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## **Affirmative Action Backfires**

By Gail Heriot

Three years ago, UCLA law professor Richard Sander published an explosive, fact-based study of the consequences of affirmative action in American law schools in the *Stanford Law Review*. Most of his findings were grim, and they caused dismay among many of the champions of affirmative action — and indeed, among those who were not.

Easily the most startling conclusion of his research: Mr. Sander calculated that there are fewer black attorneys today than there would have been if law schools had practiced color-blind admissions — about 7.9% fewer by his reckoning. He identified the culprit as the practice of admitting minority students to schools for which they are inadequately prepared. In essence, they have been “matched” to the wrong school.

No one claims the findings in Mr. Sander’s study, “A Systemic Analysis of Affirmative Action in American Law Schools,” are the last word on the subject.

Although so far his work has held up to scrutiny at least as well as that of his critics, all fair-minded scholars agree that more research is necessary before the “mismatch thesis” can be definitively accepted or rejected.

Unfortunately, fair-minded scholars are hard to come by when the issue is affirmative action. Some of the same people who argue Mr. Sander’s data are inconclusive are now actively trying to prevent him from conducting follow-up research that might yield definitive answers. If racial preferences really are causing more harm than good, they apparently don’t want you — or anyone else — to know.

Take William Kidder, a University of California staff advisor and co-author of a frequently cited attack of Sander’s study. When Mr. Sander and his co-investigators sought bar passage data from the State Bar of California that would allow analysis by race, Mr. Kidder passionately argued that access should be denied, because disclosure “risks stigmatizing African American attorneys.” At the same time, the Society of American Law Teachers, which leans so heavily to the left it risks falling over sideways, gleefully warned that the state bar would be sued if it cooperated with Mr. Sander.

Sadly, the State Bar’s Committee of Bar Examiners caved under the pressure. The committee members didn’t formally explain their decision to deny Mr. Sander’s request for this data (in which no names would be disclosed), but the root cause is clear: Over the last 40 years, many distinguished citizens — university presidents, judges, philanthropists and other leaders — have built their reputations on their support for race-based admissions. Ordinary citizens have found secure jobs as part of the resulting diversity bureaucracy.

If the policy is not working, they, too, don’t want anyone to know.

The U.S. Commission on Civil Rights hopes that it can persuade the State Bar to reconsider. Its soon-to-

be released report on affirmative action in law schools specifically calls for state bar authorities to cooperate with qualified scholars studying the mismatch issue. The recommendation is modest. The commission doesn't claim that Mr. Sander is right or his critics wrong. It simply seeks to encourage and facilitate important research.

The Commission's deeper purpose is to remind those who support and administer affirmative action policies that good intentions are not enough. Consequences also matter. And conscious, deliberately chosen ignorance is not a good-faith option.

Mr. Sander's original article noted that when elite law schools lower their academic standards in order to admit a more racially diverse class, schools one or two tiers down feel they must do the same. As a result, there is now a serious gap in academic credentials between minority and non-minority law students across the pecking order, with the average black student's academic index more than two standard deviations below that of his average white classmate.

Not surprisingly, such a gap leads to problems. Students who attend schools where their academic credentials are substantially below those of 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. As a result, in elite law schools, 51.6% of black students had first-year grade point averages in the bottom 10% of their class as opposed to only 5.6% of white students. Nearly identical performance gaps existed at law schools at all levels. This much is uncontroversial.

Supporters of race-based admissions argue that, despite the likelihood of poor grades, minority students are still better off accepting the benefit of a

preference and graduating from a more prestigious school. But Mr. Sander's research suggests that just the opposite may be true — that law students, no matter what their race, may learn less, not more, when they enroll in schools for which they are not academically prepared. Students who could have performed well at less competitive schools may end up lost and demoralized. As a result, they may fail the bar.

Specifically, Mr. Sander found that when black and white students with similar academic credentials compete against each other at the same school, they earn about the same grades. Similarly, when black and white students with similar grades from the same tier law school take the bar examination, they pass at about the same rate.

Yet, paradoxically, black students as a whole have dramatically lower bar passage rates than white students with similar credentials. Something is wrong.

The Sander study argued that the most plausible explanation is that, as a result of affirmative action, black and white students with similar credentials are not attending the same schools. The white students are more 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. They are learning, while their minority peers are struggling at more elite schools.

Mr. Sander calculated that if law schools were to use color-blind admissions policies, fewer black law students would be admitted to law schools (3,182 students instead of 3,706), but since those who were admitted would be attending schools where they have 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 (1,859 vs. 1,567) and more would eventually pass the bar (2,150 vs. 1,981) than under the current system of race preferences. Obviously, these figures are just approximations, but they are troubling nonetheless.

Mr. Sander has his critics — some thoughtful, some just strident — but so far none has offered a plausible alternative explanation for the data. Of course, Mr. Sander doesn't need to be proven 100% correct for his research to be devastating news for affirmative-action supporters.

Suppose the consequences of race-based admissions turn out to be a wash — neither increasing nor decreasing the number of minority attorneys. In that case, few people would think it worth the costs, not least among them the human costs that result from the failure of the supposed beneficiaries to graduate and pass the bar.

Under current practices, only 45% of blacks who enter law school pass the bar on their first attempt as opposed to over 78% of whites. Even after multiple tries, only 57% of blacks succeed. The rest are often saddled with student debt, routinely running as high as \$160,000, not counting undergraduate debt. How great an increase in the number of black attorneys is needed to justify these costs?

The most important other recommendation of the Civil Rights Commission is a call for transparency. As a matter of consumer fairness, law school applicants — regardless of race — need to know the statistical likelihood that someone with their academic credentials will successfully graduate and pass the bar. Once informed, they can better decide whether to undertake the risk of attending that particular school, or any law school at all. If law schools are unwilling to undertake this simple reform, it should be mandated by law.

Under current practices, law school applicants are at the mercy of admissions officers for that information; it is almost never provided except on a class-wide basis where success rates are positively misleading. Minority students whose academic credentials are substantially below their average classmates are lulled into believing that they are just as likely to graduate and pass the bar. When they don't, they may be stuck

with the bills, not to mention the loss of several years of their lives.

The problem is that the admissions officer's job is to enroll students, not to draw the risks of failure to their attention. Indeed, in some cases, the officer may be frantic to enroll minority students in order to comply with the stringent new diversity standards of the American Bar Association Council on Legal Education and Admissions to the Bar. As the federal government's accrediting agency for law schools, the ABA Council determines whether a law school will be eligible for the federal student-loan program. The law school that fails to satisfy its diversity requirements does so at its peril — as a number of law school deans can amply attest.

Decades of law students have relied upon the good faith of law school officials to tell them what they needed to know. For the 43% of black law students who never became lawyers, maybe that reliance was misplaced.

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