we think this Commission's reporting process has lost the independence and reliability it once had, resulting in such a biased report. Our comments rely on the written testimony of the briefing speakers and we highly recommend readers of this report look at the comments of Professor Richard O. Lempert and Dean Steven R. Smith reprinted in this report.

### **The Success of Affirmative Action in Law Schools**

In 2003 the U.S. Supreme Court upheld the affirmative action admissions policy at the University of Michigan Law School and eloquently spoke of the critical importance to our nation of law school diversity:

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race

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<sup>206</sup> *Grutter v. Bollinger* 539 U.S. 306, 325 ("More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."); *Parents Involved in Community Schools v. Seattle School District*, 127 S.Ct. 2738; 2007 U.S.LEXIS 8670 at 152-563 (2007) (J Kennedy, *concurring*) ("Diversity, depending on its meaning and definition, is a compelling educational goal that a school district may pursue.").

<sup>207</sup> *Compare* Report Recommendation 3 (recommending Congress compel law schools to disclose certain data on affirmative action programs) *with* House Amendment 769 of Rep. Steve King to H.R. 609 (defeated on March 30, 2006) (virtually identical language).

and ethnicity, so that all members of our heterogeneous society may participate in the education necessary to succeed in America.

*Grutter v. Bollinger*, 539 U.S. 306, 332-333 (2003) (internal citations omitted).

The Court carefully examined the past success and current need for affirmative action programs before it unflinchingly declared, “Student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Id.* at 325.

The proof that affirmative action works in law schools is overwhelming. The U.S. Census has estimated that there are now about 44,800 black lawyers,<sup>208</sup> compared with just 4,000 black lawyers in 1970; in 1980, about 15,700; and in 1990, 24,700. When one reflects that the super-majority of those 44,800 attended schools that previously were white-only institutions and were admitted to those schools through affirmative action, the success of the policy becomes unmistakable.

The simple fact is that without affirmative action, even today many African American, Native American, and Hispanic students would never become lawyers and almost none would attend the country’s elite law schools. Breaking into elite schools is particularly important because those institutions are the sources of so many of our national leaders. Researchers have found that 60 percent of black law professors at schools accredited by the American Bar Association are graduates of the top twenty law schools, including 48 percent from the top ten ranked law schools.<sup>209</sup> In the judiciary, 40 percent of African American federal judges graduated from top twenty law schools, as did almost half the country’s Latino federal judges.<sup>210</sup> Two professors, Wilkins and Gulati, also have found that over 75 percent of African American partners at leading corporate law firms are graduates of elite law schools, including 47 percent from Harvard and Yale alone.<sup>211</sup>

It is also important to emphasize that the successes of affirmative action in professional schools have benefited students of all races and backgrounds. For instance, researchers have found that since minorities gained critical mass in the 1990s about 50 percent of the University of Michigan’s white alumni, regardless of gender, gave at least a rating of 5 on a 7-point scale when asked about the contribution of ethnic diversity to their classroom experience, and almost no one indicated there was no contribution.<sup>212</sup>

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<sup>208</sup> See United States Census Bureau data *available at* [http://www.census.gov/Press-](http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006088.html)

Release/www/releases/archives/facts\_for\_features\_special\_editions/006088.html (last visited May 23, 2007).

<sup>209</sup> 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, 1896 n.145 (2005) (analyzing data on 604 African American professors in the 2003-04 AALS Directory of Law Teachers).

<sup>210</sup> *Id.* at 1896-97 n.146; William C. Kidder, Does Affirmative Action Really Hurt Blacks and Latinos in U.S. Law Schools 7-8 (Sept. 2005), Tomas Rivera Policy Institute policy brief, *available at* [http://www.trpi.org/PDFs/affirm\\_action.pdf](http://www.trpi.org/PDFs/affirm_action.pdf) (last accessed Oct. 20, 2006).

<sup>211</sup> David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, 84 CAL. L. REV. 493, 563-64 (1996).

<sup>212</sup> David Chambers, et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School* 25 LAW & SOC. INQUIRY 395, 414 (2000). Likewise, a survey of students at two leading American medical schools (Harvard and UC San Francisco) found that strong majority of students of all backgrounds report that that having classmates of different races and ethnicities was a “clearly positive” element of their educational experience. Dean K. Whitla et al., *Educational Benefits of Diversity in Medical School: A Survey of Students*, 78 ACADEMIC MEDICINE 460, 463 fig.1 (2003).

Moreover, these positive contributions of race-conscious admission policies have come with relatively few “costs” to the interest of white applicants. Research demonstrates that the total number of whites entering law school is not significantly affected by affirmative action policies, due chiefly to the fact that even with affirmative action minority students are a very small percentage of the law school population.<sup>213</sup> Moreover, if one compares the estimated number of admitted black students (2,748) whose admission would not have been predicted based on their admissions index and the standard the school ordinarily applied, that number is significantly lower than the estimated number of whites (6,321) who were predicted denials but were also admitted to law school because of preferences biased against minorities, like those for alumni’s children.<sup>214</sup>

In sum, anyone surveying the impact of affirmative action in law schools is compelled to admit its success in transforming the face not only of the profession, but the country’s leadership as a whole. This is not to say that challenges don’t exist—challenges that we hope the Commission will examine in the future. We are deeply concerned with continuing evidence that minority students entering law school today, particularly African-Americans, disproportionately do not complete their education and do not become enrolled members of the bar.

Unfortunately, apart from the record created by Professor Richard Lempert’s testimony (see pgs. 51-82), this report fails to address the real obstacles to minorities more successfully entering the legal profession—lack of early educational opportunities comparable to white classmates, financial hardship, and discrimination. The Commission’s conservative majority has written this (misnamed) report on *Affirmative Action in American Law Schools* to try to raise some doubt about the success of race-conscious admissions. They hope to rekindle the ashes of a research paper now uniformly dismissed by experts as inaccurate, and insinuate that the American Bar Association is doing something wrong when it requires schools to demonstrate a commitment to diversity (race-conscious admissions preferences are notably not required by the ABA).

It is upsetting that the United States Commission on Civil Rights has come to the point where all it does is try to discredit race-conscious policies, and we hope our colleagues in the future will issue reports rooted in current social science research rather than ideology. Meanwhile, if the Commission will not address the real obstacles (lack of early educational opportunities, financial hardship, and discrimination) we can only hope other organizations will assume leadership in shining light on these issues.

## **Sander’s Mismatch Theory**

### *The Claim*

In November 2004 Richard Sander published his article *Systemic Analysis of Affirmative Action in American Law Schools*<sup>215</sup> in a law school journal. The article describes the disparate performance of African-American and Caucasian students in law school and bar examinations. Professor Sander

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<sup>213</sup> See Wightman, Linda F. Wightman, *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, 14 (1997).

<sup>214</sup> *Id.*

<sup>215</sup> 57 STANFORD LAW REVIEW 367 (2004)



asserts that this disparity is a result of a “mismatch” that occurs when black students with lower academic credentials are admitted into law schools under affirmative action programs. His mismatch theory holds that the country’s top law schools admit the African American applicants that would otherwise enroll in second tier schools without affirmative action. In this way, Sander believes elite school admissions create a “cascade effect,” with second tier affirmative action schools drawing black applicants that would otherwise be in third tier schools, third tier schools drawing black applicants from fourth tier schools, and fourth tier schools drawing black applicants who otherwise would not be admitted anywhere. According to Sander, because black law students admitted through affirmative action are in a higher tier school than they “ought” to be without affirmative action, black law students’ suffer demoralization, poor first year grades, high dropout rates, and often fail to pass the bar.

Sander concluded his 2004 article with the media-grabbing assertion that law school affirmative action policies actually diminish the number of black students who would otherwise pass the bar. He said there would be a 7.9% *increase* in black students passing the bar if affirmative action were ended.<sup>216</sup>

### *The Reality*

Today, the academic community has dismissed Professor Sander’s 2004 study and the law school mismatch theory it asserted as flawed work that neither proves affirmative action harms minorities nor adequately explain why a low percentage of minority law students actually end up entering practice.<sup>217</sup> More accurate estimates of the potential effects of ending law school affirmative action predict a 30-40% *decline* in the number of black lawyers produced, although yearly fluctuations in the applicant pool may ameliorate or exacerbate that range.<sup>218</sup>

After publication of the 2004 article, widespread examination was brought to Sander’s methods and claims. In fact, from the experts’ perspective, this is now an exhausted research topic except insofar as certain political interests continue to raise the specter of Sander’s theory. At the Commission briefing, Professor Richard Lempert described the academic community’s view bluntly: “It is our view that the scientific quality of this study is such that it does not merit the attention it has received and that it would be a mistake for the USCCR or anyone else to set policy based on it.”<sup>219</sup> Regretfully, the Commission majority decided to ignore the research community’s opinion; it tried to create the illusion of smoke by turning over the ashes of Sander’s theory.

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<sup>216</sup> *Id.* at 473.

<sup>217</sup> See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1811 n.12 (2005), available at <http://islandia.law.yale.edu/ayers/AyresBrooksResponse.pdf> (last accessed May 23, 2007); 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 Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 52-53 (Feb. 2006), Univ. of Michigan Law School Olin Center Working Paper No. 60, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1061&context=umichlwps> (last accessed May 23, 2007); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005), available at <http://ssrn.com/abstract=717962> (last accessed May 23, 2007).

<sup>218</sup> Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 13 (Feb. 2006), Univ. of Michigan Law School Olin Center Working Paper No. 60, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1061&context=umichlwps> (last accessed May 23, 2007).

<sup>219</sup> See pg. 57 of this Report.

To set the record straight and highlight for non-expert readers some of the social science criticisms of Sander's methods, we offer a summary of some of the key problems below. Readers looking for a more thorough critique should look to the published work of Professor Richard Lempert<sup>220</sup> and other academics from which this summary draws.

*Critique #1 Sander's research was never peer-reviewed.*

Sander's original research was published in a law school journal that, while prestigious, is operated by law students rather than established experts in the field. Such a publication would be an excellent venue for presenting a policy argument. However, without peer review—the standard for social science publications—Sander's work was never formally checked for errors and he wasn't presented with other experts' suggestions for improving his or her entire analysis prior to publication. It is true that, *after* Sander's 2004 publication, critiques exposing the most egregious of his mistakes were subsequently published in the Stanford Law Review and elsewhere. Experts quickly were able to find so many problems with Sander's analysis that the research was dismissed in social science circles. However, a complete review of his work by professional editors was never done and additional problems beyond those noted below may still lay undiscovered.

*Critique #2 Sander's data was outdated.*

Reviewers of Sander's analysis usually start by lamenting the poor quality of the data used. For instance, Professor Lempert reported at the Commission's briefing the outstanding fact that "every published article that we know and all unpublished work that we have seen have failed to find in the BPS data reliable evidence for Professor Sander's claimed mismatch effect."<sup>221</sup>

Sander's most crucial data sets are drawn from either the Bar Passage (BPS) cohort of students entering law school in 1991, or data Sander himself collected from 20 law schools' students at the end of their first term in 1995. It matters that the data is old because the qualifications of the least qualified African-American law students—the ones who on average have the most difficult time in law school and passing the bar, and per Sander's argument would never have been admitted to any law school without affirmative action—have improved dramatically since 1991. More recent data from 2003-2005 show those admitted under affirmative action policies but most at risk of failure were only 4-8% of students, compared with 22% in the early nineties.<sup>222</sup> So, whereas Sander's article assumes that a large percentage of African American students are among those least likely to pass the bar, more current data shows these minority students are significantly better prepared to succeed today.

