

To: Gayle Murphy, Senior Executive for Admissions, Office of Admissions,
State Bar of California

From: Bill Kidder, Special Assistant to the Vice President -- Student Affairs,
University of California Office of the President

CC: Dean Rex Perschbacher, UC Davis School of Law (King Hall)
Dean Christopher Edley, UC Berkeley School of Law (Boalt Hall)
Chancellor & Dean Nell Jessup Newton, UC Hastings College of the Law
Dean Michael Schill, UCLA School of Law
Professor Richard Sander, UCLA School of Law

Re: **Proposed Bar Exam Study by Sander, Klein, Henderson & Williams and
Concerns about its Implications for UC Law School Graduates**

Date: January 19, 2007

In evaluating the bar examination data request from Richard Sander, Stephen Klein, William Henderson and Douglass Williams (“Sander et al.”) – and particularly the conditions under which the data would be made available to Sander et al. and potentially to other researchers – I hope the State Bar will consider the following concerns that, given the nature of the research design, weigh most heavily on graduates of University of California (UC) Law Schools.

While I have published criticism of Professor Sander’s claims about law school affirmative action, out of deference to academic freedom, I wish to make explicit at the outset that the concerns I express in this memorandum are much more narrowly focused on three issues: (1) a correctable but potentially significant shortcoming associated with the fact that less elite law schools have far higher rates of missing data, which indicates that the Sander et al. “matching/case control” study as it is currently conceived, may not accomplish its goals; (2) research design pitfalls in the Sander et al. proposal that implicate the data privacy assurances made to the UC Law Schools, and most acutely the small number of African American UC Law School graduates after Proposition 209; and (3) public fairness and impartiality concerns regarding who would be given access to the data requested by Sander et al., and what conditions would govern the release of such data.

In this memorandum, I make the following six points:

- The Sander et al. proposal risks significantly overstating findings of affirmative action “mismatch” due to a basic shortcoming in their research design. By including only data for bar exam candidates and excluding data from those who did not graduate from law school (often for academic reasons), calling this research a “matching” or “case control” study is empirically dubious when the data that is lost is clearly intertwined with variables of interest (performance in law school, eliteness of law school attended). For example, first-year attrition rates at ABA-accredited schools in California range from about 1% (e.g., UC Davis, UC Berkeley) to 30% (e.g., Golden Gate, Cal Western).

- The pledge to not identify individual law schools is of questionable utility as applied to the UCs. Almost any attempt to describe a UC Law School by “type” (eliteness, geographic location, class size, etc.) risks inadvertently identifying that law school.
- A plausible estimate of the number of African Americans likely to provide post-affirmative action data for the Sander et al. “natural experiment” is *13 for Boalt, 12 for Davis, and 16 at UCLA*, perhaps less. Such results would likely be of questionable statistical significance, and implicate strong data privacy concerns, as the proposed study could reveal that e.g., *one African American* at Boalt Hall or King Hall did not pass the bar exam on the first attempt.
- Sander et al. have not met the burden of justifying their plan to use exact bar exam scores as a proxy for “student learning.” This questionable interpretation of scores runs counter to the intended purpose of the bar exam (i.e., a threshold test of minimum competencies), it risks stigmatizing African American attorneys regardless of how successful they may be in legal practice, and it exacerbates privacy concerns for the small number of post-209 black graduates at the UC Law Schools.
- Sander et al. fail to appreciate that the pre-209 affirmative action program at UC Hastings (based largely on class and educational disadvantage), is more like the post-209 class-based affirmative action plan at UCLA than the pre-209 race-conscious programs at e.g., Boalt Hall or UCLA. It is therefore proper to exclude Hastings on methodological grounds, and that substantially reduces the sample size of the “natural experiment” Sander et al. propose to study because Hastings enrolls the largest class of any UC.
- If the Sander et al. team were to overcome the methodological, data privacy and sample size concerns detailed herein, and the State Bar was then inclined to release the data, this should only be done with a prior agreement that the same access will be granted to other bona fide researchers. The LSAC was able to release similar data from Bar Passage Study while protecting the identity of individuals and law schools. Sander’s recent studies on law school affirmative action have been widely criticized on empirical grounds, and the public deserves to have confidence that there were not any serious errors in a publication by Sander et al. that were rendered invisible because the State Bar closely held the data.

I. The Proposed “Matching” Study Cannot Meaningfully Match Students

The rest of this memorandum focuses on privacy issues uniquely connected to University of California Law Schools and their alumni, but given that several law school deans have already expressed concerns about sharing data for the Sander et al. proposal, there is a fundamental problem underlying the proposal’s methodology that I hope the State Bar of California will address at the outset because it is relevant to the question of whether the Sander et al. proposal is capable of providing the foundational evidence that the authors claim in their accompanying National Science Foundation (NSF) project description. I spoke with William Henderson a couple days ago and it appears that he and his colleagues are thinking about ways to address -- in light of the NSF’s evaluation of their initial proposal -- selection bias limitations that are similar to what I describe below, which suggests this is an area of follow-up when the Sander team meets with the State Bar in February.

Sander et al.'s initial NSF proposal claims they will "use California bar data to conduct four different types of tests of the mismatch effect – all of them of unprecedented rigor," and they argue that their research with the State Bar of California will lay the foundation for several jurisdictions to participate in their national bar study by 2008.¹ The second of the proposed studies by Sander et al. -- which would require supplemental data from California law schools -- intends to evaluate the "mismatch" hypothesis using a kind of matching methodology that would pair 2004-05 black and Latino law school graduates with comparable background characteristics (such as LSAT scores, undergraduate grades) but who attended different law schools (i.e., did the students attending the less selective schools ultimately do better than their matched pairs because the former faced less academic "mismatch"?). As detailed in Sander's NSF proposal, this methodology is inspired by an undergraduate matching study conducted by economists Dale and Krueger, and is intended to overcome the problem of selection bias.²

A key to Dale and Krueger's matching approach is that they had data from the College and Beyond database that allowed grouping of "students who received the same admission decisions (i.e., the same combination of acceptances and rejections) from the same set of colleges" in order to parse out the impact on earnings among students who were similar both in terms of characteristics that were available to researchers like Dale and Krueger (e.g., SAT scores) and characteristics that were unknown to researchers but that may have had an influence on college admission decisions (e.g., signs of motivation or special talents in an applicant's file).³ The Sander et al. NSF proposal concedes that there may be some selection bias with their matching or "case control" methodology because they do *not* have data on admission decisions, but as they see it, remaining effects of selection bias would be in the direction of understating the mismatch hypothesis.⁴

¹ Richard H. Sander et al., *The Effect of Law School Racial Preferences on Minority Bar Passage Rates at B7* (National Science Foundation project description, 2006). *See id.* at B10-11 ("By building a database with the California Bar, by demonstrating the effectiveness of our confidentiality procedures, and producing careful and credible findings, we are confident that other large-state bar organizations will join in our effort. It seems to us very realistic to project that half-a-dozen major bars will be participating in the national database project by the end of this grant in June 2008.").

² Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College*, 117 Q.J. ECON. 1491 (2002), available at <http://www.mitpressjournals.org/doi/pdf/10.1162/003355302320935089>. Regarding selection bias, the Sander et al. NSF proposal notes:

[I]f one compares two blacks with LSATs of 155 and UGPAs of 3.4, it is likely that the student going to the more elite school is there for a reason – there are likely to be unobserved characteristics (e.g., attendance at a more elite college, following a tougher curriculum, demonstrating stronger writing ability) that make the more "elite" student academically stronger, independent of law school effects.

