A Line-by-Line Analysis of the Harris-Allen op-ed in the National Law Journal

Harris-Allen text	The facts
1. Richard Sander of the University of California at Los Angeles School of Law asserts that affirmative action in law schools hurts black law students because it puts them in schools where their credentials are below the median; consequently, they cannot academically compete. Sander claims to have empirically proven this "mismatch thesis," but his findings have been contested.	1. There are 3 errors here: 1a. Just to be clear, the mismatch theory doesn't say black students can't compete; it says that any student (of any race) whose credentials are far below those of law school classmates tends to learn less than she would at a school where her credentials were closer to the median. When one adjusts for the mismatch effect, blacks achieve the same as everyone else. 1b. Sander has never claimed he has "empirically proven" the mismatch; it's not a scientific way of speaking. Scientists and social scientists generally speak instead of theories being strongly supported or weakly supported by evidence.
2. Some researchers have documented a "reverse mismatch effect": Black law students attending higher-status schools do better, not worse, in terms of bar passage rates compared to counterparts attending lower-prestige schools. (This is true of all law students — higher expectations tend to improve student learning.)	2a. Those who find a "reverse mismatch" do so by ignoring serious selection bias problems and leaving law school grades out of their explanatory models, but it's true there's genuine controversy over the size and extent of the mismatch effect. 2b. If Harris & Allen believe their statement that "higher expectations tend to improve student learning", then they should be leading the charge for the proposed study of California data, since that would be ideal data for proving their claim.
3. Others challenge Sander's findings because he does not pose a hypothesis and determine whether the evidence supports it, as social scientists do. Instead, he asserts conclusions and then scours for evidence to support his argument, as lawyers do.	3. This is a personal attack with no basis in reality. Consider, for example, Sander's most recent article on the mismatch effect, "The Racial Paradox of the Corporate Law Firm." The entire article is organized around articulating 5 distinct theories, considering all the available data, and evaluating each theory in terms of the evidence. Professor Ken Dau-Schmidt of Indiana University, who was the commentator at the July 2006 Law & Society meetings at a session that included Sander's paper, singled out the degree to which Sander took all the alternative hypotheses seriously and did not argue beyond the available evidence. This is typical of Sander's work.
4. Because [Sander] publishes without peer review — unlike social scientists — serious questions plague his research.	4. Another false personal attack. Sander's *Systemic Analysis of Affirmative Action* article – the seminal piece in the current debate over

	mismatch effects – was actually peer-reviewed at two journals, the *Stanford Law Review* and the *New York University Law Review*, both of which asked prominent economists to assess the work. Indeed, of the 20-odd articles debating Sander's mismatch effect that appeared in 2004, 2005, and 2006, it appears that Sander's piece was the ***only*** one to be peer-reviewed by social scientists. This Harris-Allen attack is thus particularly ironic.
5. Sander now says there are data — the bar exam scores of blacks and Latinos in California — that can help resolve the debate.	5. Two inaccuracies here. (a) The relevant data is not just that of blacks and Latinos, but all bar-takers in the California data. Again, the mismatch theory contends that anyone whose credentials are well below those of her classmates can be affected. Many schools, for example, give preferences to older white students, and there is strong evidence that these students are affected by mismatch. (b) It's not just "Sander" who says the data can resolve the debate. It's also: Professor William Henderson, Indiana U.; Professor Vik Amar, UC Davis; Professor Doug Williams, chair of economics, University of the South; and Dr. Stephen Klein, psychometrician recently retired from RAND Corporation. These four joined with Sander in making the proposal to study the data. They have proposed a detailed study that has been endorsed by dozens of other empirical scholars, legal academics, law school deans, California lawyers, and the United States Civil Rights Commission.
6. Thus far, the bar examiners have denied his request.	6. A committee of the California Bar recommended in late June, in an unusual divided vote, that the bar study proposal not be approved. Their reasons, and a letter from Vik Amar and others questioning those reasons, can be found [here]. The Bar's Board of Governors is taking up the issue on November 8th, 2007.
7. Sander asks: Why? Isn't it perfectly reasonable to get more data? Before we board the train, we must ask where it's going. Sander says the information will help because the bar scores — versus readily available bar passage rates	7. Two misconceptions here. (a) This is not primarily an issue of bar scores versus bar passage rate, but of aggregated data versus individual-level data. Currently, the only data made available by the bar is aggregate pass rates by racial group. It would be highly relevant and