Also worth noting is that in Sander's 1995 data nearly 25% of the respondents didn't give information on race/ethnicity, making the data set unreliable. There are some indications these non-

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<sup>220</sup> 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)

<sup>221</sup> Pg. 66 of this Report.

<sup>222</sup> Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 52-53 (Feb. 2006), Univ. of Michigan Law School Olin Center Working Paper No. 60, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1061&context=umichlwps> (last accessed May 23, 2007).

responses hide a significant number of African Americans and other minorities whose data is significantly different from those who disclosed their race/ethnicity.

Critique #3 *Sander's analysis makes several false assumptions.*

Even if Sander's data is accepted, the models he uses to analyze the data contain assumptions that academic researchers have rejected. Three of these assumptions deserve special mention because they are critical to Sander's astonishing claim that minority lawyers would increase by 7.9% if affirmative action were ended.

First, and most importantly, Sander assumes that were affirmative action eliminated, it would be the 14.1% of black law students with the lowest credentials (and highest risk of failing to graduate or pass the bar) that would be denied admission.<sup>223</sup> This assumption is what leads to his claim that ending affirmative action would harm very few of the minorities who would ultimately pass the bar, because those with the very lowest credentials rarely succeeded in passing.<sup>224</sup> However, this assumption is a critical deviation from the statistical calculations done by Dr. Linda K. Wightman, whose work Sander took as the basis for his hyped 7.9% prediction.<sup>225</sup> Wightman's published work indicates that ending affirmative action would impact black applicants with academic credentials in the middle and middle-lower range—not just those with the worst performers.<sup>226</sup> But, ignoring that part of Wightman's analysis, Sander appropriated Wightman's data and added this assumption that it would be only blacks with the worst academic credentials who would be cut out of the system by ending affirmative action. Sander's error here artificially inflates the number of black students who would pass the bar without affirmative action.

Second, Professor Sander assumes black students' decisions to apply to law school would be unaffected by the end of affirmative action. Among other things, such an assertion overlooks the importance to many minority students of having "critical mass" in the schools they apply to. The Supreme Court's recent decision in *Grutter* accepted the testimony of numerous experts, including Dean Kent Syverud of Vanderbilt law school, that, "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because non-minority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."<sup>227</sup> Conversely, without a sizable minority community, individuals may expect to be marginalized and therefore not apply to schools that otherwise (under affirmative action) would have a significant number of other minority students.

Lastly, the baseline for Sander's analysis assumes that minorities—particularly African Americans—are not underrepresented in law schools. While admitting there is significant under-representation if

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<sup>223</sup> Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 473 (2004).

<sup>224</sup> *Id.* at 474 ("Conversely, the black students excluded by a switch to a race-blind system have such weak academic credentials that they add only a comparative handful of attorneys to total national production.").

<sup>225</sup> *Id.* at 472.

<sup>226</sup> Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. LEGAL EDUC. 229 (2003); Linda F. Wightman, *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).

<sup>227</sup> *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003) (internal citations omitted).

one looks at the overall African American youth population, Sander bases his claim on data from 2001 showing roughly the same percentage of blacks in first year law school classes and college graduates.<sup>228</sup> However, as Professor Lempert has pointed out, 2001 was an aberrant year and the number of white law school applicants has increased substantially since then.<sup>229</sup> The greater number of white law school applicants today (e.g., due to external job market reasons like the decline of the dot-com bubble) results in a lower proportion of black applicants. Ending affirmative action today, therefore, likely would have a much greater impact upon minority applicants compared to 2001 because they are already underrepresented in the applicant pool.

*Critique #4 Sander's did not follow established statistical practices.*

Deviating from established social science practices, Professor Sander overreached and gave a very specific estimate of the effects of affirmative action that garnered lots of quotations but was rooted in his policy position, not science. He did not report his conclusions with confidence intervals that tell readers how certain his estimates were. Sander's most outrageous claim—that ending affirmative action would actually increase the number of African-American lawyers by 7.9%—is a prime example of such a misleading practice. As two renowned experts have bluntly noted, the 7.9% calculation is “not based on a statistical procedure: there are no standard errors of the estimate, no confidence intervals, and no measures of whether the 7.9% estimate is statistically any different than 0%.”<sup>230</sup> On a more abstruse but important matter of statistical practice, Sander's interpretation of statistical significance in the article has been labeled as simply “wrong,”<sup>231</sup> influencing the robustness of many of his calculations.

*Critique #5 Sander failed to explain a key consequence of his theory.*

If Sander's mismatch theory was correct, it would lead to an easily tested hypothesis: African American students with the same academic credentials should have a higher bar passage rate if they attend a lower-tier school, other things being equal. This reflects Sander's insistence both that grades and class ranking trump prestige, and that lower tier schools will yield students with the same academic credentials better grades and rank. However, Sander's 2004 paper never even addressed this issue (and therefore never discovered that data don't support this position—most notably, they show students with equal academic credentials performing better at elite schools)!

To be fair, in a subsequent publication<sup>232</sup> Sander has offered selection bias as a possible explanation for this empirical contradiction of his theory. He suggested that the top law schools may be looking beyond the usual academic credentials and picking students who are better able to succeed despite having the same grades as their counterparts at lower tier schools. An uncontroversial explanation—many affirmative action advocates have credited their policies with looking beyond the numbers for talent—this constitutes a crucial admission by Sander that the “mismatch” phenomenon isn't at work

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<sup>228</sup> Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 374 (2004).

<sup>229</sup> Pg. 69 of this Report.

<sup>230</sup> Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1811 n.12 (2005), available at <http://islandia.law.yale.edu/ayers/AyresBrooksResponse.pdf> (last accessed May 23, 2007).

<sup>231</sup> Pg 65 of this Report.

<sup>232</sup> Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

in the top schools. Even if “mismatch” occurs some years at some middle or lower tier schools, the top schools hold a disproportionate power and influence in our country. In Sander’s attempt to explain away the data with selection bias he has to admit not only that his theory doesn’t work for many schools, but that the elimination of affirmative action would cut most African Americans out of the elite law schools where they would perform best.

In sum, given the broad consensus that the methods and claims in Professor Sander’s 2004 paper were wrong, the Commission majority’s decision to give Professor Sander a soap box to stand on and second his recommendations<sup>233</sup> must be called what it is—political gamesmanship. It is dangerous to ignore a broad scientific consensus on such an important social issue or suggest a lone voice outside that consensus is as equally valid or worthy of attention. Social science is not “relative” or a matter of political opinion—there are right and wrong answers and established research methods and consensus positions.

Stanford professor Michele Landis Dauber analogized the media hype over Sander’s hypothesis to the claim many years ago that scientists had discovered cold fusion.<sup>234</sup> Those headlines were retracted when the scientific community began to review the claims with systematic, empirical analysis. Similarly, faulty methods led Sander to the hasty conclusion that law school affirmative action policies cause a net harm to minorities. Scholars who have since reviewed Sander’s work using established methods have found affirmative action is clearly beneficial to minority law students.

In reality, ending affirmative action would result in an approximate 30-40% decrease in the number of black lawyers entering the profession.<sup>235</sup> Sander’s discredited theory must be laid to rest. On a topic as critical to our country as minorities’ access to law schools (and through them to the nation’s leadership positions in the military, government, and private sector), we can’t afford to politicize scientific findings that affirmative action in law school admissions works.

Experts agree that the chief barriers to minorities entering the legal profession don’t include academic mismatch. Whatever the effects of academic mismatch may be (they will vary year-to-year, school to school) they have been shown to be a minor factor in minority success. Unfortunately, the Commission has not considered, or even mentioned, in this report the chief factors holding back greater minority advancement in the legal field—lack of access to quality educational opportunities prior to law school, disparate financial resources, and discrimination. If the Commission was serious about addressing barriers for minorities it would not seize upon one theory and one researcher’s discredited work, but would examine mainstream theories and areas of consensus in the social science research. The Commission should have looked at those law schools which are models of success and study best practices such as the existence or availability of retention programs for minorities in law schools, or at law firms and within the profession itself. Unfortunately, the majority’s narrow ideological interest in Sander’s work and academic mismatch theory has

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<sup>233</sup> Note that three of Sander’s four recommendations based on his 2004 paper (pgs. 8-9 of this Report) are repeated in the Commission majority’s recommendations (pgs. 134-37 of this Report).

<sup>234</sup> Michele Landis Dauber, *The Big Muddy*, 57 *Stanford Law Review* 1899 (2005).

<sup>235</sup> Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 13 (Feb. 2006), Univ. of Michigan Law School Olin Center Working Paper No. 60, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1061&context=umichlwps> (last accessed May 23, 2007).

misdirected the Commission from a thorough, broad-based investigation that could actually improve minorities' access to the legal profession.

## **The American Bar Association Position on Affirmative Action**

### *The Claim*

In early 2006 the Department of Education announced its intention to review the petition of the American Bar Association's ("ABA") Council of the Section of Legal Education and Admissions of the Bar ("Council") for renewal of its power to accredit law schools. Since the Council's previous accreditation, the ABA had adopted a slightly different policy on Equal Opportunity and Diversity, memorialized in Council Standard 211. The revised Standard 211 required law schools to "demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity." Standard 211 does not require racial preferences be used in admissions, but it does allow them if they otherwise comply with the law. This moderate position nonetheless angered Bush administration officials in the Department of Education and was taken up by majority Commissioners<sup>236</sup> who thought affirmative action policies are illegal and unwise for law schools.

In response, the Commission majority first wrote letters<sup>237</sup> in their official capacity to the Secretary of Education urging her to either deny the petition or make acceptance contingent on a rejection of Council Standard 211. Then, their personal minds already made up and stated on the record, on June 16, 2006 Commissioners held the briefing that is the basis for this report to seek more attention for their stated positions. At the briefing the Commission majority voiced the same positions they had already staked in their March correspondence in an unruly and at times disrespectful debate.<sup>238</sup> The majority's expectation was that this briefing report would be issued in time to influence the Secretary's consideration of the Council's petition.

In December 2006, however, the Department of Education's independent advisory committee overruled the concerns raised by the Bush administration and the majority Commissioners in their March letters by voting to approve the Council's petition for renewal of its accreditation powers. This briefing report was still mired in the Commission's backlog of briefing reports and had no impact on the accreditation decision.

Immediately after the independent advisory committee grant of the Council's petition, the General Counsel of the Department of Education announced his intention to appeal the decision.<sup>239</sup>

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<sup>236</sup> We note that Chairman Reynolds and Staff Director Marcus were both political appointees heading the Department of Education's Office for Civil Rights immediately prior to their political appointments to the U.S. Commission on Civil Rights by the President.

<sup>237</sup> Two letters were sent, with the same recommendation. The first letter was signed by Vice-Chair Thernstrom on March 8, 2006, available at <http://www.usccr.gov/correspd/060606LetterChairetal.pdf>. The second letter signed by Chairman Reynolds and Commissioners Kirsanow, Braceras, and Taylor on March 20, 2006 and may be found at <http://www.usccr.gov/correspd/060606LetterChairetal.pdf>.