³ Dale & Krueger, *id.* at 1496-97.

⁴ Sander et al. claim:

In Analysis 2, we will construct a logit model to predict a student's likelihood of passing the bar exam based on that student's admission credentials (i.e., LSAT score and UGPA, with the later variable adjusted for undergraduate school attended). We will then form pairs of students where both members of the pair had comparable predicted probabilities of passing, but one graduated from a law school where his/her classmates had similar admissions credentials while the other member of the pair graduated from a law school where his/her classmates had a substantially different "credential gap" (i.e., much better or worse). We will then examine whether the difference in credential gap is related to differences in bar scores between members of

Yet, aside from the absence of information about law school admission decisions, there is a potentially even larger selection bias problem that heretofore has not been contemplated in the three datasets that Sander et al. seek from the State Bar (with some additional cooperation from California law schools).⁵ Understandably, the State Bar only has data on those candidates who took the California bar exam. The absence of data on those did not graduate from law school (and therefore did not take the California bar) is a serious source of selection bias that would likely cut in favor of *overstating* findings of mismatch, for the reasons I describe below.

It is well known in legal education that bar passage issues exert the greatest academic pressures on the less selective ABA-accredited law schools.⁶ To put it bluntly, a less selective law school concerned with its bar passage rates (for both ABA accreditation and *U.S. News* rankings/recruitment reasons) has strong incentives to flunk out students who receive low grades in the first-year of law school in order to preserve its overall bar passage rate. This is especially so in California, given the stringency of California's bar exam relative to other states (e.g., in 2005 Golden Gate University School of Law was placed on probation by the ABA over its low bar passage rate).⁷ Indeed, Dr. Klein is uniquely familiar with these dynamics, since for many years he has consulted with law schools that have low bar passage rates, and has urged schools that the best tradeoff of student body diversity and bar passage is reached by admitting many

a pair. This method of analysis corresponds to the type of "case control" study Klein, Freedman, and their colleagues used in their recent study of possible racial bias in the federal death penalty (2006).

There is some room for selection bias in this approach; in comparing a pair of students with similar entering credentials, is the one who is at the more elite institution (and thus potentially more mismatched) really comparable to the other student, or is he at the more elite institution because of some unobserved advantage? However, the bias cuts against a finding of mismatch effects...

Richard H. Sander et al., *The Effect of Law School Racial Preferences on Minority Bar Passage Rates at B10-11* (National Science Foundation project description, 2006).

Note that the substantial missing (and nonrandom) data on those who did not graduate from law school is a feature that distinguishes the Sander et al. "case control" proposal from the Klein et al. federal death penalty case control study, where useable data was available for virtually all cases submitted to the Attorney General's Review Committee on Capital Cases (AGRC), and where the 1995-2000 period of study corresponded to a new policy requiring that all death eligible cases were required to be submitted to the AGRC. STEPHEN P. KLEIN ET AL., *RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES 11* (2006), RAND Technical Report *available at* http://www.rand.org/pubs/technical_reports/2006/RAND_TR389.pdf.

⁵ The Sander et al. NSF proposal describes the three State Bar of California (SBC) datasets as follows:

We expect to obtain authorization to use three SBC datasets. The first, which we will call SBC-1, consists of existing bar data for the exam cohorts from 1997 through 2005. These data include the raw and standardized scores of bar takers on the various components of the bar, the LSAT scores of most bar takers, their race and gender, and the law school they attended. The second dataset, which we will call SBC-2, consists of existing bar data collected by SBC for past validity studies. This dataset covers fewer years, but includes (in addition to the data in SBC-1) data on the law school grades and undergraduate grades of bar takers. The third dataset, which we will call SBC-3, would duplicate SBC-2 for the two most recent cohorts of California bar takers (those taking the bar in 2004 and 2005), and would include for nearly all bar takers their detailed bar scores, law school attended, race and gender, law school GPAs, undergraduate GPAs, undergraduate college LSAT scores. Only SBC-3 requires significant new data collection efforts.

Sander et al., National Science Foundation project description at B8-9.

⁶ Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1704 n.18 (2002) ("When accepting students, some schools deny admission to those with low LSAT scores partly because of the potential impact admitting those students may have on the school's overall bar passage rate."); See also Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927 (1997).

⁷ Sandhya Bathija, *Law Schools: Need a bar exam edge? Check out the tailgater*, NAT'L L.J., Nov. 27, 2006 at 6.

students of color with lower LSATs/UGPAs, then flunking out larger numbers of students with first-year law school grades below a certain threshold.⁸

Accordingly, a conspicuous selection bias problem emerges from the fact that the Sander et al. case control study, in contrast to Dale and Krueger’s study that included *both graduates and non-graduates*,⁹ does not have any data on the students who dropped out during law school and therefore never reached the point of becoming candidates to take the California bar exam. The table below clearly demonstrates that first-year law school attrition rates have a strongly negative relationship with a law school’s level of selectivity/eliteness (or stated differently, graduation rates are correlated positively with selectivity). Law schools like UC Davis, Stanford, and UC Berkeley have first-year attrition rates of about 1%, Loyola, Pepperdine and Santa Clara have attrition rates of 11-13%, Southwestern and USF have attrition rates of about 18%, and Golden Gate and Whittier have attrition rates of about 30%.¹⁰

2005 First-Year J.D. Attrition Rates at California’s ABA-Approved Law Schools ¹¹		
UC Davis – 0.5%	Chapman – 8.8%	U. San Francisco – 18.3%
Stanford – 0.6%	Loyola – 10.8%	Western State – 18.5%
UC Berkeley – 1.1%	Santa Clara – 11.9%	Golden Gate – 28.7%
UC Hastings – 3.0%	Pepperdine – 12.6%	Cal. Western – 29.6%
UCLA – 5.2%	McGeorge (UOP) – 13.1%	Whittier – 31.0%
USC – 5.4%	Thomas Jefferson – 13.4%	
U. San Diego – 8.3%	Southwestern – 17.5%	

What would happen, for instance, if a student from UC Davis has been matched based on LSAT/UGPA with a Loyola student, a UCLA student matched with a Santa Clara student, and so on? The mismatch effect will be exaggerated if the students from schools with higher attrition rates (e.g., Loyola and Santa Clara) have stronger unmeasured characteristics helpful in law school and on the bar (e.g., study habits, organizational skills, tenacity) compared to their classmates with similar LSATs and UGPAs who did not graduate. This is to be expected, since such unmeasured characteristics will in many cases be the very reason why the one law student graduated and another classmate with similar index scores dropped out.

To put it another way, if one is attempting to use matching techniques to compare how students with similar qualifications performed depending on the degree of academic “mismatch” they faced vis-à-vis their classmates, then students should be matched at random across law schools. And random matching would result in some students at highly selective/low-attrition law schools (e.g., UCLA, USC) being matched with students in less selective/higher-attrition law schools

⁸ Stephen Klein, *The Educational Effects of Assessment Policies: What the Legal Community Is Learning*, PEER REVIEW, Winter/Spring 2002, available at <http://www.aacu.org/peerreview/pr-sp02/index.cfm>; Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 THURGOOD MARSHALL L. REV. 517, __ (1991).

⁹ Dale & Krueger, *supra* note __, at 1505 (“Everyone in the sample attended a C&B [College & Beyond] school as a freshman but did not necessarily graduate from the school (or from any school).”).

¹⁰ Note that a sliver of the students reflected in first-year attrition rates actually had high law school grades and transferred to more selective/prestigious law schools, but those students could not reasonably be lumped in with non-transferring students under the Sander et al. matching methodology.

