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HEADLINE: A mismatch effect?;
Affirmative action policies need closer study to see if they have a negative effect on minority law school students.

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BODY:

IMAGINE, for a moment, that a program designed to aid disadvantaged students might, instead, be seriously undermining their performance. Imagine that the schools administering the programs were told that the programs might be having this boomerang effect -- but that no one investigated further because the programs were so popular and the prospect of change was so politically controversial.

Now imagine that an agency had collected enough information on student performance that it might, by carefully studying or releasing the data, illuminate both the problem and the possible solutions. What should the agency do?

This is not a hypothetical question. The schools involved are dozens of law schools in California and elsewhere, and the program is the system of affirmative action that enables hundreds of minority law students to attend more elite institutions than their credentials alone would allow. Data from across the country suggest to some researchers that when law students attend schools where their credentials (including LSAT scores and college grades) are much lower than the median at the school, they actually learn less, are less likely to graduate and are nearly twice as likely to fail the bar exam than they would have been had they gone to less elite schools. This is known as the "mismatch effect."

The mismatch theory is controversial. One of us (**Sander)** has advanced it in the academic literature. The other (**Amar)** believes that while it raises substantial questions, it has not been empirically proved. Some dismiss the whole idea as nothing more than a politically motivated attack on affirmative action or, even worse, an attack on blacks and Latinos -- the main recipients of current preferences. Many rightly point out that definitive conclusions are difficult because the data available to researchers thus far have been limited in very important ways.

Still, certain facts are indisputable. Data from one selective California law school from 2005 show that students who received large preferences were 10 times as likely to fail the California bar as students who received no preference. After the passage of Proposition 209, which limited the use of racial preferences at California's public universities, in-state bar passage rates for blacks and Latinos went up relative to out-of-state bar passage rates. To the extent that students of color moved from UC schools to less elite ones (as seems likely), the post-209 experience is consistent with the mismatch theory.

In general, research shows that 50% of black law students end up in the bottom 10th of their class, and that they are more than twice as likely to drop out as white students. Only one in three black students who start law school graduate and pass the bar on their first attempt; most never become lawyers. How much of this might be attributable to the mismatch effect of affirmative action is still a matter of debate, but the problem cries out for attention.

A lot of legal scholars who focus on empirical work agree that the mismatch effect deserves serious study. A few weeks ago, the U.S. Commission on Civil Rights issued a 280-page report on these issues that came to the same conclusion.

The best data in the nation for studying any mismatch effect in law schools reside in the archives of the State Bar of California, the state agency that administers the bar exam and oversees the conduct of lawyers. Starting in the 1980s, the California bar has maintained careful records on the backgrounds of bar exam-takers and their performance on its tests. With this data, it is possible to compare how students with similar college grades and LSAT scores do on the bar when they've attended different law schools and experienced different types of legal education. It is also possible to more deeply compare the bar performance of minority students before and after Proposition 209 and use other careful techniques to test whether the mismatch effect exists.

Given the richness of the data and the intensity of interest in the mismatch issue, it was not surprising that a blue-ribbon panel of diverse scholars (including both of us) approached the bar with a detailed proposal to study its data, backed by full funding and letters of support from dozens of scholars, law school deans and public officials.

But although the California bar was initially enthusiastic, one of its committees recently rejected the study proposal. Its stated reasons are implausible; it expressed concern, for example, about disclosing confidential information; but the proposed study includes the bar's own in-house expert, thus mooting the need for any data release.

It seems more probable that the bar, like many law schools, is simply queasy about touching a delicate area. The Society of American Law Teachers captured this sentiment in a letter it sent the California bar, cautioning it against releasing the information because, it said, "SALT is concerned about the potential negative impacts upon minority bar applicants and attorneys" who "already face a variety of misperceptions about their qualifications." By this reasoning, no one should seriously attempt to get to the bottom of racial disparities in bar performance because the attempt itself would make more people aware of the disparities!

We know of no serious scholar who has denied, or reasonably could deny, that the study we're proposing would shed some important light on a vital public policy issue. It would not be the final word on mismatch theory, no doubt, but it would be an important step that would advance understanding of the subject. We hope the bar's board of governors, which oversees what is, after all, a public agency, will reconsider in the coming weeks and decide to make its make its information available for research.

A generation ago, the late U.S. Supreme Court Justice Harry Blackmun wrote in Regents of UC vs. Bakke, the famous UC Davis affirmative action case, that for society to get beyond race, the government must first take account of race. Last summer, Chief Justice John G. Roberts Jr. countered that the way to get beyond racial discrimination was for government to stop using race as a consideration. We suspect both justices would agree that however one feels about race-conscious school admissions policies, it is vital that we do our best to understand the effects of those policies, and doing that requires more, not less, analysis of real-world data.

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