<sup>238</sup> See, e.g. U.S. Commission on Civil Rights, Transcript of June 16, 2006 Briefing, pgs 60-61, available at <http://www.usccr.gov/calendar/trnscrip/bmb060616.pdf>.

<sup>239</sup> See Katherine Mangan, *Education Dept. Will Challenge Law-School Accreditor's Diversity Standard*, THE CHRONICLE OF HIGHER EDUCATION 23 (January 19, 2007).

Moreover, the petition was renewed for only 18 months rather than the usual 5 year renewal period. The import of this action means that the Administration soon will be reviewing ABA Standard 211 again, this time with this report by the Commission majority for support.

Critics of ABA Standard 211 and its official interpretations make two simple claims. First, they suggest Standard 211 illegally mandates racial preferences, either openly by its plain language or tacitly by pressuring schools into the only easy way of achieving diversity. Secondly, critics claim racial preferences are bad policy because they harm less qualified minorities by offering them admission to programs without warning them of their likelihood of failure.

### *The Reality*

There is no basis for either of the critics' claims, but the claim that the American Bar Association is breaking the law by Standard 211 is particularly outrageous and easily dispelled.

In its revised standards on Equal Opportunity and Diversity the ABA (and its Council) have mandated only that law schools must demonstrate by concrete action a *commitment* to a student body diverse with respect to gender, race, and ethnicity. The Standard is crystal clear that in demonstrating this commitment schools: 1) may use whichever methods of recruiting and enrolling a diverse student body fit the school's particular circumstances, including racial preferences; 2) if racial preferences are used by a school, they must comply with the constitution as ordered by the Supreme Court; 3) if racial preferences are prohibited by other state or federal laws, the law school must use other methods of demonstrating commitment to diversity.

The plain language of Standard 211 makes clear that the ABA is *not* mandating racial preferences or breaking any laws (see underlined portions below):

## **Standard 211. EQUAL OPPORTUNITY AND DIVERSITY.**

**(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.**

**(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.**

### ***Interpretation 211-1:***

**The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions..**

### ***Interpretation 211-2:***

Consistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.

***Interpretation 211-3:***

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

As for critics' argument that the ABA is "pressuring" the use of racial preferences insofar as they are the "easiest" way of establishing a diverse student body, no proof of any kind has been offered to support this position. In fact, as one law school president testified at the Commission's briefing, there are many methods of diversity recruiting besides racial preferences that already are in widespread use.

Examples are: admissions recruitment outreach to undergraduate campuses having a substantial population of minority students; "pipeline" efforts to encourage persons from underrepresented groups, even as early as high school, to consider the legal profession as a career; careful consideration of factors in addition to LSAT score and undergraduate grade point average, such as achievements in student leadership, the workplace and graduate education, when making admissions decisions; holding or collaborating in summer programs that assist those of all races and ethnic backgrounds to be better prepared for admission to and success in law school; and enhanced efforts to encourage admitted minority students to enroll.<sup>240</sup>

With so many alternatives to racial preferences in current use—particularly in those states where race-conscious admissions policies are forbidden by state law—schools have many viable options for demonstrating their commitment to diversity. Suggestions to the contrary are disingenuous.

The second argument of opponents of affirmative action also is baseless—that minorities are harmed when they are admitted under affirmative action policies without being warned of their possibility of failure. We have discussed in the sections above the tremendous success of affirmative action in law schools and the flaws with Sander's hypothesis that affirmative action harms minority law students. It remains only to address the claim that minorities should be given information about their risk of failure in law school.

We strongly disagree with the Commission majority's blank endorsement of the idea that law schools be required to disclose information on their use of racial preferences and failure rates of particular

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<sup>240</sup> Pg. 85 of this Report.



groups of students. We further note that when legislation was proposed in 2006 that would have mandated release of this kind of information, a bipartisan Congress resoundingly defeated the proposal by a vote of 337-83.<sup>241</sup>

Instead, we believe that any decision to release information that may have the effect of intimidating minority students from entering careers in law or inciting racial animus must be approached with great care. Established social science research on the phenomenon of “stereotype threat” shows that minorities’ performance on academic testing (affecting undergraduate grades, law school entrance exam performance, law school classroom exams, and bar passage) is substantially affected by negative expectations a student is aware of in his social environment.<sup>242</sup> Stereotype threat describes how a student’s fear that her actions will confirm negative stereotypes interferes with her optimal performance. Flooding all minority law students with statistics showing that they are at greater risk for failure in law school is a clear trigger for stereotype threat.

We think law schools should choose what information to collect and how to disclose it based on their particular circumstances. In some cases it may be that release of more information about affirmative action policies and student failure rates are warranted because there is a misperception among a school’s minority students or pool of applicants about the difficulty of law school classes. In other cases, it may be that release of more information would do nothing but stifle minority interest in legal careers and result in race-baiting. Therefore, we recommend that law schools and their accrediting organizations examine the question of whether and what types of information disclosures about affirmative action and student failure rates would be useful to students.

In closing, we want to emphasize that beyond the natural interests of every law school to see every one of their students graduate and pass the bar (boosting their rankings and prestige), the ABA’s accreditation standards also mandate that every admitted student have the background necessary to succeed. Standard 501(b) on law school admissions mandates that “A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.”<sup>243</sup> The notion that law schools would choose to enroll minority students they think are likely to fail in order to boost their diversity is offensive and absurd.

We support the ABA’s revised Standard 211 on equal opportunity and diversity—a policy that not a single law school objected to when scrutinized in a public hearings.<sup>244</sup> The Commission should praise, not criticize, the ABA’s requirement that law schools demonstrate a commitment to diversity through recruiting methods of their choice that comply with all laws.

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<sup>241</sup> See House Amendment 769 of Rep. Steve King to H.R. 609 (defeated on March 30, 2006).

<sup>242</sup> For a summary of the research literature on stereotype threat, see e.g. Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype Threat and Social Identity Theory*, 34 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 379-440 (M. Zanna ed., 2002). For a popular explanation of the phenomenon for non-experts, see e.g., Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, *The Atlantic Monthly* at 44 (Nov. 1999). [http://serc.carleton.edu/files/cismi/broadaccess/steele\\_on\\_stereotype\\_threat.pdf](http://serc.carleton.edu/files/cismi/broadaccess/steele_on_stereotype_threat.pdf)

<sup>243</sup> American Bar Association Section of Legal Education and Admissions to the Bar, 2006-2007 Standards, Ch. 5, available at

[http://www.abanet.org/legaled/standards/20062007StandardsWebContent/B.Chapter%205\\_20061005150250.pdf](http://www.abanet.org/legaled/standards/20062007StandardsWebContent/B.Chapter%205_20061005150250.pdf)

<sup>244</sup> Molly McDonough, *See You in 18 Months: Education Department puts ABA accreditation role on 'a short leash,'* 93 *American Bar Association Journal* 64 (Noting that it was only organizations that have long opposed affirmative action, including Linda Chavez’s Center for Equal Opportunity, that spoke against Standard 211 at the hearing).

## The Bias of the Commission's Briefing Report Process

This briefing report was compiled by the Commission's Staff Director in an *ad hoc* manner, in violation of the Commission's Administrative Instructions, recent GAO recommendations to the Commission, and perhaps pending federal regulations.<sup>245</sup> The result is a compromised report, lacking in balance and objectivity.

Over the past year we have repeatedly and publicly<sup>246</sup> urged the Staff Director and other Commissioners to fully enforce the agency's long-standing quality control procedures. These procedures are a crucial safeguard to ensure the Commission's work is credible, independent, and transparent. However, the Staff Director's failure to fully enforce these procedures, combined with a lack of candor to Commissioners, the GAO, and perhaps even Congress about the report drafting process, forces us to describe how the process is broken.

Some of our fellow Commissioners conceded that our reporting system was broken the last time we voted on a briefing report, and promised not to vote on another briefing report until the system was fixed and credibility restored.<sup>247</sup> Unfortunately, the Commission recently chose to "fix" its failure to enforce its quality control procedures by voting to eliminate most of those procedures from its books on April 13, 2007 and explicitly stating that in the future the Commission will apply key quality control measures to briefing reports in an *ad hoc* manner at the Staff Director's exclusive discretion. Although we applaud the Staff Director and Commission majority for their new willingness to comply with the agency's written directives, we regret this was accomplished by sacrificing the Commission's longstanding quality control measures. Below we review the procedures used to generate this report in order to ensure transparency and understanding of the Commission's shifting policies and compromised products.

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<sup>245</sup> As with other federal agencies, the Commission is required to issue Quality Information Guidelines that are published in the Federal Register and codified as binding regulations. The Commission adopted and published proposed rules Quality Information Guidelines in June of 2006, but no public comment was received. *See* 71 Fed. Reg. 41,762 (July 24, 2006). A final version of the Quality Information Guidelines was then approved for publication by Commissioners at the Commission's February 9, 2007 business meeting. The suspension of quality control procedures for briefing reports may run afoul of the approved Quality Information Guidelines which not only lists the reviews for national office reports mentioned in AI 1-6 (e.g., editorial, legal sufficiency, defame/degrade, and affected agency) but also other, additional procedures that arguably go beyond AI 1-6 in requiring that information be given a "full and proper context," conduct a "thorough review of the literature," and specify the study's "limitations" and "error sources." *Id.* at §5.03. Even if the Commission's Quality Information Guidelines do not yet have the full status of regulations, they are at least binding internal policy.

<sup>246</sup> *See, e.g.*, U.S. Commission on Civil Rights, Transcript of Oct 13, 2006 Briefing, pgs 21-38, *available at* <http://www.usccr.gov/calendar/trnsrpt/cm071013.pdf>.

<sup>247</sup> *See, e.g.*, U.S. Commission on Civil Rights, Transcript of Nov 17, 2006 Briefing, pgs 11-12, *available at* <http://www.usccr.gov/calendar/trnsrpt/cm061117.pdf>. (Commissioner Braceras stating that: "I would like just to be very clear that this will be the last briefing report that I will vote for until we implement, not necessarily my rules, but a system that hopefully we can get buy-in on from the Democratic members of the Commission, as well. Because I think that's really important to our credibility going forward, and I think that it's important to have integrity in the process, and have all of the commissioners feel comfortable with that process, whatever it may turn out to be.")

The practice of routinely issuing briefing reports with findings and recommendations is new to the Commission. It began on May 13, 2005 when the Commission's new Republican majority<sup>248</sup> decided to hold an ongoing series of monthly briefings to coincide with its monthly business meetings. Several rationales were offered for the new practice: it would give Commissioners a chance to gather information on fast-breaking civil rights issues in a more "timely" manner; it would be a way of "leveraging" the increasingly limited resources of the Commission so that it could speak out on more issues yet in a more cost-effective way; and it would encourage Commissioner involvement in the Commission's business meetings. A set of monthly briefing topics, including this briefing, was voted upon and set to begin the winter of 2005-06.