¹¹ Data reported in the 2007 Searchable Edition of the ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2006), available at <http://officialguide.lisac.org/Docs/cgi-bin/home.asp>.

(e.g., Pepperdine, McGeorge) who did not manage to graduate. Eliminating the non-graduates from higher-attrition law schools before the matching takes place necessarily biases the results in favor of students attending high-attrition law schools. When so much data is lost, and when the data that is lost is clearly not random with respect to the variables of interest (performance in law school, eliteness of law school attended), it follows that Sander et al.'s claim that the students for whom they would like to obtain data would be "matched" in any meaningful sense is empirically dubious.¹²

Other authors studying bar exam outcomes by race/ethnicity, as well as the affirmative action "mismatch" hypothesis at the undergraduate level, employed statistical techniques (e.g., Heckman regression methods, propensity score analysis) in order to offset or minimize the effects of selection bias, but these are techniques that Professor Sander has declined to use in his recent studies of legal education affirmative action in the *Stanford Law Review* and the *North Carolina Law Review*.¹³ More importantly, the current proposal by Sander et al. does not seek academic and demographic data from California law schools on non-graduating law students, and without such baseline data it will not be possible to employ standard techniques to control for selection bias. This problem about how missing data will be handled should be squarely addressed before any data is released; the Sander et al. proposal as currently conceived is not likely to deliver what it promises, which is an effective means of overcoming the problem of selection bias.

For the same set of reasons described above, the problem of missing data on non-graduates undermines Sander et al.'s third approach to studying mismatch, which is to "use standard regression techniques to compare all students in the population for whom we have complete data," with bar exam candidates' exam scores treated as the dependent variable and the independent variables defined as "student's credentials, gender, race, year, and the measured credentials gap between that student and his classmates (i.e., a measure of mismatch)."¹⁴

¹² While many of those dropping out of law school will have lower LSATs and UGPAs, the relationship is far from perfect. LSAC research indicates that LSATs and UGPAs, when optimally weighted, explain about one-quarter of the variance in first-year law school grades among those enrolled at a typical ABA-accredited law school. LISA C. ANTHONY ET AL., LAW SCH. ADMISSION COUNCIL, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 1995-1996 CORRELATION STUDIES 6 tbl.2 (1999).

¹³ My co-authors and I made the following criticism in a 2005 essay in the *Stanford Law Review*:
Students are admitted to law schools for reasons the bar passage study measures, like their LSAT scores, and reasons it does not measure, like information from references describing work habits. If one is trying, as Sander is, to explain outcomes that may be affected by both measured and unmeasured variables, and if people are selected for a treatment (e.g., entrance into a law school of a certain quality) in part for reasons the data do not measure, causal conclusions about the effects of the measured variables may be misleading. There are statistical ways to attempt to cope with this problem. Sander does not employ them. For example, Timothy Clydesdale uses Heckman regression methods to correct for sample selection bias in the BPS... and Sigal Alon and Marta Tienda use both Heckman methods and propensity score analysis to control for selection bias in analyzing the mismatch hypothesis at the undergraduate level.

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 STANFORD L. REV. 1855 1872-73 n.59 (2005) (citations omitted), available at http://www.equaljusticesociety.org/sanders_rebuttal_final.pdf. In his "Reply to Critics" essay in the same volume of the *Stanford Law Review* Sander did not employ these statistical techniques, but chose to use a substitute form of a "matching" approach, an approach that was compromised in part because Sander compared the sample of black students who elected to go to their second-choice law schools with a sample of blacks attending "first-choice" schools that included a substantial number of black students who did not have a choice about where to attend (i.e., only one admission offer).

¹⁴ Sander et al. NSF Proposal, at __.

II. Research Design & Confidentiality Concerns Regarding UC Law School Graduates

I believe there are several methodological concerns about the manner in which data from the UC Law Schools will be handled and interpreted under this proposal. The Sander et al. research team is particularly interested in the “natural experiment” involving African Americans and Latinos entering the UC Law Schools, with 1994-96 treated as the “with affirmative action” condition and 1997-99 treated as the “without affirmative action” (or “diminished” affirmative action) condition.¹⁵

A) *Inadequate Assurances of School-Level Confidentiality for the UCs*

The research proposal also states, “Research will use the types of confidentiality mechanisms that Dr. Klein and Dr. Bolus have used in their research for California and other state bars over the past 30 years.” Moreover, the supplemental memorandum from Sander et al. states that they would not identify individual law schools in their published works, and the supplement and proposal indicate the authors plan to describe law schools by general type (e.g. “elite”).¹⁶ However, this assurance is least persuasive when it comes to the UC Law Schools, precisely the law schools most relevant to their proposed analysis of the “natural experiment” of Prop. 209.

More detailed and concrete confidentiality assurances should be provided to UC Law Schools in this regard, if such assurances are possible. If they are not possible the research should not go forward, for it might put individual privacy interests, which schools are obligated to protect, at risk. The first proposed study by Sander et al. hinges on data from the UC Law Schools because the much larger number of private law schools are not bound by Proposition 209. Yet almost any attempt to describe a UC Law School by “type” risks inadvertently identifying that law school. This concern is not merely hypothetical. For instance, in an earlier law review article on racial disparities in bar exam rates, Dr. Klein displayed law school grade distribution data by race/ethnicity at “Law School A” and “Law School B,” which are described as two California public law schools with “large minority enrollments.”¹⁷ This innocuous description, which is intended to shield a school’s privacy, likely had the opposite effect. Given that UCLA had both a large total enrollment and the largest percentage of underrepresented minorities of the UCs (prior to Proposition 209), I believe there is a strong probability Dr. Klein’s article effectively divulged

¹⁵ I say “diminished” affirmative action in quotations because Professor Sander has already stated his view that the admission practices at Boalt Hall and the UCLA School of Law likely violate Proposition 209. Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003, at B11; Daniel Golden, *Case Study: Schools Find Ways to Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003, at A1 (quoting Sander as calling UCLA’s Critical Race Studies program “legally suspect”).

¹⁶ In a November 2006 supplemental memorandum to the State Bar, Sander, Williams and Henderson write, “*We will not identify individual schools in any of our published work, period.* One of the strengths of the California data is the large number of law schools in the state. This makes it possible to discuss different types of schools (e.g., elite vs. non-elite, ABA-approved vs. state-approved) without giving away the identity of an individual school.” As should be clear from the memorandum, absent greater clarification, I do not interpret such a statement to mean that Sander et al. promises not to publish data where a law school is the unit of analysis, only that they intend to shield the identity of the schools they would describe in their findings.

¹⁷ Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 THURGOOD MARSHALL L. REV. 517, 525 (1991).

school-level data for the UCLA School of Law (and because some of the racial grade data was the same at Schools A and B, providing school specific data rather than aggregated data contributed to risking disclosure). If one triangulated other data from public sources (e.g., school level overall bar passage rates for that July, information on the racial composition of each class and their admission profiles), it should not be difficult to determine which UC Law School is A and which is B.

I am concerned about how meaningful the Sander et al. team's pledge not to identify individual law schools in this context. Unlike the LSAC Bar Passage Study or the After the J.D. research project, here it would be difficult to shield the identity of individual law schools by clustering, since there are too few schools to cluster. If one wanted to make a meaningful distinction along eliteness lines, as the Sander et al. seems to desire, one natural cluster is Boalt and UCLA, and the other cluster is Davis and Hastings. However, King Hall has by far the smallest enrollment of the UCs, and for reasons I indicate below in Part I.C, the inclusion of Hastings is problematic. Moreover, tiny clusters do not just implicate school privacy concerns. When there are very few students of interest, which is the case with black students in these schools in the years immediately following Prop. 209, it is easy for those reading about a cluster to attribute average findings to those few who make up the average. That said, if the State Bar elects to release the data, it would be more responsible if there were an agreement to combine data for Boalt, UCLA and Davis when analyzing the impact of Prop. 209.

