

Memorandum

To: Committee of Bar Examiners
From: Professor Vik Amar, Professor of Law, UC Hastings
Date: February 2, 2007
Re: Why I've Joined the Consortium Project to Study California Bar Data

I first became aware of the project spearheaded by Professor Sander last December, and was immediately interested. I have spent a fair bit of my decade and a half in the legal academy studying, teaching and writing about issues of race, including race-based affirmative action programs in law schools and other institutions of higher education. While most of my written academic work and litigation efforts in the area has focused on the constitutional permissibility of such programs and the legal doctrinal implications of various judicial pronouncements on the subject, I have also spent many hours reflecting on the policy efficacy and fairness of the various kinds of programs that are or might be used around the country.

From my vantage point as a scholar and (sometimes) law school admissions committee member within the University of California, I have generally tended to favor the use of some form of race-based admissions programs, which I believe are permissible under the U.S. Constitution (but which since 1996 have been forbidden to public entities here in California). I was thus troubled by the thesis asserted in Dr. Sander's noteworthy *Stanford Law Review* article a few years ago that many minority students (and the legal bar as well) might be disserved by preference programs that place "mismatched" students in situations where they have a tendency not to succeed and move on to the next levels within the profession the way proponents of affirmative action had hoped and expected. I spoke (and wrote) about Professor Sander's study after it was released, trying to suggest both some limitations on his findings based on some unanswered empirical questions, and some alternatives to improve, rather than cut back on, race-based affirmative action policies even if Sander's basic assertions were descriptively accurate.

The two things of which I became quickly convinced after reading, analyzing and (most importantly) discussing Dr. Sander's work and that of his critics were: (1) there are too many assumptions and suppositions the underlie various rather entrenched arguments and conclusions that people embrace on these matters – assumptions and suppositions that could, in theory at least, be verified or disproved by additional empirical data that should, with effort, be discoverable; and (2) that many people – liberals and conservatives alike-- are uncomfortable discussing the factual realities of this setting and what might be accounting for them.

It is because I think the project described in the NSF grant application has the potential to substantially alleviate both of these constraints on the national conversation about race that I readily agreed to participate. The data the California bar has maintained and that we are seeking to review can, as explained in the NSF grant proposal description, help resolve (or move towards the resolution of) many empirical questions the answers to which one simply must know if one is to form an intelligent view on the

mismatch debate. Importantly, I haven't seen or heard anyone – even critics of the NSF project proposal – who denies the essential relevance of much of the data the bar has within its control to the important debate over the mismatch thesis.

To be sure, there are important questions of *how far* particular pieces of data can take us. For instance, individualized bar exam performance is not, of course, an ideal measure of what a student has learned or mastered during three years of law school. But everyone who takes the bar test does try to pass it with some margin of comfort; and if “mismatched” students (i.e., those of all races who are attending law schools whose students in the main have higher incoming academic credentials and demonstrated skills) are not achieving the same margin of comfort as their non-mismatched counterparts at other (less elite) schools, that is undeniably a relevant piece of information in this larger debate. So too, while we might each quibble over whether a particular law school is or ought to be considered more “elite” than another, having information about the graduates and test takers of each and every law school makes identification of “mismatched” students much, much easier. And the more easily you can identify mismatched students and their (otherwise similarly situated) non-mismatched counterparts at other law schools, the more easily you can then do the work of measuring any mismatch effect that may or may not exist.

I myself don't know how much of a mismatch effect our analysis will find. I would be quite pleased personally if our regressions and other analyses debunk or tend to cut against the mismatch hypothesis advanced in Dr. Sander's *Stanford Law Review* piece. And I want very much for us to run *as many different kinds of tests and analyses as we can think of – using a variety of alternative assumptions about the way schools pick students and the way students go about the task of learning the law – to make sure the data we present can be used by scholars across the ideological spectrum to make their best arguments.*

But more than anything else, I want to move the debate forward and encourage – perhaps even force – people to confront whatever reality seems most likely to exist, even if our sense of that reality is not free from uncertainty, so that we can adapt policy (or perhaps just leave it alone) in a way that is most likely to accomplish our shared objectives of diversity and fairness.