Notably, after the decision was made to begin regular monthly briefings, the Staff Director reviewed the agency's procedures for national office reports set out in Administrative Instruction 1-6 ("AI 1-6") and issued a new version<sup>249</sup> on January 12, 2006 ("Jan 06 version"). The Jan 06 version of AI 1-6 described procedures intended to make sure national office projects were "well planned, efficiently managed, and appropriately reported to the Staff Director and to the Commission," and publications would "meet high standards of quality."<sup>250</sup> The scope of the procedures therein were clearly stated to "apply (unless otherwise stated) to *all publications*, films, and tapes, including but not limited, statutory reports, clearinghouse reports, staff reports, staff reports, periodicals, and transcripts or proceedings based on information obtained from hearings, consultations, and conferences (emphasis added)."<sup>251</sup>

In the Jan 06 version of AI 1-6, "briefing reports" and other kinds of reports besides the annual statutory report were not specifically listed as exempt or distinct from the general report procedures to be applied to all national office publications. On the contrary, briefings were clearly contemplated in the Jan 06 version of AI 1-6 as one of the agency's many kinds of past publications; its glossary and other parts of the document describe some details for approval of briefing topics, concept papers, etc. This is not surprising since, prior to the Commission majority's institution of regular monthly briefings, the Commission had occasionally held briefings and issued reports on other topics.<sup>252</sup> Notably, however, before the Commission majority's 2005 change of policy there were never findings and recommendations in briefing reports.

What procedures were required with respect to briefing (and other national office) reports? The Jan 06 version of AI 1-6 specifically mentions the following should happen prior to the briefing:

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<sup>248</sup> This policy change was made by Chairman Reynolds (Republican appointee, December 2004), Commissioner Braceras (Republican appointee, December 2001), Commissioner Kirsanow (Republican appointee, December 2001), Commissioner Taylor (Republican appointee, December 2004), Commissioner Thernstrom (Republican appointee, February 2002), and Commissioner Yaki (Democrat appointee, February 2005). Current Commissioner Melendez (Democrat appointee, September 2005) and Commissioner Heriot (Republican Appointee, February 2007) were not part of this policy change.

<sup>249</sup> The previous version of AI 1-6 had been issued by former Staff Director Les Jin on Jan. 24, 2003.

<sup>250</sup> AI 1-6 Section 1a&b (Jan 06 version) (on file at Commission).

<sup>251</sup> AI 1-6 Section 2.03 (Jan 06 version) (on file at Commission).

<sup>252</sup> Among the many past briefings that resulted in Commission publications (none of which contained findings or recommendations) are: *Native American Health Care Disparities* (Oct. 2003); *Crossing Borders: The Administration of Justice and Civil Rights Protections in the Immigration and Asylum Context* (Jan. 2003); *Boundaries of Justice: Immigration Policies Post September 11* (Oct. 2001); *Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs* (Sept. 1996); *Civil Rights Implications of Growing Anti-Immigrant Sentiment* (June 1994).

- *Concept paper.* A project concept paper should give a brief overview of the civil rights question. (§6.03,.06)
- *Initial project planning outline.* Staff in the office assigned the project should “perform background research and a literature review of the topic,” that will be part of an outline for submission to Commissioners detailing “a summary of the research performed to date,” a statement of scope and direction,” the “proposed methodology,” and the “timeline for completion.” (§7.01)
- *Discovery plan.* Staff in the office assigned the project create a discovery plan that describes “with as much detail as practicable the subpoenas; interrogatories, document requests and other forms of discovery that the staff proposes to undertake and the timeline for doing so.” (§8.01)
- *Project tracking.* All projects are to have clear milestone dates and deliverables, and any changes “that substantially alter national office project proposals, designs, or schedules (e.g. changes of substance that affect a project’s purpose, scope, or methodology) must be approved in writing by the Staff Director and by a majority vote of the Commission.” (§10.02)

The Jan 06 version of AI 1-6 also details how draft reports are to be vetted to ensure quality:

- *Commissioner review.* Draft reports, containing findings and recommendations “if appropriate,” are to be given to Commissioners with four weeks for review. (§13.01, .03)
- *Editorial review.* The Staff Director appoints members of an editorial policy board that “will usually consist of three members,” and the board’s comments are incorporated into the draft. Notably, the “primary purpose of the editorial policy review is to determine the adequacy and accuracy of the substantive information in the draft document (e.g., conceptual soundness, adherence to Commission policy, quality of research, argumentation, and documentation of major points).”<sup>253</sup> “Review of whether the argumentation and conclusion of a draft are documented sufficiently and with convincing evidence is the responsibility of the editorial review board...” (§ 14.02-.06; §15.07)
- *Legal sufficiency review.* The Office of General Counsel will perform a legal sufficiency review with the purpose of ensuring “the accurate interpretation and citation of legal materials and compliance with statutory requirements.” (§15.01, .02)
- *Defame/degrade review.* The Office of the General Counsel will perform a defame/degrade review “if appropriate.” The “purpose of the defame/degrade review is to ensure that Commission reports do not defame or degrade persons named in them. (§15.02, .03)
- *Affected agency review.* After completing other reviews, “sections of the draft report (but not the conclusions, findings, recommendation, or letter of transmittal) that pertain to a government agency” are sent for their review and comment on the accuracy of the material. “When appropriate, non-governmental organizations receive pertinent material for review.”

These facts are important to establish because, although the Jan 06 version was later revised to *add additional features* in July 31, 2006, the abovementioned aspects of AI 1-6 were constant until February 2007.<sup>254</sup> Thus, according to the Commission’s written procedures, from the time the

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<sup>253</sup> This language regarding the purpose of the editorial policy has been in place since at least Feb. 1989.

<sup>254</sup> In fact, nearly identical language for vetting draft reports (editorial, legal sufficiency, defame/degrade, and affected agency reviews) has been in force at the Commission since at least January 24, 2003 as memorialized by the version of AI 1-6 that issued then by previous Staff Director Les Jin.

majority began holding regular briefings in 2006 until February 2007 all briefings should have been subject to the abovementioned four levels of planning and five levels of draft report review.<sup>255</sup>

Unfortunately, we have learned that since the majority decided to hold monthly briefings in May of 2005, the Staff Director has not followed the above provisions of AI 1-6 with respect to briefing reports. His rationale has been that, despite its plain language (which he himself signed into effect in January 2006), he did not think Commissioners intended for briefing reports to be subject to of AI 1-6.<sup>256</sup> Consequently, it appears the Staff Director has selectively applied the above-listed procedures in an ad hoc, variable manner from the time the majority began holding regular briefings in 2006 to February 2007.

As we are best able to reconstruct based on our inquiries of the Staff Director, the following procedures were applied to this briefing on Affirmative Action in American Law Schools at the Staff Director's discretion:

- Procedures Completed: *Concept paper; Commissioner review; \*Editorial review (however, it is unclear whether the review was substantive); Legal sufficiency review; Defame/degrade review;*
- Procedures Not Completed: *Initial project planning outline; Discovery plan; Project tracking; Affected agency review*

These deviations are substantial and Commissioners were not informed about them, much less asked to approve them. It was a clear error, if not intentional omission, not to allow the American Bar Association to conduct an affected agency review of the draft report (certainly the NGO's positions and motives are a major concern of this report). Primarily, it was the pre-briefing procedures meant to ensure a sufficient literature review, background research, and methodology that were eliminated. The Commission not only did not do independent social science research on this briefing topic, it did not even gather the articles cited by the briefing speakers in their written remarks. The social science research in the record for the report drafter and Commissioners, therefore, was negligible—consisting only of Sander's 2004 article and the May 2005 response by Lempert, et al. This briefing record was neither comprehensive nor even representative of the entire field of social science research on this topic, yet it includes conclusive findings and recommendations that will be given to Congress and the President.

The credibility of the Commission is undermined when we issue a report based on incomplete, potentially biased information. This is exactly what AI 1-6 is intended to prevent and we are deeply disappointed by the Staff Director's unwillingness to comply with AI 1-6. As it stands, the only authority for most of this report's recommendations rest upon the isolated, often unquestioned comments of just one invited speaker, Professor Sander.

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<sup>255</sup> Actually, as mentioned in note 254, above, the version of AI 1-6 dated Jan. 24, 2003 also mandated the above four procedures, so it could be said that all briefing reports from Jan. 2003 to February 2007 required these procedures. We describe the Jan 06 version of AI 1-6 as the baseline for comparison because it was issued by Staff Director Marcus and therefore he clearly had notice of its contents and had recently reviewed it in late 2005 onward.

<sup>256</sup> See Feb. 2, 2007 Memorandum to Commissioners (Regarding preparation of this Affirmative Action in American Law Schools, the Staff Director responded that, "In general, we have been applying the spirit of Administrative Instruction 1-6 broadly...OSD did not prepare the project proposal, discovery plan, or detailed project outline that is required of national office reports, as these appear inapplicable to briefing reports, which do not entail formal discovery.").

However, while egregious, the breakdown of procedures has been substantially worse with briefing reports issued before the fall of 2006 (prior to our learning about the Staff Director’s decision not to enforce AI 1-6 and raising objections). On March 8, 2007, in response to questions posed by Commissioner Melendez on January 29, 2007, the Staff Director disclosed what procedures he chose to apply under his *ad hoc* practice.<sup>257</sup> The disclosure not only shows a complete disregard for Commission policy or standard quality control practices—it shows a Staff Director who took to himself tasks normally assigned to career staff such as writing findings and recommendations, at times was the sole reviewer of whether his own work met quality of research standards, did not perform legal sufficiency or defame/degrade reviews of drafts with extensive legal findings, and did all this without disclosing to Commissioners his deviations from the controlling agency procedures in AI 1-6.

In addition to failing to notify Commissioners of his suspension of written procedures for briefing reports, the practice apparently was not disclosed to the General Accounting Office (GAO) which at the same time was investigating the information quality procedures at the agency. In the winter of

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<sup>257</sup> Campus Anti-Semitism Report (November 2005 Briefing)

- The Staff Director drafted the findings and recommendations, with assistance from OSD attorney Chris Byrnes for the remainder of the report. Staff Director Marcus alone reviewed the document for quality of research.
- Procedures Completed: *Concept paper; Commissioner review; Legal sufficiency review; Defame/degrade review;*
- Procedures Not Completed: *Initial project planning outline; Discovery plan; Project tracking; \*Editorial review (the Staff Director did not claim to do this and a panel was not selected); Affected agency review (the Staff Director said that he informally provided the findings and recommendations to the Department of Education's Office for Civil Rights, but did not conduct an affected agency review).*

The Native Hawaiian Government Reorganization Act (January 2006 Briefing)

- Office of Staff Director (OSD) attorney Chris Byrnes (then Acting Deputy General Counsel) and Office of General Counsel (OGC) attorney John Blakely drafted the document. Chris Byrnes and the Staff Director reviewed the document for quality of research.
- Procedures Completed: *Concept paper; Commissioner review;*
- Procedures Not Completed: *Initial project planning outline; Discovery plan; Project tracking; \*Editorial review (the Staff Director did not claim to do this and a panel was not selected); Legal sufficiency review; Defame/degrade review; Affected agency review.*

Disparity Studies as Evidence of Discrimination in Federal Contracting (Dec 2005 Briefing)

- Office of Civil Rights Evaluation staffer Eileen Rudert primarily drafted the report under the supervision of Staff Director Marcus and her OCRE supervisor. Staff Director Marcus alone reviewed the document for quality of research.
- Procedures Completed: *Concept paper; Commissioner review; Defame/degrade review; Legal sufficiency review;*
- Procedures Not Completed: *Initial project planning outline; Discovery plan; Project tracking; \*Editorial review (the Staff Director did not claim to do this and a panel was not selected); Affected agency review (the Staff Director said that he informally provided the findings and recommendations to the Department of Education's Office for Civil Rights, but did not conduct an affected agency review).*

Benefits of Diversity in Elementary and Secondary Education (July 2006 Briefing)

- The Staff Director and his attorney-advisory drafted the entire report. The Staff Director however said that a staff social scientist provided “additional input on some of the findings.” Staff Director Marcus alone reviewed the document for quality of research.
- Procedures Completed: *Concept paper; Commissioner review; Defame/degrade review;*
- Procedures Not Completed: *Initial project planning outline; Discovery plan; Project tracking; \*Editorial review (the Staff Director did not claim to do this and a panel was not selected); Legal sufficiency review; Affected agency review (the Staff Director said that he informally provided the findings and recommendations to the Department of Education's Office for Civil Rights, but did not conduct an affected agency review).*

2005-06 the GAO was finishing its interviews of staff and review of the Commission's policies for the report it issued in May of 2006, *U.S. Commission on Civil Rights: The Commission Should Strengthen Its Quality Assurance Policies and Make Better Use of Its State Advisory Committees*. In the report the GAO staff found that the Commission's written procedures (then AI 1-6 Jan 06) were inadequate as written—lacking policies “requiring varied and opposing perspectives” in projects, lacking a policy for when and how to select external reviewers so they can provide a variety of perspectives, lacking “accountability for the decisions made on its products,” and having quality control policies that are more comprehensive for its state advisory committees than its national office reports.<sup>258</sup> To repeat, the GAO report found the Commission's quality control practices for national reports inadequate in key ways as they were written in AI 1-6 Jan 06.