B) Research Design Flaws and Privacy Concerns Regarding UC Law School Alumni

The Sander et al. proposal is based on the questionable assumption that data from Boalt, Davis, Hastings and UCLA can be treated in the same manner, with 1994-96 treated as the pre-209 condition and 1997-99 treated as the post-209 condition.¹⁸ However, even if the unacknowledged problems in the Sander et al. proposal are straightened out, doing so would substantially reduce the sample providing useful data and thereby heighten concerns about the inadvertent disclosure of the identities of African American alumni at UC Law Schools.

To help explain why there are serious privacy implications for UC law school graduates, below is a table displaying the number of first-year African American students entering each of the four UC Law Schools in 1997, 1998, and 1999. The left side displays the number of entering black law students that Sander et al. assume, *sub silencio*, could provide useable data. The right side of the chart indicates the same sample size after accounting for two problems associated with including UC Hastings in the study (see Part II.D). The chart also incorporates a smaller concern, and one recognized in an earlier is Sander's earlier article, that two of the ten African American students entering UCLA in 1997 were actually admitted in 1996 (when affirmative action was permissible) and deferred entry for a year,¹⁹ as was the sole African American entering Boalt in

¹⁸ Page 3 of the Sander et al. proposal discusses their plan to analyze the natural experiment arising out of the consequences of Proposition 209, and the authors state, "In theory, this means that the four public law schools in California (Boalt, UCLA, Davis, and Hastings) stopped considering race in admissions from 1997 onwards, while the many private law schools were free to continue doing so."

¹⁹ *Id.* at 498.

1997. There may be similar cases at UC Davis in 1997 and/or UC Hastings in 1998, though that is not readily ascertainable.²⁰ Data privacy scenarios at individual UCs are described below.

	Post-Affirmative Action Sample Size Assumed by Sander et al.				Post-Affirmative Action Sample Size in Sander et al. with Kidder's Critique			
	Boalt	Davis	Hastings	UCLA	Boalt	Davis	Hastings	UCLA
1997	1	5	9	10	0	5 (or less)	0 (N/A)	8
1998	8	3	19	8	8	3	19 (or less)	8
1999	7	6	8	3	7	6	8	3
Total Sample = 87					Total Sample with Hastings = 75 or less			
					Total Sample Excluding Hastings = 48 or less			

The table represents an upper-bound limit on the number of African Americans who might contribute useable post-affirmative action data in the Sander et al.'s first proposed study. In other words, the actual sample size is necessarily smaller because (1) not everyone graduates from law school, for either academic or personal reasons; (2) not all graduates necessarily elect to take a bar exam immediately after graduation; and (3) not all those taking a bar exam take the California bar.

Looking at and comparing the number of students of all races in these 1997-99 entering classes with the number of first-time test-takers on the corresponding July California bar exams (2000-02), we see that the number of test takers from Boalt, UCLA, and Davis combined was only 84.3% of the number of students who started in these schools.²¹ The actual number of starting black students taking the test is likely to be even lower both because some black students – I personally know of one - will have transferred in (selection bias would preclude using their results) and because it is possible, as Sander has argued strenuously elsewhere, that even at schools like these black students are less likely than average to graduate and take a bar.²² Thus, the actual number of African Americans providing post-affirmative action data for the Sander et al. “natural experiment” would be approximately *13 for Boalt, 12 for Davis, and 16 at UCLA*, and is most likely somewhat less.

What this means is that the value of this part of the Sander team's proposed research will be minimal. First, statistical significance requires a reasonably large number of cases. The number of cases Sander is working with is so small that the team is likely to have to emphasize non-significant differences, which is conventionally improper and may be misleading. Moreover, the small number of cases means that Sander et al. will not be able to report on checks they did for control variables to ascertain that the performance of those doing more poorly on the bar is not explained by some cause other than mismatch because then the privacy issues mentioned above

²⁰ To the extent that LEOP had a modest race-conscious component pre-2009, note that UC Hastings had 19 entering African Americans in 1998 though it admitted only 40 that year -- a yield rate even Harvard Law School would be proud of – which is consistent with the notion that some may have deferred entry that year.

²¹ Boalt, UCLA and Davis had a combined total of 1,913 first-year students entering in 1997-99. The bar exam data used for this estimate is available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10397&id=1010.

²² Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 436-42 (2004).

would come into play.²³ In short, this proposed research seems to have such limited benefits, if it has any at all, that it is hard to justify conducting it and even the limited disclosure of confidential information to the research team.

With samples this small, one can also appreciate how the data requested by the Sander team can result in the unintentional disclosure of an African American bar candidate's identity and academic information. Take Boalt Hall, for example. It's been reported in a reputable source that the combined California first-time bar pass rate for African Americans entering Boalt Hall in 1994-96 (when there was affirmative action and therefore a much larger sample size) was 80.5%.²⁴ If the pass rate for African Americans at Boalt in 1997-99 is similar, and if there are only about 13 such students providing useful California bar data, then it follows that the Sander team would be reporting on only *about two or three black candidates at Boalt* who did not pass the California bar exam on their first attempt.

Moreover Sander's mismatch hypothesis posits that, other things being equal, the post-209 bar pass rate at the UCs should be considerably better than the pre-209 rate. However, if his theory is borne out by the data with an e.g., 90% black pass rate at Boalt (and there are alternatives to "mismatch" like selection bias that could also explain such an effect²⁵) the data privacy implications worsen insofar as the Sander et al. team's findings for Boalt (whether it is described as an "elite" school or based on some other characteristic) could very well be based on a *single African American* not passing the bar on the first attempt.

The more detailed NSF proposal by Sander et al. states they would "suppress data on cohorts at particular institutions with fewer than five members" (p. B15), but the ordinary meaning of the term "cohort" would apply to the group of post-209 black bar candidates from a particular school rather than the subset of that cohort who may not have passed the bar on the first-attempt, so this assurance is not necessarily helpful. Here I believe there is a very real concern that the identity of that one African American (or perhaps two or three) and his or her confidential academic information (LSAT score, law school percentile rank in class, exact Bar Exam score) could easily become known via word-of-mouth to many classmates and/or others in the legal community,

²³ See e.g., Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in REFERENCE GUIDE ON SCIENTIFIC EVIDENCE 178, 195 (Fed. Judicial Ctr. ed., 2d ed. 2000) ("The issue of robustness—whether regression results are sensitive to slight modifications in assumptions (e.g., that the data are measured accurately)—is of vital importance. . . . Consequently, experts should be encouraged to provide additional information that goes to the issue of whether regression assumptions are valid, and if they are not valid, the extent to which the regression results are robust.").

²⁴ John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AMERICAN LAWYER, Nov. 1997, at 4, 8. (I say reputable in part because it appears that this data was likely provided by the dean's office or an individual faculty member at Boalt, based on data provided by the State Bar).