— "are a measure of what law graduates have actually learned; this allows one to study not only how the mismatch might affect bar passage but also how it might affect actual learning."	useful to test the group's various hypotheses using individual-level pass-fail outcomes, and in fact the team plans to do this. But actual scores contain far more information than simple pass-fail results. Any social scientists understands this. If one wants to study the relation between, say, weight and cholesterol, one can learn much more by knowing actual weights and cholesterol levels rather than simply knowing whether someone's weight is over or under 170 lbs., and whether their cholesterol is over or under 200. (b) The quote is intended to highlight that there are two issues in the proposed study. One issue is whether the mismatch is partly responsible for the dramatically lower bar passage rates of blacks and Hispanics on the California Bar. A second issue is whether "mismatched" students learn less than other, similar students who aren't mismatched. This necessarily requires comparing how much similar students are learning at different schools. The bar exam is very much like a universal exit exam for law graduates; it may not be perfect, but it is certainly "a" measure of what law graduates have learned.
8. Not true. This is his assumption — not proven fact. What the bar exam tests and what is learned in law school are not the same.	8. This is a misleading rhetorical move. As noted above, "proof" is a lawyer term, not a term social scientists much use. The question is whether bar scores are a reasonable measure of learning for the purposes of this study. Read on.
9. First, the bar exam is a pass/fail test. Unlike in law school, there's no incentive to get an A.	9. The argument here seems to be that people study "just enough" to pass, and therefore bar scores aren't really spread out as much as learning is spread out, but are instead clumped just above the "pass" threshold. (Note that if this were true, it would make it harder, not easier, to show that mismatch effects occur.) It is easy to examine this idea with the data, and that data show it is not true. The correlation between bar scores and law school grades, for example, is extremely high (around .7), and the correlation is as high at the top of the grade distribution as at the bottom. Note that Harris and Allen cite no evidence whatever for their claim.
10. Second, the bar exam claims to determine minimum competency to practice law: It does not measure	10. Harris and Allen are confusing the legal purpose of the exam (to establish a base

relative learning in law school.	threshold for admission to the bar) with its psychometric properties. There is abundant evidence that the bar does measure relative learning in law school. First, note the very high (.7) correlation of law school grades and bar exam scores. Students who do well in college and ace the LSAT, but do poorly in law school, do worse on the bar exam than students with so-so entering credentials but stellar law school grades. How is that possible if the bar is not a measure of law school learning? Second, note that portions of the bar are cribbed directly from the core law school curriculm. The multistate portion of the bar exam, for example, has six subject areas: Torts, Contracts, Criminal Law, and Property, Constitutional Law and Evidence. If this is not a measure of law school learning, what would be?
11. Third, bar test scores are a product of learning in bar-examination cram courses as much as actual learning in law school.	11. This is demonstrably false. Psychometricians have done careful studies that collect systematic information on the credentials, law school grades, and law preparation activities of bar-takers. Although it's true that how one prepares for the bar has a statistically significant effect on outcomes (that is, bar prep courses are not irrelevant), their effect is dwarfed by the effect of law school grades. Law school performance is vastly more important than "bar-prep" courses.
12. Admitted to the bar are some people who never attended law school, but took and passed the bar exam. Some highly regarded legal scholars — those who teach law — have never taken the California bar exam; others initially did not pass.	12. This is equivalent to the argument that "some people smoke and live to be 100."
13. In fact, elite law schools (those with the highest passage rates) devote little effort to teaching what is tested on the bar exam.	13. Experts on bar exams say that the tests aim to test (a) legal reasoning skills, (b) analytic ability applied to legal issues, and (c) knowledge of legal rules. It is probably true that elite schools emphasize (a) and (b) and non-elite schools place somewhat more emphasis on (c). But the overlap between what all law schools try to teach and what the examiners try to measure is tremendous. Furthermore, if elite schools deemphasize legal rules in their curriculum, this could be a source