Unfortunately, like us, it appears that GAO was misled by the Staff Director who, in a letter he wrote to GAO on April 17, 2006 (just two months before the briefing that is the subject of this report) indicated that all the general procedures of AI 1-6 applied to briefing reports. “The quality of briefing reports is ensured through internal procedures such as affected agency review, editorial review, and legal sufficiency review. These procedural requirements have long been established in formal, written Commission policies and continue to be followed by staff.”<sup>259</sup> Obviously, had GAO been informed that the Staff Director thought no written procedures applied to over 90% of the Commission's work product (briefing reports), it would have recommended more than a few additional procedures to better ensure objectivity. The GAO auditors would have said a baseline of quality control policies were needed *as well as* the additional procedures it in fact recommended.

The Commission responded to the May 2006 GAO report recommendations in two ways.

First, the Commission hired an outside Inspector General (IG)<sup>260</sup> to draft policies in accordance with the recommendations and, upon their adoption by the Commission, certify that the GAO criticisms had been addressed. Accordingly, in July 2006 the services of Peace Corps IG David Kotz were

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<sup>258</sup> General Accounting Office, *U.S. Commission on Civil Rights: The Commission Should Strengthen Its Quality Assurance Policies and Make Better Use of Its State Advisory Committees*, GAO-06-343 pg. 3 (May 2006) (“The Commission has some policies that provide adequate quality assurance for its products; however, it lacks policies for ensuring the objectivity of its national office reports, briefings, and hearings and providing accountability for decisions made on its national office products. Among its key policies, the Commission requires its national office products to be reviewed for legal sufficiency and provides affected agencies an opportunity to comment on the accuracy of information in its draft reports. In addition, under new Commission policies, Commissioners have an increased role in the development of its products, as we previously recommended. However, the Commission lacks several key policies that could help ensure objectivity in its national office products. Specifically, the Commission does not have a policy requiring varied and opposing perspectives in its national office reports, briefings, or hearings. Similarly, the Commission does not have a policy for determining when to use external reviewers for its national office reports and how to select reviewers so that they can provide a variety of perspectives. The Commission also lacks accountability for the decisions made on its products. In some cases, the Commission has made decisions without fully consulting with the Commissioners or documenting its decisions. For example, the Staff Director did not consult with all the Commissioners or obtain their agreement before he significantly redirected the focus of its 2005 statutorily required national office report. In addition, although we found that the Commission has weaknesses in its policies for ensuring the objectivity of its products and accountability for the decisions made on these products, it has not provided for any external examination or monitoring of its policies or practices. Finally, the Commission's product quality policies for its state committees are more comprehensive than those for its national office policies, including, for example, the requirement that state advisory committees consider varied and opposing perspectives in conducting its work.”)

<sup>259</sup> *Id.* at 45.

<sup>260</sup> The GAO itself had recommended seeking an external IG to review agency policy. *Id.* pgs. 35-36.

retained, with the stated purpose of “evaluating and developing appropriate internal policies and procedures as recommended by GAO in its May 2006 report.” Unfortunately, the details of the IG’s work agreement required the IG to report directly to the Office of Staff Director and it appears that the Staff Director defined the IG’s work so narrowly as to make the Staff Director’s suspension of all written procedures for briefing reports beyond the scope of the IG’s work. In the fall and winter of 2006 both Commissioners Melendez and Yaki, as well as the Special Assistant to Commissioner Melendez, repeatedly informed the IG in oral conversations and writing of the Staff Director’s claim that AI 1-6 did not apply to briefing reports. IG Kotz, however, expressed the view that failure to implement the written policies was beyond the scope of his work agreement concerning the GAO’s recommendations. While the GAO did not know and therefore did not comment on the lack of written procedures for briefing reports,<sup>261</sup> the IG’s scope of work precluded him from reaching the issue as well.

Consequently, the IG’s final report narrowly tracked the several additional procedures that the GAO recommended be added to AI 1-6, providing for:

- solicitation of greater input from Commission personnel and external groups in project planning;
- solicitation of external groups for suggested hearing witnesses and briefing speakers; requirements that background research and literature consider varied and opposing views;
- requirements that hearing and/or briefings include a “numerical balance” of speakers between opposing views.
- a requirement that a checklist be kept of the procedures followed in every report—with separate and different checklists for hearings and briefings.
- a requirement that someone outside of the Office of Staff Director look at the checklist of procedures followed and certify their completion.

While we agree with the spirit of all these recommendations of the IG (and GAO), their implementation again has been problematic.<sup>262</sup> More importantly, some of the IG’s changes seemed

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<sup>261</sup> The IG’s Final Report to the Staff Director, dated March 15, 2007, referenced very briefly Commissioner Melendez’s most recent protestation of the lack of written procedures for briefing reports. However, the IG did not find this to be an issue raised by the GAO report and explicitly said he wasn’t taking a position on procedures for briefing reports besides those new ones he himself recommended to comply with the GAO report. See IG’s Final Report to the Staff Director, pg 19. (“In November 2006, the Commission established a Commissioner-level working group to recommend new procedures for briefing reports. These procedures would be in addition to the policies on objectivity, transparency, and accountability implemented by the Commission in February 2007. Areas of concern discussed by this group include, among other areas, the role of findings and recommendations in briefing reports and Commission’s use of briefing reports in lieu of hearings. It was specifically brought to my attention yesterday evening that *one of the Commissioners is particularly concerned about the Commission’s lack of written procedures regarding briefing reports* and the fact that internal guidance did not require certain independent reviews be conducted with respect to these briefing reports. It is my understanding that these concerns are part of the scope of this ongoing working group. Because the working group had not completed its work by March 15, 2007 and in view of the fact that my contract has been extended numerous times since it began in June 2006, I have been unable to address the issues regarding procedures for briefing reports and did not participate in the working group. Therefore, I conclude my work and issue this final memorandum summarizing my findings.”(emphasis added))

<sup>262</sup> For instance, the provision that there be a “numerical balance” in the viewpoints of briefing and hearing speakers has not always been enforced (see May 11, 2007 Briefing on Title IX) and begs the question whether on some topics an “even” number of speakers on each side of a position accurately represents the range of views in the academic community.



to ratify parts of the Staff Director's suspension of procedures for briefing reports,<sup>263</sup> and the very act of the IG certifying compliance with the GAO report recommendations gave the false impression that the Commission's quality control problems were resolved.

The other Commission response to the May 2006 GAO report was to revise the Jan 06 version of AI 1-6. First, on July 31 the Staff Director issued the July 06 version of AI 1-6. The July 06 version did not change the language in the Jan 06 version applying AI 1-6 to all publications and requiring the full list of research requirements and report reviews. All it did is add additional provisions that were part of the IG's recommendations, including the use of "the National Office Hearing/Briefing Checklist form." Subsequently, on February 2 the Staff Director issued the Feb 07 version of AI 1-6 which implemented the remainder of the IG recommendations and, most importantly, changed the scope of AI 1-6 so that by default it no longer covered "all publications."<sup>264</sup> Even though a bipartisan working group of Commissioners had been discussing solutions to the broken system for briefing reports, the Staff Director did not consult the working group before he implemented the Feb 07 version of the policy. Unfortunately, the Feb 07 version brought AI 1-6 into alignment with the Staff Director's ongoing practice by stripping out of the written policy all requirements that briefing reports have discovery plans, editorial reviews, legal sufficiency reviews, and affected agency reviews.

When we pointed out to our fellow Commissioners what had become of AI 1-6 with the Staff Director's Feb 07 changes, not only was there no support for retaining the Commission's previous quality control measures for briefing reports, but quite the opposite—at the April 13, 2007 meeting the majority of Commissioners passed a motion by Chairman Reynolds that explicitly stated a new, limited set of procedures that would henceforth apply to briefing reports. The new minimal set of procedures required for briefing reports since April 13, 2007 are: a concept paper, defame-and-degrade review, Commissioner review of the initial draft of the report, external review of the report, and final revision of the report. Per the Chairman's motion, the Commission's current policy is that "Editorial review and legal sufficiency review will be provided when they are appropriate on a case-by-case basis at the discretion of the Staff Director." Affected agency reviews are to be used to the same extent as for other national office reports.

Ironically, this report on *Affirmative Action in American Law Schools* was approved by a majority of Commissioners at the same April 13, 2007 meeting that the majority made these final rule changes. It appears that to the Staff Director and majority of Commissioners there is no further need to examine the Commission's quality control procedures for briefing reports. They find several of the procedures used in this report unnecessary and are content to trust the Staff Director's *ad hoc* decisions on this report and others.

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<sup>263</sup> The IG approved separate "checklists" for hearings and briefings, with the latter being much shorter than the former, eliminating requirements of editorial, legal sufficiency, and affected agency review.

<sup>264</sup> Compare the language about scope in the Feb 07 version of AI 1-6 (§2.03 The policies and procedures contained in this AI pertain to national office projects. They apply (unless otherwise stated) to national office statutory reports, hearing reports, staff reports, periodicals, transcripts or proceedings based on information obtained from hearings, consultations, and conferences, films, and tapes) with corresponding language in the July 06 and Feb 06 versions of AI 1-6 (§2.03 The policies and procedures contained in this AI pertain to national office projects. They apply (unless otherwise stated) to all publications, films, and tapes, including but not limited to, statutory reports, clearinghouse reports, staff reports, periodicals, and transcripts or proceedings based on information obtained from hearings, consultations, and conferences.).

We are extremely disappointed in both the process and outcome of the Commission's decision to issue monthly briefing reports with findings and recommendations.