²⁵ A full treatment of the myriad selection bias issues, even in the proposed matching study intended to overcome selection bias, is beyond the scope of my comments. Here is but one of several possible selection bias scenarios. One recent report, using ABA data in conjunction with dean surveys, found that the graduation rate for African Americans entering Boalt and UCLA in 1998-2000 (post-209) was 85%. *The Superior Performance of Black Students at the Nation's 26 Highest Ranked Law Schools*, J. BLACKS IN HIGHER EDUCATION, Autumn 2004, at 28. Though these data are imperfect because of the transfer student phenomenon, if this is an accurate post-209 graduation rate, I would be surprised if the pre-209 Boalt and UCLA black graduation rate were not higher. If all the Sander et al. team were working from were data from bar exam candidates without accounting for graduation rates (i.e., data on those who did not make it far enough to be candidates for the California bar), and if for whatever reason there was a post-209 decline in the Boalt/UCLA graduation rate for African Americans, the net effect would be a tendency to overstate a mismatch effect when comparing pre-209 and post-209 bar exam outcomes.

including employers. The University of California's *Draft Guidelines for Release of Aggregated Student Data With Small Cell Sizes* explains one of the reasons this scenario warrants heightened concern:

Even summarized information about these often small and tight-knit populations raises privacy concerns because members of these populations know about and can identify each other with relative ease, and as a result learn information about each other that they did not already know. Thus, a table showing average LSAT scores by race/ethnicity may reveal the outcome of a specific student to other students from the same group, even if the information is aggregated. Because these populations are tight-knit and often members have access to other information about members of the population, special care should be used when tables contain information about small groups of students.²⁶

The numbers of entering African Americans at King Hall and UCLA in 1997-99 (see above table) are similar to the total at Berkeley, so there are equally serious data privacy concerns for those law schools.

In light of the concerns detailed in this memorandum, I do not believe the Sander et al. team anticipates the extent to which their proposed analysis could run afoul of accepted professional standards covering the release of student testing data.²⁷ Indeed, in the case of Boalt Hall, the Law School's Academic Honor Code also prohibits a student, dean or faculty member from disclosing a student's exact class rank except for clerkship and law faculty candidate purposes.²⁸

C. The Consequences of Interpreting Bar Exam Scores in a Questionable Manner Would Fall Squarely on UC Law School Alumni

At first blush, it might appear that some level of confidentiality protection is assured from the fact that Sander et al. are requesting data on exact bar exam scores rather than pass/fail status²⁹ (i.e., the small number who did not pass could be obscured amidst the other data points), but the

²⁶ Univ. of California, *Guidelines for Release of Aggregated Student Data With Small Cell Sizes--Draft for Public Comment*, (Dec. 2006).

²⁷ See e.g., American Psychological Association Working Group of the Joint Committee on Testing Practices, *Test Taker Rights and Responsibilities* (Aug. 1998), available at <http://www.apa.org/science/ttrr.html>. In this document, Test Taker Right 9(a) states:

Because test takers have the right to have the results of tests kept confidential to the extent allowed by law, testing professionals should:

1. Insure that records of test results (in paper or electronic form) are safeguarded and maintained so that only individuals who have a legitimate right to access them will be able to do so.

²⁸ Boalt Hall Academic Rules art. 3.06 (D) ("Other Uses Impermissible. The Dean, Dean of Students, faculty, and students shall not disclose information about class standing provided by the Registrar under this section for any professional purpose other than obtaining a judicial clerkship or academic position. A student who reveals this information for any other professional purpose is in violation of the Honor Code.") available at <http://www.law.berkeley.edu/students/registrar/academicrules/>

²⁹ Page 3 of the Sander et al proposal states, "Knowing whether a student passed or failed the bar is a much cruder measure than knowing a student's actual scores; with data on scores, one can measure outcomes with a much finer resolution. Scores not only let one distinguish the relative performance strength among students who pass the exam (or among those who fail). Just as importantly, the bar scores 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."

authors provide no such assurances and this does not necessarily follow since the score required for passage is something that is already in the public domain.

In fact, the release of exact bar scores, in conjunction with the extremely small samples of black bar test-takers at Boalt Hall, King Hall and UCLA emerging from the 1997-99 entering classes, poses additional concerns. Even if it is appropriate to release exact bar score tests for research purposes unrelated to validating or improving the bar, given privacy concerns, they should not be released unless their release serves an important purpose. Sander et al. request exact bar scores so they can study “not only how the ‘mismatch’ might affect bar passage, but also how it might affect actual learning.” As someone engaged in the academic debate over Sander’s research on law school affirmative action, I read this statement and the Sander et al. claim to “distinguish the relative performance strength among students who pass the exam” as expressing an inclination to look for evidence that even those African Americans whose bar exam scores are above California’s stringent passing threshold are still potential victims of “mismatch” who would have learned (and earned) more had they gone to less selective law schools.³⁰

Michael Kane, director of research for the National Conference of Bar Examiners, cautions that “validity involves an evaluation of the overall plausibility of a proposed interpretation or use of test scores. It is the interpretation (including inferences and decisions) that is validated, not the test or the test score.”³¹ The proposal by Sander et al. appears to take for granted that establishing law school “mismatch” by means of bar exam score differences among bar-passers constitutes a valid interpretation of bar exam results. However, as Dr. Klein has acknowledged, the ostensible purpose of bar exam, and specifically the passing standard set by the State Bar, is to test for minimum competencies deemed important for a newly licensed attorney.³² In fact, the *Standards for Educational and Psychological Testing* directs that governing bodies setting professional licensing standards should aim for a passing threshold that is “not so high as to be unreasonably limiting” and that “depend[s] on the knowledge and skills necessary for acceptable performance in the profession.”³³ And as data from Dr. Klein makes clear, when states’ bar exam passing standards are ranked using a common metric (i.e., scaled to the MBE), *California had the most difficult bar exam in the nation* (tied with Delaware) out of 49 jurisdictions.³⁴

I therefore recommend that the State Bar provide more concrete assurances, so that bar exam scores will not be used in the Sander et al. study in a manner that very well could (a) be contrary to the intended purpose of the California bar exam; and (b) stigmatize African American attorneys

³⁰ See e.g., Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 NORTH CAROLINA L. REV. 1755, 1780-81 (2006) available at <http://www.law.ucla.edu/sander/NorthCarolina/sander.pdf> (“If blacks make up 7% to 8% of law students, 1% to 2% of students with high grades, and 8% of corporate law firm hires, then it is quite likely that the grade gap between whites and blacks in law school is duplicated in performance once inside the firm. This would only be possible with very large and aggressive racial preferences.”).

³¹ Michael T. Kane, *Current Concerns in Validity Theory*, 38 J. EDUC. MEASUREMENT 319, 328 (2001).

³² Stephen P. Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature*, N.Y. STATE BAR J., Oct. 1989, at 28, 31 (“The exam is not designed to determine who will be a good lawyer. Instead, it wants to make sure that anyone who is licensed has at least some of the basic competencies that are essential for practice.”); see also Stephen P. Klein, *Setting Bar Exam Passing Scores and Standards*, 70 BAR EXAMINER 12-14 (2001).

³³ AMERICAN EDUCATIONAL RESEARCH ASSOCIATION ET AL., *STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* 157, 162 (1999).

³⁴ Stephen P. Klein, Panelist and Reader Judgments Regarding the Passing Score on the Florida Bar Exam at Appendix A, Expert Report to the Florida Board of Bar Examiners, Aug. 12, 1999.

in California, including those who graduated from UC Law Schools and a private law school like Stanford (i.e., Stanford is also likely to stick out conspicuously in any description of California law schools by “type”).³⁵ I do not believe the Sander et al. team has met what should be a fairly high burden in explaining their plans to use exact bar scores from California (that there may be a strong correlation between bar exam scores and law school grades is not sufficient to establish the appropriateness of Sander et al.’s proposed test score interpretation³⁶). This is especially so when the consequences of interpreting (and publicizing) that test data in questionable ways occurs alongside parallel risks of inadvertently disclosing the individual records of UC law school graduates.