	of mismatch effects. If the study found that "mismatched" students did worse on the "multistate" but no worse on the "performance" exam, this would be an important and interesting finding, with implications for law school curricula.
14. How then can one categorically say bar exam score differentials reflect actual learning in law school? Shouldn't this hypothesis first be tested and demonstrated?	14. Our comments on points 9 through 13 are just the tip of the iceberg; there's a vast literature on the relation between law school learning and the bar exam, of which Harris and Allen seem to be totally ignorant.
15. Sander's repeated efforts to secure National Science Foundation funding for his project failed largely for this reason.	15. Multiple distortions in a single sentence. Five scholars, including Sander, sought NSF funding for the proposed California Bar study. After its initial review, NSF gave the authors a "revise and resubmit" request, which is reserved for stronger proposals. In the end, NSF did not fund the study, but it did not (and does not) state a specific reason. A majority of the outside reviewers strongly supported the study, often in the most glowing terms possible. If there was any recurrent reservation in the reviews, it was about the uncertainty of actually securing the California Bar's cooperation.
16. According to outside experts assigned to assess the project, the mismatch hypothesis that affirmative action academically harms black law students cannot reasonably be tested by analyzing the bar scores of black and Latino test takers. It's too big a leap from the data he wants to the conclusion he has reached.	16. Harris-Allen mischaracterize the study here, which is not limited to particular races. Only one of nine NSF reviewers suggested anything like this critique. A more typical comment of the outside reviewers was this comment from a self-identified affirmative action supporter: "I believe this is, on intellectual grounds, one of the strongest proposals I have review[ed] – either for NSF or for any funding agency. …The state hypotheses are logically deduced from extant theory and findings. The research design is thoughtful, careful, and appropriate to address these hypotheses. And the data sources will offer a goldmine of information with which to answer the questions raised throughout the proposal." Seven of the leading scholars in legal empiricism, including one prominent critic of the mismatch effect, endorsed our study. Harris & Allen ignore all of this. The full NSF reviews, critiques, and letters of support are all posted here: http://www.law.ucla.edu/sander/NSF/CABar.htm

17. There are also privacy concerns.	17. Absolutely false. The proposal to the Bar specifies that the bar's own experts will retain control of the data. No *individual data whatsoever* is released under this proposal.
18. The bar examiners turned down Sander because test takers provide racial and gender information on the understanding it will be used to determine whether the exam is fair, not for other purposes — like confirming the mismatch theory.	18. False again. (a) The California Bar has twice cooperated with outside studies, in some cases actually releasing individual pass-fail data by name (something not even remotely contemplated in this study). (b) The Bar has also done many internal research studies of phenomena other than the "fairness" of the exam.
19. Moreover, because so few black students matriculated in a given class at some schools, student identity could be discerned.	19. Absolutely false. The study would not report results by individual schools or individual classes. The smallest cohorts discussed in the study would contains at least dozens of cases (more likely hundreds). The Bar would review the study before its release to satisfy itself that no individual data can conceivably be inferred.
20. In fact, higher black failure rates on the bar exam are connected to testing differences being researched throughout the educational pipeline. (Think about the debate over testing mandated by No Child Left Behind.) Differences obtain among whites and Asians on the SAT (where some groups of Asians outscore whites in math) as well as among blacks and whites. Are these standardized test score differences related to classroom learning? While Sander has reached his conclusion, social science recognizes this as a question yet to be definitively resolved.	20. This comment is fairly incoherent, but two facts seem relevant. (a) The California bar exam is not simply a standardized test. One third is multiple choice, one third is essay, and one third is the "performance" test that California pioneered in the early 1980s to provide a more multi-dimensional assessment of legal skills. The study would make use of all three of these scores, separately and collectively, to assess learning. (b) Race has never been shown to be significantly related to outcomes on any of these tests, once law school performance and credentials are controlled for.
21. Fine. But if the mismatch hypothesis doesn't explain the racial gap in exam performancewhat does? One possibility is stereotype threat — the fear that one's performance will confirm prevailing negative stereotypes about one's social group — which has been well documented as a factor depressing academic performance. Sander's Sept. 26 *Los Angeles Times* commentary invites us to	21. Stereotype threat is an interesting theory, and the proposed study actually provides good opportunities to examine it. It should be noted, however, that the available evidence argues strongly against stereotype threat. If individual blacks, for example, perform worse because they think they are *expected* to perform worse, then they will underperform their grades and credentials. But dozens of studies have shown that this does not happen at all on bar exams, and

| "imagine." So consider this: Imagine that you are a law student whose social group is considered academically substandard and that the group's asserted inadequacies are continually discussed in the national press, among members of the faculty who teach you and among your classmates. What effect might this have on your academic performance? *Imagine indeed.* | happens very little in law school.

  It's good to imagine ideas. But it's not good to ignore evidence on the validity of one's ideas. It's even worse to try to shut down all inquiry by anyone. |