The Commission's majority has rolled back its written procedures for briefing reports to a new low:

- Current quality control policy does not require a thorough literature review or discovery plan for briefing topics at all, and leaves it to the Staff Director's discretion whether to conduct an editorial review (with someone other than the report drafter to determine the adequacy and accuracy of the substantive information in the draft document) or legal sufficiency reviews (with attorneys in the Office of General Counsel checking the accuracy of the report drafter's legal interpretations);
- Current written procedures for briefing reports (as of the Feb 06 version of AI 1-6) are considerably less rigorous than they were under the previous Commission majority, lower than the standards GAO found to be insufficient in its May 2005 report, lower than the standards applied to reports issued by the Commission's State Advisory Committees, and lower than any other kind of report previously issued by the Commission;

Quality control procedures, when properly designed and executed, help ensure that there is an adequate basis for the viewpoints, findings, and recommendations by the Commission. The elimination of such basic checks on quality—particularly in light of the Staff Director's practice of himself drafting and reviewing the reports given to Commissioners, bypassing non-political career staff—casts suspicion on this briefing report and all others.

The majority's practice of issuing monthly briefing reports with findings and recommendations replaces the Commission's previous practice of holding hearings, issuing subpoenas or interrogatories for information and accounts for nearly all the Commission's work product today. As an agency without enforcement powers, the Commission's effectiveness depends on credible fact-finding, and this is why Congress gave the Commission subpoena power. But the Commission's last report based on a hearing with sworn testimony was issued in October 2003.<sup>265</sup> The Commission majority's initial rationales for switching from hearings to briefings have all been undercut. By planning briefing topics two years in advance, the topics are no more timely; each briefing may be cheaper, but monthly briefings may not be less expensive than one or two thorough hearings each year; and briefings haven't increased Commissioner involvement in business matters, and in fact now Commissioners are postponing business meetings to give more time to churning out briefing reports.

The Commission majority has used monthly briefing reports as a way to issue findings and recommendations without having to do the underlying research and quality assurance involved in hearings. Previously, briefings highlighted issues for policymakers and posed questions for further inquiry but never pretended to be an adequate basis for giving findings and recommendations to Congress and the President. From the beginning, we have objected that briefings are too short (less than two hours), are not necessarily giving a representative picture of the issue (evenly divided panels, no thorough background research), and distract resources and attention from statutory mandates that the Commission is not currently meeting (e.g. maintenance of advisory committees in all states). We strongly recommend the Commission end its practice of issuing briefing reports with findings and recommendations and return to using the more thorough process provided by hearings with subpoenas, interrogatories and other tools to ensure a truthful and unbiased record.

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<sup>265</sup> See, U.S. Commission on Civil Rights Report, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* (2003)

Just as troubling as the roll-back of the Commission's quality control measures for briefing reports is how the Staff Director has (or, more to the point, has not) disclosed the roll-back. In addition to the Staff Director's failure to inform Commissioners,<sup>266</sup> the GAO, and Inspector General about his practice from May of 2005 until February of 2007 of not applying to briefing reports basic quality control procedures required in AI 1-6, we are concerned that the Office of Staff Director may have not fully informed Congress about this matter.

Specifically, we note the Staff Director's failure to disclose his suspension of most aspects of AI 1-6 for briefing reports in either his March 29, 2007 testimony to the U.S. House of Representatives' Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, or in his May 11, 2007 follow-up letter to the Subcommittee clarifying Commission policies regarding the objectivity and quality of Commission reports.

At the very least the Staff Director's comments reflect a stunning lack of candidness to direct Congressional inquiries about the quality control procedures being used for Commission reports:

- In his March 29, 2007 written testimony, the Staff Director testified that the Commission had "firmly established policies institutionalizing the role of Commissioners during the background and planning, discovery, and report drafting stages of projects."<sup>267</sup> However, he did not disclose the fact that when this report was being drafted the Staff Director unilaterally decided to suspend the Jan 06 version of AI 1-6 insofar as it required an Initial project planning outline (§7.01), a Discovery plan (§8.01), and Project tracking (§10.02) that were meant to ensure a thorough literature/background review before the briefing.
- In his May 11, 2007 letter, the Staff Director said that the July 06 version of AI 1-6 "provides that the Staff Director will certify that draft national reports had been submitted for editorial, legal sufficiency, defame/degrade, and affected agency reviews...are consistent with the Commissioner-approved concept, proposal, outline, and discovery plan...." But, this fails to disclose that nearly all the draft national reports at that time were briefing reports for which the Staff Director did not think he was bound to do any reviews.

The rosy picture painted by the Staff Director's testimony of increased quality control procedures with external reviews and balanced perspectives is inaccurate.

The system clearly is broken when the agency's politically appointed administrator breaks with established practice by failing to do thorough background research and submit the outline or discovery plan to Commissioners, himself drafting a briefing report with findings and recommendations instead of career staff, himself reviewing his draft for quality of research and the accuracy of the information, failing to do other quality assurance reviews, and never even informing Commissioners of these breaks with written policy until directly questioned months later.<sup>268</sup>

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<sup>266</sup> We first became aware of the Staff Director's decision not to implement AI 1-6 with respect to briefing reports in July of 2006 through our own initiation of questions about the review process. However, it was only late this past winter that the Staff Director, in response to our direct questions, disclosed what procedures he had applied on *ad hoc* basis to reports voted on earlier in 2005-06.

<sup>267</sup> See March 29, 2007 Testimony of Staff Director Kenneth Marcus to U.S. House of Representatives' Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, pg. 5, *available at* <http://www.knowledgeplex.org/news/285181.html> (last visited May 29, 2007).

<sup>268</sup> See note 257, above (detailing the preparation of the Campus Anti-Semitism Report (November 2005 Briefing) which was prepared in the manner described here, as well as other reports prepared in a similarly *ad hoc* manner).

We wish that it was not necessary to enter into such lengthy detail about the Commission's process for creating reports like this one on *Affirmative Action in American Law Schools*. However, our hand is forced by the Staff Director's continued unwillingness to be forthright and the conservative majority's willingness to let the Staff Director draft reports with findings and recommendations that lack a basis in the record.

This report was based on a June 16, 2006 briefing at the Commission that did not follow written procedures in the 2006 versions of AI 1-6. There was little background research and no discovery plan or outline was approved by Commissioners. The draft of this report was created over the next 10 months during which time we have repeatedly voiced concerns about the Staff Director's *ad hoc* reporting process. In light of our criticism, the Staff Director appears to have limited his personal involvement with this particular report and chosen to apply many (but not all) of the traditional review procedures for draft reports, but maintained throughout that he was not bound to do so. Yet, the review process even in this case dips below the thresholds recommended by the GAO and is an inadequate basis for issuing findings and recommendations to Congress.

In light of the Commission's broken process in reviewing this and other briefing reports, we believe this document and its findings and recommendations are basically unreliable and do not deserve the public's trust and respect. We hope the Commission majority will immediately cease issuing briefing reports with findings and recommendations and that all future reports be subject to the full array of quality control procedures that were assumed by the GAO and uniformly used prior to the current majority.

## **Conclusion**

We are strong believers in the ongoing importance of the Commission's mission to provide Congress, the President, and the American people accurate and balanced information about civil rights. However, we are increasingly troubled by the quality of the Commission's reports, the Staff Director's decisions to not follow written policy or inform Commissioners of those decisions, and the recent decision of the Commission majority to formally lower standards even further. This briefing report is an example of the politicization of the Commission's work product that results when quality control standards are removed.

There is widespread legal and scientific consensus that affirmative action programs have helped and continue to help minorities enter the legal profession, and that these programs are legal. Professor Sander's 2004 article hypothesizing that affirmative action harms minorities by mismatching them with law schools they are unprepared for has been rejected by subsequent research. The American Bar Association Council's requirement that law schools demonstrate a commitment to diversity by legal race-conscious or race neutral means is to be applauded. We are proud of the success of affirmative action policies in diversifying the faces of our nation's lawyers and leaders, and hope the Commission will resume its mission and investigate the real barriers to more minorities entering the legal profession.

## Appendix

Commissioner Melendez and Commissioner Yaki submit the following one-sentence statements for insertion into the findings and recommendations in the report on Affirmative Action in Law Schools.

This submission is made pursuant to the Commission's new policy on April 13, 2007 providing for separate votes on each finding and recommendation and that, "Those items receiving a majority vote would be included in the report with a vote tally and a sentence explaining any opposition vote for that item." These submissions replace all one-sentence statements in the draft report that Commission staff suggested.

### Finding 1.

Given that Sander's 2004 article has been resoundingly rejected by the social science community as flawed in its methods and conclusions, we find it improper to make this article the focus of a report that purports to give authoritative guidance on the broad topic of "Affirmative Action in American Law Schools."

### Finding 2

The Commission majority's failure to disclose that the "others" who disagree with Sander's assertions include a substantial majority of the social science research community who have reviewed the data is extremely misleading and gives the false impression that Sander's conclusions are credible or in need of further exploration.

### Finding 3

While there may be some potential benefits to further information disclosure, this finding is biased insofar as it disregards the potential negative effects (e.g. due to stereotype threat) of flooding law school applicants with information about their risks of failure.

### Finding 4

It is misleading to suggest that the focus of social science research should be on discredited claims that race conscious admissions policies harm minorities rather than the real barriers to minorities entering the legal profession—inadequate early education opportunities, financing difficulties, and discrimination.

### Finding 5

In the majority's Findings 5-7, we object to raising these facts in a context that casts doubt instead of praising the ABA Council's standards for diversifying law schools in full accordance with the law.

### Finding 6

The plain language of Standard 212 and its Interpretations allow law schools flexible means of demonstrating its commitment to diversity besides the use of racial preferences.

### Finding 7

Similar to our comments to Recommendation 7, we disagree with the majority's inclusion of a finding that might suggest some impropriety with the notion that diversity is an essential goal for law schools or that the ABA's Council should not work to increase diversity among its membership.

#### Recommendation 1

As with Finding 4, above, we think it is grossly misleading for the majority to suggest that the focus of social science research should be on already discredited claims that race conscious admissions policies harm minorities, rather than the real barriers to minorities entering the legal profession—inadequate early education opportunities, financing difficulties, and discrimination.

#### Recommendation 2

Since flooding minority law school students with information warning them of statistical risks of failure could intimidate applicants, or trigger what researchers have called “stereotype threat,” we think the more prudent course is to recommend each law school evaluate whether its applicant pool and students need more information rather than calling for all schools to blankly release all such information.

#### Recommendation 3

In addition to our comments to Recommendation 2 and noting that this essentially parrots Rep. King’s 2006 legislation (that overwhelming failed 337-83), we object to the Commission making any direct recommendations to Congress on a “briefing report” like this that involved a minimal record, no thorough background research, and even failed to follow all agency quality control procedures.

#### Recommendation 4

As noted in our comments to Recommendation 2, since flooding minority law school students with information warning them of statistical risks that they will fail could intimidate applicants, or trigger what researchers have called “stereotype threat,” we think the more prudent course is to recommend each law school evaluate whether its applicant pool and students need more information rather than calling for all schools to release all such information.

#### Recommendation 5

As noted in our comments to Recommendation 2, since flooding minority law school students with information warning them of statistical risks that they will fail could intimidate applicants, or trigger what researchers have called “stereotype threat,” we think the more prudent course is to recommend each law school evaluate whether its applicant pool and students need more information rather than calling for all schools to release all such information.