Even if the State Bar elects to release the data safeguards can and should be taken to be certain that their release will not unfairly burden or stigmatize members of any race as individuals or as a group. For example, there could be a guarantee that the only comparisons the scores will be used in are comparisons that look for a mismatch effect within each racial/group rather than across groups.

D) Research Design Flaws Unique to UC Hastings

One problem accentuated by the fact that UC Hastings is the workhorse in holding up the sample size of the Sander et al. proposal – due to its larger class size Hastings enrolled 36 African American first-year law students in 1997-99, compared to 21 at UCLA, 16 at Boalt, and 14 at Davis – is that prior to Proposition 209, UC Hastings had what might be called a “class plus”

³⁵ At Stanford Law School, an annual average of only 96 total graduates annually took the July California Bar for the first time in 2000-02 (Stanford graduates disproportionately take the bar outside California), so there would be parallel concerns about the small number of African American taking the bar when e.g., Stanford is described as an “elite private” law school used in comparing post-209 outcomes at Boalt or UCLA. Even if USC were also treated as an “elite private” school, the presence of other information, like LSAT scores or bar pass rates, might make it easy to deduce the identity of Stanford (or USC). Moreover, Sander’s accompanying National Science Foundation proposal suggest that he regards Stanford as the sole elite private school in California, and he appears specifically interested in the post-209 redirection effects at Stanford and USC:

As a practical matter, those denied admission to [Boalt and UCLA] could either attend less elite schools within California or attend Stanford (a private elite school in California) or similarly elite public or private schools out-of-state. To the extent that they chose to remain in-state (and did not go to Stanford), they would have presumably attended a law school where their admissions credentials were more like those of their classmates. It is also plausible that these students would have produced some cascade effect among California schools. For example, if the University of Southern California (USC), which usually loses its best applicants to UCLA and Boalt, in 1997 faces a swelling of more qualified minority applicants, it would presumably use smaller preferences and would reject some of the lower-credentialed minority candidates it would otherwise normally admit.

Richard H. Sander et al., *The Effect of Law School Racial Preferences on Minority Bar Passage Rates at B9* (National Science Foundation project description, 2006).

³⁶ Kane, *Current Concerns in Validity Theory*, *supra* note __, at 323 (“A problem that came to be clearly recognized by the late 1970s was the possibility, even the ease in this context, of being highly opportunistic in the choice of validity evidence. [citations omitted] For example, a proposed interpretation stated in theoretical terms might be supported by analyses of test content and/or correlations with various criteria, some of which could be of dubious relevance (*correlations of licensure scores with grades in professional school*), without ever evaluating the reasonableness of the proposed interpretation (or even stating it clearly).”) (emphasis added).

affirmative action program rather than a program focused much on race/ethnicity per se. Under the Legal Education Opportunity Program (LEOP) approximately 20% of the class was admitted based on consideration of socioeconomic and educational disadvantage (80% is more formula-driven by LSATs, UGPAs, etc.); Whites and Asian Americans were also admitted under LEOP, and race/ethnicity could only be a plus factor for underrepresented minorities who were also socioeconomically disadvantaged.³⁷ That Hastings LEOP's program had more of an emphasis on class than race is also consistent with substantial differences in the percentage of African Americans in the 1994-96 entering classes:

- Boalt Hall ranged between 7.6% and 11.5% African American;
- UCLA ranged between 6.2% and 13.7% African American;
- Hastings ranged between 2.7% and 5.3% African American (and this is in line with the post-209 Hastings figures, which reinforces my point).³⁸

It is thus fair to conclude that the pre-209 LEOP program at Hastings bears a closer resemblance to the post-209 class-based affirmative action program at UCLA than it does with the pre-209 affirmative action programs at Boalt, UCLA or Davis. When I examined the Hastings LEOP program a few years ago, I found that two-thirds of those admitted to LEOP in 1997 (again, prior to the ban on affirmative action at that school) were not underrepresented minorities (i.e., White, Asian American, and other).³⁹ By comparison, Sander's examined on the post-affirmative action admission policy at UCLA in 1997 -- and he was instrumental in designing that program -- indicates that just over three-quarters of those admitted based on considerations including socioeconomic criteria were not underrepresented minorities.⁴⁰ These Hastings and UCLA statistics are fairly consistent, and some of the modest difference in racial outcomes is likely attributable to UCLA's greater selectivity.⁴¹

Sander's more detailed National Science Foundation proposal (which he provided to me upon request) implicitly concedes there is some force of my argument above, but he fails to appreciate

³⁷ See e.g., Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1067-68 (1996) ("At Hastings College of Law in California, twenty percent of the class is set aside for disadvantaged students through the Legal Equal Opportunity Program (LEOP)"; *id.* at n.161 ("Race is considered a plus in LEOP admissions, but advantaged people of color do not qualify for LEOP.")).

³⁸ Boalt Hall and UCLA statistics are available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/> (website currently being updated). UC Hastings statistics are in my files and were provided to me years ago by the Hastings Director of Public Affairs.

³⁹ William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 38 n.47 (2000).

⁴⁰ Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 496 tbl.11 (1997) (206 of 269 admits for whom class-based disadvantage was a factor were White, Asian American or other), available at <http://www.law.ucla.edu/sander/ClassBased.pdf>. One important distinction is the extent to which the UCLA class-based program is driven by a quantitative formula whereas Hastings is based more on qualitative judgment.

⁴¹ Differences between UCLA and Hastings in the percentage of underrepresented minorities admitted in 1997 in their class-based admission programs is not necessarily a metric of the extent to which race/ethnicity was a factor in Hastings' LEOP program, for as Sander has observed, the "racial multiplier" effect of a class-based program "increases as the index range falls: blacks and Latinos are admitted at eight times the rate of whites in the 625-699 range, but only at twice the rate in the 760-814 range." *Id.* at 496. The point is relevant in this context because Hastings is not quite as selective as UCLA.

the implications.⁴² Moreover, the Sander et al. proposal suffers from another oversight related to the fact that Hastings was subject to a different time line with respect to the termination of race-conscious affirmative action. To be sure, Hastings was subject to Proposition 209 just like other public institutions, and this took effect with the entering class of 1998 (those offered admission the prior winter and spring). However, the Sander et al. proposal overlooks the fact that UC Hastings was not subject to the UC Regents' SP-1 Resolution of July 1995, which also banned affirmative action and which took effect at the Berkeley, Davis and UCLA Law Schools and other UC graduate and professional schools in 1997 (a year prior to Proposition 209).⁴³ SP-1 did not apply to Hastings because, for somewhat arcane historical reasons, the Hastings College of Law is UC-affiliated but has an autonomous governance structure apart from the UC Regents.⁴⁴

The bottom line emerging from the above two criticisms (especially the first) is this: *UC Hastings should simply be excluded from the first Sander et al. research proposal on methodological grounds*, as Hastings muddies the water between the “experimental” and “control” group conditions in the “natural experiment” at the heart of the first proposed study by the Sander et al. team. Once Hastings is excluded to prevent cross-contamination between the pre-209 and post-209 conditions, it reaffirms the importance of the heightened confidentiality concerns for Boalt Hall, King Hall and UCLA associated with the first Sander et al. proposed study (discussed above). Moreover, the burden should be on Sander et al. to justify the feasibility of their proposed study of the “natural experiment” surrounding Proposition 209 in light of the much smaller sample size of African American law school graduates that could provide useful data.