#### Recommendation 6

As noted in our comments to Finding 7, we strongly disagree with the majority’s notion that diversity is not essential for our country’s law schools and am shocked that the majority on the U.S. Civil Rights Commission would assert otherwise.

#### Recommendation 7

We think the ABA Council’s Standard 212 and its Interpretations are perfectly clear that all laws must be followed in their progress toward greater diversity.

## Dissent of Commissioner Michael J. Yaki

Over fifty years ago, in the throes of violence, lynching, and oppression of blacks of this country, voices began to rise above the tumult to begin the slow process of lifting our country out of the depths of Jim Crow and into the bright sunshine of liberty conceived by the Founders over eight-score years before. Voices such as a young Martin Luther King, Jr., Rosa Parks, Thurgood Marshall, Constance Baker Motley and, surprisingly, a unanimous Supreme Court. Voices that said that the Constitution and the Bill of Rights applied equally to all Americans, regardless of race or color.

One such voice, the U.S. Commission on Civil Rights, was appointed fifty years ago this year with the bipartisan effort of a Republican President and a Democratic Congress. The Commission was charged with investigating and recommending changes to the government that would lead to the fuller inclusion and true emancipation and integration of minorities into society.

I need not go into the glorious history of the Commission during its halcyon days in the late 50's and early 60's. Suffice it to say that through bipartisan efforts and cooperation, the Commission's studies and reports, based upon thousands of hours of investigation, document analysis, and the work of hundreds of young men and women, became the foundation against which the fulcrum of justice would be levered against a status quo that for centuries refused to be moved.

Fifty years later, we again have a Republican President and a Democratic Congress. But that is about the only similarity between the state of civil rights and the Civil Rights Commission that exists today.

The Commission today is a pale shadow of its former self. And though one can attribute mission fatigue to the lack of appropriations, staff, and budget, there is something more insidious happening that has perverted and subverted its original mission. Internecine fighting amongst Commissioners, clashes with Congress, and a loss of the true focus of the Commission is the rule, rather than the exception.

The Commission today is dominated by an ideology that rejects the fundamental premise that the America today, though far different than 50 years ago, is still an America where the promise of true equality remains unfulfilled for many people of color. The Commission today is guided by so-called "first principles" that twist the notion of a color-blind society into a color-blind test for all segments of American society, regardless of past and current discrimination. This ideology seeks to create and preserve a status quo locked in the 1990s, declaring "victory" over discrimination and, while in pursuit of color-blindness at all levels, turns a blind eye to the continuing need to combat and remedy past, present, and future discrimination.

Today we have a majority on the Commission which, astonishingly, sat on the sidelines and sat on its hands during the bipartisan and near-unanimous reauthorization of the Voting Rights Act. A Commission majority that blindly backs Bush Administration proposals to weaken Title IX's impact on young women in sports. A Commission majority which twists the definition of the native peoples of this country to exclude Hawaiians and, in fact, moves swiftly (unlike its movements during the Voting Rights Act debate in Congress) to intervene in Congressional legislation.

The Commission majority, in fact, is so eager to put blinders on any Commission apparatus that could lead to a progressive civil rights agenda that, in a single stroke, it wiped clean the institutional memory of the civil rights movement by summarily removing men and women who have fought and struggled for civil rights in their lifetimes from our State Advisory Committees, the local eyes and ears of the Commission. Like a computer virus, at the same time it repopulated the SACS with clones, political hacks, and singularly and sometimes spectacularly unqualified individuals bound by nothing more than their shared ideology with the Commission majority.

The majority report on Affirmative Action in American Law Schools typifies and exemplifies this flawed ideology in practice. I will not repeat the argument made in the joint Dissent of myself and Commissioner Melendez. Suffice it to say that the zeal with which the majority has pursued the elimination of all race-conscious remedies, programs, and tools is unparalleled in the history of the Commission.

By relying on flawed, peer-rejected data, the majority's reasoning clings by a faulty thread to Professor Sander's conclusions regarding admission of African Americans into law schools. The idea that minority students should be "warned" through mandatory disclosures by law schools that they face a tougher road filled with failure is the exactly the type of stereotype threat denounced by serious social science scholars of today. To follow the reasoning of the majority, we might as well hang a sign saying "blacks and other minorities need not apply" on the doorways of Yale, Harvard, and other elite schools. If this were the mind-set fifty years ago, we would still have segregated universities, high schools, and elementary schools. To follow the reasoning of the majority to its logical conclusion, separate is not inherently unequal, and so long as blacks and other minorities find admission and success at some other institution the resegregation of elite universities is not, in itself, unconstitutional.<sup>269</sup>

In the midst of this and other arguments regarding the appropriate nature of race-conscious remedies and programs, there yet remain important areas for the Commission to explore that go unheeded by the majority. And these areas point out the fact, which the majority refuses to admit, that race is still a flashpoint in American society. Race, unfortunately, still matters, the majority's protestations notwithstanding. And unless we continue to confront the issues of race and point the way to progress forward, we will continue to engage in endless and circular, and ultimately irrelevant, debates over the remedies of the past.

Earlier this year, a young Asian American wrote a piece for an Asian-American oriented periodical entitled "Why I hate Blacks." There are still towns in the southern part of our country that are de facto segregated, and the news reports that the practice of segregated proms still exists in high schools in the deep south. The Commission has yet to fully study and investigate the "newer" minority groups, such as the Hispanic population that, like the Asian American population, has many subgroups from different countries of origin and culture in Central and South America, to understand the nature of invidious discrimination that exists against these Americans. Congress moves to

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<sup>269</sup> Apparently, the dissents for this briefing report authored by Commissioner Melendez, jointly and separately, caused enough seismic tremors within the Commission majority that they took the unusual step of "reopening" the record to allow themselves two full months to respond to our critiques. I am sure that there will be a plethora of polemic-filled self-justifications against all the criticisms mentioned herein. But I would expect nothing less. It is worth pointing out that two months is often more time than we have as Commissioners to respond to the final, change-filled drafts of briefing reports.



reauthorize the Americans with Disabilities Act, and this Commission is a silent, and irrelevant, participant in the proceedings.

Our mission needs to be defined to include discrimination against gay, lesbian, and transgender citizens. This glaring omission of civil rights jurisdiction for these individuals is a shame to our nation. The Commission investigated discrimination against blacks before the Civil Rights Act of 1964 was passed, before the Voting Rights Act was passed. The Commission issued a report on discrimination against the disabled prior to the passage of the ADA. Do we need to wait for Congressional authorization (which I would argue exists already with the new Hate Crimes Act passed by the House of Representatives this year) to investigate and issue a report on citizens whose lives and careers are the subject of daily abuse, ridicule, and assault?

Our mission needs to be expanded to include the assault on civil liberties that can be used to identify and target discrete minority populations in our country. Again, I hear from my colleagues that it is “beyond our jurisdiction” but the fact is that the advances of technology over the past half-century are so far beyond the predictive powers of legislative foresight that the Commission should act to assert jurisdiction to investigate and protect its citizens from such massive intrusions into their daily lives.

The Commission, as a concept, is as vital and as viable today as it was fifty years ago.

Herbert Brownell, President Eisenhower's Attorney General, summed up the scope of the Commission best when he testified before Congress on the creation of the Commission 48 years ago this February in stating that:

"Above and beyond the need for improving the legal remedies for dealing with specific civil rights violations is the need for greater knowledge and understanding of all of the complex problems involved . . . . [T]here is no agency anywhere in the executive branch of the federal government with authority to investigate general allegations of civil rights."

As Attorney General Brownell stated, the Commission can and should go where Congress and its power of subpoena, where state and local governments and their investigative powers, subject to political deals and political temporizing, often can and will not go. The independence of this Commission can and should be its strength in terms of pursuing the truth about the state of civil rights in this country. A renewed and invigorated Commission can and should be unafraid dealing with the tough challenges and issues of today, not devoted to deconstructing and reconceiving the past as this majority does today.

If we continue, however, unchecked down the path led by the majority, then our mission, our relevance, our necessity, becomes an obsolete relic of the past, a dinosaur, whose purpose and mission have long since expired. Despite this, I remain firmly committed to the Commission and its original ideals. I believe that those ideals are the lodestar for our continued efforts, and will, with luck and the continued good graces of Congress, survive far beyond the terms of the current Commission.

In my first month as a Commission, two years ago, the then Republican-controlled Congress held oversight hearings on the future of the Commission. In my testimony I stated:

“As an independent agency, the Commission can venture where Department Secretaries and Administrative heads fear to tread – it can question the efficacy of existing government programs and policies. The targets of discrimination, the tools used to discriminate may have changed or evolved. But the fact that discrimination remains cannot be seriously disputed. And thus the need for the Commission remains.”

Two years, later, despite all that has happened, I still believe in the Commission. But I believe in a Commission of vitality, of purpose, in a Commission whose original intent was to pave the way forward, not sweep clean the path behind.

Joint Response to Commissioners Michael Yaki and Arlan D. Melendez  
*Chairman Gerald A. Reynolds, Vice Chair Abigail N. Thernstrom, and Commissioners  
Jennifer C. Braceras, Gail I. Heriot, Peter N. Kirsanow, and Ashley L. Taylor, Jr.*

In their joint dissent to the findings and recommendations of the briefing report on affirmative action in law schools, Commissioners Michael Yaki and Arlan Melendez devote a significant portion of their statement to spurious *ad hominem* attacks, misrepresentations and unfounded allegations. As the Commission majority, we reject these attacks as unworthy of the station of a federal Commissioner. Moreover, we believe that the dissenting Commissioners' repeated use of personal aspersions and falsehoods requires that we take the unusual step of preparing a formal response. While we disagree with virtually all matters of substance that the dissenters convey, we limit ourselves to addressing the misrepresentations with regard to Commission procedures and the groundless personal attacks contained in the joint dissent.

## **I. Quality and Objectivity Controls**

As an initial matter, the quality and oversight of Commission publications has improved significantly since December 2004. During this period there has been a marked strengthening of quality control procedures – a strengthening that Commission staff has worked commendably to effect. By way of demonstrating recent improvements in quality control, it should be noted that, prior to the December 2004 arrival of new leadership at the Commission, practices and procedures were openly abused and the views of minority members were either excluded or ignored. Commissioners were not provided an opportunity to review or provide input on reports until they were publicly disseminated; reports were routinely posted on the Agency's website prior to any opportunity for commissioner dissent; and information quality guidelines required by federal law were ignored.

In stark contrast, since the new leadership assumed office in December 2004, the Commission has implemented an extraordinary range of quality and objectivity controls, including:

- Requiring the project office responsible for each report to review and consider materials that present varied and opposing views, opinions, and perspectives, and certify that they have done so;
- Requiring staff briefings to attain numerical balance of speakers at the briefing itself whenever this balance can be achieved in light of the subject of the briefing and the Commission's ability to locate topical speakers and requiring formal certification that this has occurred;
- Providing a process with multiple opportunities for Commissioner input prior to publication, along with formal standards under which Commissioner comments are reviewed;
- The creation of information quality guidelines as required by the Office of Management and Budget to comport with their Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies;
- Requiring certification by the Staff Director that input was sought from program staff, regional offices, State Advisory Committee members and others.