III. Concerns about Impartiality, Fairness and Transparency

In a different context, Justice Frankfurter declared many years ago that “justice must satisfy the appearance of justice.”⁴⁵ In the present context, the Sander et al. proposal implicates a public good (or quasi-public good), which is the data on the admission profiles of California bar exam test takers that has been collected by the State Bar in cooperation with California’s law schools, including the UC Law Schools. If the above data privacy shortcomings in the Sander et al. proposal are somehow remedied, and if the State Bar is therefore inclined to release the data, I have some suggestions about the most appropriate way to do so to preserve a public sense of fairness and neutrality amidst the pitched debate over affirmative action and the “mismatch” hypothesis. It is particularly important that that these protocols be thoughtfully worked out in advance of any data release, rather being deferred to a later time, because one cannot “unring the bell” once an error in judgment or an oversight is made.

⁴² Richard H. Sander, *The Effect of Law School Racial Preferences on Minority Bar Passage Rates at B9* (National Science Foundation project description, 2006) (“Prop 209 generally prohibited the use of race in state programs, including university admissions. Four California law schools were affected: Boalt, UCLA, UC Davis, and UC Hastings. Boalt and UCLA are both elite schools that had used preferences aggressively prior to the passage of Prop 209. UC Davis also used preferences, but to a lesser degree, and UC Hastings still less.”).

⁴³ Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 IND. L. REV. 55, 73 n.101 (2000) (“The fourth public law school in California, UC’s Hastings College of the Law, is governed by its own Board of Trustees, not by the Regents of UC, and was unaffected by SP-1. It was, however, subject to Proposition 209.”).

⁴⁴ See e.g., THOMAS GARDEN BARNES, *HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY 70-86* (1978) (reviewing history of the founding and early days of Hastings in the late-1800s, including power struggles involving the UC Regents and the Hastings Board).

⁴⁵ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

In other words, despite my lengthy list of concerns even in the limited context of UC-related data privacy issues, it is conceivable that California bar exam data along the lines of what the Sander team is requesting could be released in a responsible manner (my memo also makes clear my view that releasing the data under the conditions specified in the Sander et al. proposal would be a *worse* option as a matter of public policy than not releasing the data). I recommend an approach similar to the way that the Law School Admission Council made their Bar Passage Study data widely available while shielding the identity of individuals and law schools and precluding the publication of minority-white test score differences within the range of those passing the bar (i.e., pass/fail data was provided).⁴⁶ This is the approach most likely to yield what California State Bar members deserve – research findings they can confidently believe have received the benefits of full-throated scientific scrutiny.

I understand that several members of the U.S. Commission on Civil Rights (USCCR) wrote in support of releasing this data. The USCCR hearing last June on law school affirmative action included invited testimony from Professor Sander and Professor Richard Lempert, who is one of Sander’s leading empirical critics and my more senior co-author.⁴⁷ Both Sander and Lempert agreed at the USCCR hearing that it would be helpful to have a neutral panel of social science experts evaluate the costs and benefits of affirmative action in legal education.⁴⁸ I too generally agree that this would be helpful to advance a contentious debate. Releasing the data solely to the team of Sander, Klein, Williams and Henderson contrasts dramatically with what Sander and others have said is needed to arrive at the truth on these issues.

Evidence for or against the “mismatch” hypothesis can turn on highly technical methodological choices, choices that can be invisible to even highly regarded empiricists if these social scientists are denied the opportunity to look “behind the data” supporting a particular conclusion. Absent a level playing field in which the State Bar authorizes the release of the same data set to multiple researchers contemporaneously, I believe that many stakeholders in California, including social scientists, law faculty, and law school graduates (particularly people of color who graduated from the UC Law Schools), will view the results of this research proposal as suspect and one-sided.

Wholly apart from the question of who is ultimately proven correct with respect to the mismatch hypothesis, the State Bar should appreciate the extent to which the methodology and findings in

⁴⁶ For instance, the LSAC website states, “LSAC has created a public-use dataset from its National Longitudinal Bar Passage Study. For information about how to request a copy of this dataset, please contact Ann Gallagher, LSAC Social Research Scientist, at agallagher@LSAC.org.” <http://members.lsacnet.org/> (go to research reports). These data can also be requested at <http://bpsdata.lsac.org/>.

⁴⁷ Richard Lempert with William Kidder, Written Testimony presented before the U.S. Commission on Civil Rights (June 2006); Richard O. Lempert et al., Affirmative Action in American Law Schools: A Critical Response to Richard Sander's “A Reply to Critics” (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>; 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 STANFORD L. REV. 1855 (2005) available at http://www.equaljusticesociety.org/sanders_rebuttal_final.pdf.

⁴⁸ U.S. Comm’n on Civil Rights, Public Hearing on June 16, 2006, Washington, D.C.

Professor Sander's 2004 study in the *Stanford Law Review*⁴⁹, which argues that affirmative action does more harm than good for African Americans at U.S. law schools, has been the focus of extensive criticism in published articles and working papers:

- Lempert and Chambers of the University of Michigan Law School, Clydesdale of the College of New Jersey, and myself (now of UC Davis),⁵⁰
- Ayres and Brooks, economists at Yale Law School;⁵¹
- Wilkins, Harvard Law School;⁵²
- Dauber, Stanford Law School and Sociology Department;⁵³
- Rothstein and Yoon, economists at Princeton and Northwestern;⁵⁴
- Ho, now at Stanford Law School;⁵⁵
- Barnes, Washington University Law School;⁵⁶
- Dean Garth of Southwestern University School of Law and many other colleagues of Sander from the *After the JD* research project.⁵⁷

And aside from the methodological criticism, there are several critiques focusing on the conclusions drawn in Sander's article, including one by the Associate Dean at King Hall.⁵⁸

Just as the Code of Professional Responsibility and California's law schools teach law students to be scrupulously aware of situations where the *appearance of a conflict of interest* might arise

⁴⁹ Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

⁵⁰ 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 STANFORD L. REV. 1855 (2005) available at http://www.equaljusticesociety.org/sanders_rebuttal_final.pdf.

⁵¹ Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005), available at <http://islandia.law.yale.edu/ayers/AyresBrooksResponse.pdf>.

⁵² 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>.

⁵³ Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005).

⁵⁴ 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.

⁵⁵ Daniel E. Ho, Reply: *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005), Daniel E. Ho, *Scholarship Comment: Why Affirmative Action Does Not Cause Black Students To Fail the Bar*, 114 YALE L.J. 1997 (2005), both available at <http://www.law.stanford.edu/directory/profile/244/Daniel%20E.%20Ho/>

⁵⁶ Katherine Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?* (Aug. 2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913411.

⁵⁷ Robert L. Nelson, Ronit Dinovitzer, Bryant G. Garth, Joyce S. Sterling, Gita Z. Wilder & Terry K. Adams, *Observations from the After the JD Survey of the Bar Class of 2000*, 24 QUINNIPIAC L. REV. 539, 545, 553 (2006).

⁵⁸ See e.g., Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me A River: The Limits of 'A Systemic Analysis of Affirmative Action in American Law Schools'*, 7 AF. AM. L. & POL'Y REP. (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=729384.

when representing a client, the State Bar and the law schools in California have an obligation to uphold high standards of appearing impartial in handling important matters of public concern. While I acknowledge there is some degree of viewpoint diversity among the researchers proposing this study (e.g., Klein and Sander have defended the LSAT whereas Henderson published a critique of the LSAT), it is also relevant for the State Bar to consider that in terms of “the appearance of justice” many constituents will have a reasonable basis for concluding that releasing the data only to the Sander team effectively means making it available only to four scholars who are sympathetic to the mismatch hypothesis.