Furthermore, additional controls have been put into place on a going forward basis. In response to issues raised by the GAO, the Staff Director retained Peace Corps Inspector General David Kotz to assist in evaluating Commission policies, with an eye toward ensuring that the Commission had indeed established appropriate quality and objectivity controls pursuant to the GAO's May 2006 report. Working with the Inspector General, a new iteration of AI 1-6 – the internal Commission rule governing the development of Commission projects and the drafting and review of various types of national reports – was developed. This version of AI 1-6, issued in February 2007, included additional quality and objectivity controls such as the use of an external reviewer and outreach to Commissioners, national and regional office staff, and external groups in the program planning process.

Despite these actions, Commissioners Yaki and Melendez have characterized these strong quality and objectivity improvements as a “rollback.” This characterization borders on Orwellian double-speak. Under the prior administration the rights of Commissioners in the minority were flagrantly abused and the Commission operated in an opaque fashion. The steps outlined above ensure a process that is fair to all Commissioners and seeks to prevent the kind of abuse that existed before the current Staff Director arrived. Any claim of a “rollback” is false.

In a similar fashion, the dissenters seek to create the misimpression that the Staff Director improperly influences the Commission's reports when they assert that the Staff Director was the sole reviewer of whether certain reports met quality or research standards. Although staffing levels have fluctuated, and the Staff Director may at times have had to personally take on briefing tasks normally assigned to subordinates, the Commissioners have the ultimate role in approving the work product, and do so with quality and research standards in mind. The dissenters' true objection is not the process of review, but that the findings and recommendations adopted by the majority do not reflect the views of the minority.

## **II. Obvious Inapplicability of Certain Procedures to Briefing Reports**

Commissioners Yaki and Melendez spend much of their dissent misrepresenting the Commission's decision to provide different levels of control for briefing reports and for more formal national reports. Specifically, they fail to acknowledge that the Commission carefully considered and publicly rejected their position on this issue. Commissioners Yaki and Melendez had requested that all reports, including briefing reports, be subject to the full range of procedures used in year-long national statutory reports.<sup>270</sup> The Commission rejected the dissenters' proposal because it was unworkable and, frankly, nonsensical. As described more fully below, there is absolutely no basis for the panoply of procedures that the dissenters proposed for briefing reports, unless their sole purpose is to delay and obstruct staff work on important agency assignments. It is not surprising that the Commission rejected the dissenters' proposal. What is surprising is that Commissioners Yaki and Melendez misrepresent the process so shamelessly.

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<sup>270</sup> Despite his current position, the benefits of the less formal, more fluid nature of briefings were previously recognized by Commissioner Yaki, as was the need for less elaborate procedures. He noted, “I like the briefings, I think they provide intellectual and civic discussion of important issues, number one. Number two, a lot of this could be solved if we didn't have this insanely cumbersome mini-national report process for briefing reports, where that has a habit of consuming staff time while they're busy also trying to prepare for briefings in the future.” U.S. Commission on Civil Rights, Transcript of November 17, 2006 Commissioner Meeting, p. 80.

The dissenters specifically ignore the fact that the formal practices required by AI 1-6 for large statutory reports or reports based on hearings simply are not applicable to less formal briefings. In this regard, the dissenters identify three procedures under AI 1-6 that they claim should be applicable to briefings: i) detailed internal project planning; ii) the preparation of a discovery plan; and iii) project tracking. As set out below, the very nature of a briefing and the resulting briefing report reveals the practical inapplicability of much of AI 1-6 to such proceedings.

First, a requirement of a detailed internal project planning outline for briefings makes no sense whatsoever. Briefing reports are largely based on the testimony and written statements submitted by independent panelists, both resources that are not available in advance. To provide a comprehensive, advance project planning outline for this particular type of report would not be practicable, and, if done, would be baseless.

In a similar fashion, there is no basis for the creation of a discovery plan in order to hold briefings. As mentioned above, those making presentations at briefings appear voluntarily. The proceedings are not adversarial, and there is no basis or need to use any formal discovery procedures.

Finally, the dissenters claim that project tracking, a process intended for long term projects, should apply equally to briefings. In making this contention, the dissenters ignore that briefings are specifically meant to be a more rapid moving, flexible process as compared to the more rigorous and time-consuming hearings, and thus do not lend themselves to formal project tracking. In fact, project tracking has nothing to do with any of the content-related issues raised by the dissenters. Instead, project tracking was designed to provide the Staff Director with a tool to ensure timeliness of staff work – not quality or objectivity. The dissent exhibits a basic lack of understanding on this point.

### **III. The Staff Director Has Exhibited Complete Candor and Diligence Regarding Quality Controls and Procedures Governing Commission Work Product**

In spite of voluminous evidence to the contrary, the dissenters paint a disingenuous picture of the actions of the majority of Commissioners and of the Staff Director regarding Commission report procedures. The questions regarding briefing procedures, and the differences in said procedures as compared to more formal reports, were discussed often.<sup>271</sup> The dissenters fail to acknowledge that the Commission voted, after a working group was assembled upon the Staff Director's recommendation, to adopt briefing procedures in line with the Staff Director's understanding of the applicable internal administrative instruction, AI 1-6 on April 13, 2007. They claim falsely that they urged the Staff Director and others to "fully enforce" the agency's quality control procedures when they were in fact urging the Commission to reconsider the dissenters' previously rejected position. No one who was at

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<sup>271</sup> See U.S. Commission on Civil Rights, Transcript of March 9, 2007 Commissioner Meeting, p. 68. Commissioner Taylor: "[W]e can't, given our resources and our time, associate with every briefing all of the procedural safeguards that get to your point and provide you ... with what you see as the tools to have a rich discussion." See also U.S. Commission on Civil Rights, Transcript of March 9, 2007 Commissioner Meeting, p. 53. Commissioner Bracer: "One [question] is what are the front-end procedures leading up to the briefing. In other words, what type of information do Commissioners get ahead of time; what type of input do they have ahead of time; what type of discovery is done ahead of time; and, if any, what type of literature review is done ahead of time ... The back-end questions have to do with what type of reviews take place at the staff level, affected agency review and those types of things."

the Commission at the time that the applicable rules were adopted has agreed with the dissenters' revisionist history, and it cannot be credibly argued that the Commission's procedures were not fully discussed.

In complete disregard for the facts, Commissioners Yaki and Melendez brazenly charge that the Staff Director exhibited a lack of candor on this issue. For example, the dissenting Commissioners assert that the Staff Director "unilaterally decided to suspend" the portions of AI 1-6 requiring project planning, a discovery plan, and project tracking; however, in reality, the Staff Director never viewed these steps as part of the established briefing report process and neither did a majority of the Commissioners.<sup>272</sup> The Staff Director has in fact been fully forthcoming about his understanding of the applicable internal rules. Indeed, the Staff Director's interpretation was openly discussed by the dissenters as early as October 2006.<sup>273</sup> Given this full, open and public discussion, the dissenters' charges of nondisclosure are disingenuous in the extreme. The basis for the present allegations seems to rest on the hard truth that the dissenters' position was publicly rejected by majority vote.

Of all the dissenters' reckless charges, however, none can match the allegation that the Staff Director was not candid about this process in his testimony and communications with Congress. This contention is both extremely serious and wholly without merit. As acknowledged in the joint dissent, the issue of what procedures to apply to briefing reports was discussed in open session among the Commissioners and was raised with the Inspector General.<sup>274</sup> That is to say, the dispute between the dissenters and the majority of the Commissioners was open and public. There is little doubt that the nature of the dispute was known to Congress prior to the Staff Director's testimony on March 29, 2007.

Indeed, in his testimony before a Congressional subcommittee, the Staff Director openly discussed the issue and answered all questions honestly and candidly. In fact, at one point he agreed with Commissioner Melendez about the need for formal written procedures on briefings. The Staff Director explained, "[i]t [the lack of a written procedure for briefing reports] is a legitimate concern. It is a concern that I share and that I have expressed from time to time with the Commission. The issue has been referred to a commissioner working group which we have been working with since November to try to come up with resolution on these questions. Now we do have a number of

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<sup>272</sup> See U.S. Commission on Civil Rights, Transcript of October 6, 2006 Commissioner Meeting, p. 25. Commissioner Braceras: "When the new leadership at this Commission was appointed, one of the first thing we did was establish a working group on reform to address some of the procedural issues, and rules that you cite to are basically the rules that the working group came up with to deal with the Commissioner input and time lines for reports coming out of *hearings*. And so I agree with the Staff Director that they don't apply to this particular situation [briefings] (emphasis added)." See also U.S. Commission on Civil Rights, Transcript of May 13, 2005 Commissioner Meeting, p. 181. Commissioner Braceras: "I don't think the Braceras Plan [processes used for certain national reports, such as the creation of a discovery plan, proposed by Commissioner Braceras] kicks in with a *briefing* except to the extent that they would come back to us and we would have input into the list of speakers at the briefing ... " Commissioner Yaki: "Okay."

<sup>273</sup> See U.S. Commission on Civil Rights, Transcript of October 6, 2006 Commissioner Meeting, p. 24. Commissioner Melendez: "I ask the question of whether or not even [AI 1-6] applied to [briefing reports]. I believe that Staff Director Marcus said that he did not feel that that was applicable to the 1.6, Section 14 and all of those places that basically applied, the time frames and all of those different things." In their joint dissent, Commissioners Yaki and Melendez acknowledge that they were aware of this interpretation as early as July of 2006. See Joint Dissent at p. 206, n. 263.

<sup>274</sup> Joint Dissent at pp. 204-05, 207.

procedures with respect to briefing[s] and briefing reports, but there are still some areas of ambiguity ... where we don't have clarity on what should be done."<sup>275</sup>

Given the open nature of the dispute between Commissioners and the fact that briefing procedures were discussed during the Congressional hearing in question, it is beyond irresponsible to contend that the Staff Director was less than candid. This allegation is baseless and seeks to convert a difference of policy into a question of personal integrity. It has no place in a report on affirmative action in law schools or anywhere else.

#### **IV. Conclusion**

Looking past the vitriol, the dissenters' most salient point seems simply to be that the majority of the Commissioners rejected the internal procedures that they recommended, including a slew of very minor procedural issues that the dissenters have blown out of proportion and that do not merit discussion here. The key policies relating to the procedures governing briefing reports have been discussed deliberatively and transparently in a manner that we believe strengthens agency procedures. They were designed to improve Commission processes and products in light of current fiscal and staffing realities, were debated in good faith, and were approved by a majority vote amongst the Commissioners. That the dissenting Commissioners are unhappy that their views did not prevail is understandable; that their reaction would be an unbridled attack on the Staff Director and on the valuable work product generated by Commission staff is disappointing and counterproductive.

Many of us were Commissioners at a time when minority members of the Commission were given little opportunity to review or provide input into Commission reports. Refreshingly, the Staff Director has worked in a cooperative fashion to open up the process. It is both sad and ironic that the result has been an unjustified personal attack based on half-truths and distortions. We reject these accusations and express our deep disappoint with Commissioners Yaki and Melendez for their repeated publication of misrepresentations and false personal aspersions. Moreover, we wish to express our continued confidence in the professionalism, truthfulness and integrity of the Staff Director and the fair and open process he has promoted.

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<sup>275</sup> U.S. House of Representatives, Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, *Appropriations for 2008*, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2007, Hearing Transcript p. 95.