Apart from Sander, whose published views in the *Stanford Law Review*, *North Carolina Law Review* and elsewhere are well known, over the years Dr. Klein has published articles critical (or at least skeptical) of law school affirmative action, including in the National Association of Scholars’ journal *Academic Questions*.⁵⁹ I do not know Professor Williams’ particular views on affirmative action, but he and Sander have co-authored many labor economics articles and studies dating back to when they were doctoral students together in the 1980s,⁶⁰ so it would indeed be surprising if Williams turned out to be a critic of Sander’s scholarship on affirmative action and the mismatch hypothesis. Finally, while I know Professor Henderson through prior exchanges of draft articles, from the vantage point of the public and the “appearance of justice,” I think it is fair to characterize Henderson as someone who is largely not persuaded by the various empirical critiques of Sander’s affirmative action study.⁶¹

Providing the data to the Sander team with the only guarantee of an unbiased analysis being a commitment to publish results in a peer reviewed social science journal like the

⁵⁹ Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, BAR EXAMINER, November 1997, at 8, 13 (“Minority applicants generally have lower passing rates because they usually have lower (and sometimes substantially lower) LGPAs than their classmates...”) and *id.* at 14 (“The large differences in LGPAs among groups can be traced back to differences in admission standards... The large differences among groups in LGPAs and LSAT scores translate into large differences in their bar exam passing scores.”); Stephen P. Klein, *Law School Admissions, LSATs, and the Bar*, 15 ACADEMIC QUESTIONS, Winter 2001-02, at 33, 35 (including a figure displaying LSAT/UGPA index scores and admission probabilities by race/ethnicity as evidence of the “statistical footprint of affirmative action” at a “large and highly regarded public law school”); STEPHEN P. KLEIN, SUMMARY OF RESEARCH ON THE MULTISTATE BAR EXAMINATION 26 (1993) (“Several factors may account for the relationships discussed above. One hypothesis is that all four measures—LSAT, LGPA, bar exam essay, and MBE—are affected by a candidates general intellectual/academic ability.”); *id.* at 38 (“To sum up, differences in mean MBE scores among racial and ethnic groups correspond to differences in the general academic ability levels of these groups as indicated by their mean LSAT scores and LGPAs.”).

⁶⁰ See e.g., Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431 (1989); E. Douglass Williams & Richard H. Sander, *An Empirical Analysis of the Proposed Los Angeles Living Wage Ordinance* (2000), available at http://www.law.ucla.edu/sander/L_Wage/Sander_LA-LivingWage-19970117.pdf; Richard H. Sander et al., *The Economic and Distributional Consequences of the Santa Monica Minimum Wage Ordinance* (Employment Policies Institute Report, 2002), available at http://www.epionline.org/studies/sander_10-2002.pdf. Other “liberal” economists have criticized the Williams and Sander living wage research on methodological grounds. See e.g., Michele Landis Daubert, *The Big Muddy*, 57 STANFORD L. REV. 1899, 1910 n. 58 (2005) (summarizing criticism by economists Pollin & Brenner and by Bernstein & Zabin).

⁶¹ See Empirical Legal Studies Blog of July 26, 2006 (edited by Henderson), available at http://www.elsblog.org/the_empirical_legal_studi/2006/07/sander_affirmat.html; *Debate Club* with Richard Sander and William Henderson, LEGAL AFFAIRS Blog (Jan. 2005), available at http://www.legalaffairs.org/webexclusive/debateclub_sander0105.msp.

Journal of Empirical Legal Studies (JELS) is not an adequate substitute for an equal playing field for serious scholars of all political stripes. Indeed, it may be no guarantee at all. In this connection, the written comments to the State Bar by Sander, Williams and Henderson responding to similar fairness concerns raised at a meeting of deans are susceptible to misinterpretation. In these comments Sander et al. say, “In point of fact, the Journal of Empirical Legal Studies (JELS) has heard about this proposed study and has invited us to submit the manuscript to them.” While the Sander's team commitment not to publish their results unless their work passes peer review is appropriate, the State Bar should also consider that journal editors express interest in seeing article submissions all the time with no implication of eventual favorable action. The statement about JELS should be read neither as a commitment to publish nor as someone's assessment of the quality of work Sander et al. are likely to produce, but rather that the planned article's topic and methods address matters of interest to the journal's readers, and the editors would like to have a chance to evaluate the manuscript when it is finished.

Independent data analysis *in combination with* publication in a highly respected peer reviewed journal is the much-preferred scenario for the release of the data requested by Sander et al. If one looks at Sander's recent affirmative action studies in the *Stanford Law Review* and *North Carolina Law Review*, there are serious flaws of the sort that even if these articles had been submitted to a refereed journal rather than student-run law reviews, such flaws that would likely have been beyond the scope of a typical peer reviewer's assessment.⁶² In other words, peer review is a very important safeguard, but so too is independent reanalysis of the data, which peer reviewers do not ordinarily do. In terms of the “appearance of justice,” if the data is released, the constituents of the State Bar deserve to have confidence that if, as it turns out, there are serious errors in a publication by Sander et al., such errors will not have been rendered invisible by the fact that the data was closely held by the State Bar.

In summary, I recommend that a combination of broad access with more rigorous individual and school-level data privacy protections, like the LSAC Bar Passage Study, is

⁶² An example in the *Stanford Law Review* is where Sander claims to be using the Wightman's “grid model” results in projecting the consequences of ending affirmative action (Table 7.2, p.473). After my colleagues and I obtained LSAC data to perform this grid model calculation, it was clear Sander misapplied Wightman's results when he removed *the entire* bottom 14.1% of African Americans by LSAT/UGPA index scores from the 1991 sample and kept *all* of those with higher index scores – under the grid model many of those who wouldn't be admitted to law school are in the middle of the index score distribution -- which inflated his estimates of the annual production of black lawyers without affirmative action. See Chambers et al., *supra* note 34, at 1889-90.

Similarly, Sander's *North Carolina Law Review* article culminates in a table simulating African American attrition at corporate law firms (Table 22, p.1807), and portrays African Americans as starting out as 8.1% of newly hired associates but ending up as 4.6% of all associates, a bleak pattern of attrition that Sander blames on “the aggressive use of racial preferences.” As my colleague Richard Lempert recently learned when he obtained law firm data from the National Association for Law Placement (NALP), the problem is that Sander's assumed starting point for newly-hired firm associates substantially overstates the percentage of African Americans. NALP data indicate the figure is approximately 6%. Sander's 8.1% figure was derived from *summer associate* firm data (Table 7, p.1781). To give a baseball analogy, that would be like trying to prove that a certain group was better (or worse) at hitting home runs over the course of the season and using spring training rosters rather than the opening day rosters as the baseline. The actual law firm attrition for African Americans (from 6% of the total to 4.6%) is much more modest and about three-fifths of the attrition that Sander blames on affirmative action (and which he argues causes a host of problems such as “the likely crippling of human capital development among many of the most able young minority attorneys” p. 1820) is unfortunately a byproduct of Sander's questionable data interpretation and assumptions.

a more appropriate approach. It is also an approach that is more faithful to the U.S. Supreme Court's guidelines for the admissibility of scientific expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which focus on: (1) whether the expert's technique or theory can be or had been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.⁶³

⁶³ 509 U.S. 579 (1993).