

**PROPOSAL NO.:** 0648635

**INSTITUTION:** U of Cal Los Angeles

**NSF PROGRAM:** LAW AND SOCIAL SCIENCES

**PRINCIPAL INVESTIGATOR:** Sander, Richard H.

**TITLE:** Effects of Law School Admissions Preferences on Minority Bar Passage Rates

**RATING:** Very Good

**REVIEW:**

What is the intellectual merit of the proposed activity?

The proposal authors claim that the so-called "mismatch debate" in law school admissions has attracted "wide discussion and a number of empirical ripostes." (A-1). This is an understatement! Legal scholars, from various substantive backgrounds and with various political leanings, have actively debated the impact of racial preferences in admissions on educational and other outcomes. This proposal promises to shed light on this important topic.

What are the broader impacts of the proposed activity?

The proposal authors promise to provide comprehensive, rigorous, and unbiased analyses of the mismatch effect, relying largely, though ultimately not exclusively, on California data (assuming, as they do, that other state bars and LSAC will cooperate during the project phase). If they succeed in providing such analyses, and if their analyses survive subsequent scrutiny and peer review, their results could have an impact on: (1) law school admissions policies; (2) law school curriculum; (3) targeted law school programs for minority students; and (4) state bar exams.

Summary Statement

I suspect I was identified as a prospective reviewer largely because I have significant experience in law school administration and because I do a modicum of empirical work (albeit not of this type). Because I do not do empirical work of the type envisioned by the proposal authors, and because I have never written a word about law school admissions, racial preferences, etc., I am not well-suited to provide input on the substantive and methodological details of this proposal.

What I can say, though, is that the proposal authors do not overstate the import of this topic; that the proposal authors appear quite qualified to conduct this work; and that the benefits of this project (i.e., shedding meaningful light on this topic) appear to trump its rather modest costs.

I have two minor concerns, prompting me to rate the proposal "very good" rather than "excellent":

First, and most importantly, it would be helpful if the proposal authors could provide NSF with greater certainty re: Part B of the proposal (i.e., "The Development of a National Database on Legal Education Outcomes"). They indicate that they have been in contact with other states and LSAC, and they "project that a half-a-dozen major bars will be participating" in the study eventually (B-12). I don't know how reliable that projection is. If it is not particularly reliable, NSF might fund Part A of the Proposal and invite the authors to seek additional funding for Part B when they have firm commitments from other states and LSAC.

Second, and less significantly, Professor Sander, fairly or unfairly, is associated with a particular position on this topic. Thus, though he is a recognized expert, his published works on this topic are likely to be met with skepticism from some quarters. To his credit, Professor Sander recognizes this, and indeed, Professor Henderson is apparently participating in the project in part to anticipate and address this credibility issue (B-13).

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**TITLE:** Effects of Law School Admissions Preferences on Minority Bar Passage Rates

**RATING:** Fair

**REVIEW:**

What is the intellectual merit of the proposed activity?

The passage of Proposition 209 in California presents an interesting opportunity to examine the effect of a change in policy (affirmative action) on bar passage rates.

What are the broader impacts of the proposed activity?

The entire project is limited by lack of analysis of how a mismatch translates into harm, so it is not clear how this work informs other applications of affirmative action policy.

Summary Statement

The PI proposes to use a natural experiment in California, the passage of Proposition 209 (which prohibited racial preferences at publically-funded schools), as a means to examine the effect of racial preferences on mismatch of minority students with institutions. This is part of the larger question of the social and individual effects of affirmative action (a.a.). In this case the focus is on the individual: does a.a. policy in admissions to law school help or hurt minority (black and Hispanic) applicants. The full argument is two-staged. First, is there a mismatch between the capabilities of minorities admitted under a.a. and the scholastic demands of law schools employing such policies (particularly, elite law schools)? Second, if such a mismatch occurs, with (presumably, though not necessarily) minority students being poorly prepared for the level of law school to which they are admitted and possibly failing to graduate or pass a bar exam, does this result in harm to them (in the sense that they are worse off than if there had been no affirmative action policy)? The PI's proposal is to improve existing databases and to examine the causes of differential performance on bar exams; his focus is on the mismatch problem, but the assumption is that bar passage rates are a useful indicator of harm.

While development of the database is of broader use than this project alone, I have strong reservations that the measure of success or failure that is being employed in the subsequent analysis tells us much about whether a.a. policy is a net gain or loss to the individual involved. Why is bar passage rate of interest to more than law students who wish to be practicing lawyers? In particular, many students go to law school and do not become practicing attorneys. Did they suffer a loss? There is no consideration given, in this entire proposal, to controlling for alternative employment as well as changes in the economy. If admission to elite law schools leads to better employment than would have occurred otherwise, then this means that the implied measure of harm (bar failure rate) could be misleading. This is partly because changes in employment possibilities (including non-lawyer opportunities), may asymmetrically draw from the pool of minority candidates. Thus, the observation on page B-7 of pass rates, and drops in rates of blacks who become lawyers, is a discussion in a vacuum, since we don't know what those who did not take the exam, or took and failed the exam, ended up doing with their degree.

There also seems to be no control for income effects, or for the quality of preparation of students for bar exams. If minority students are poorer, are they less likely to take bar exam preparation courses (which cost money)? Since elite law schools do not particularly emphasize preparing students for bar exams (anywhere near to the degree lower level schools do), does this not then bias the results? If there is a correlation between income and race in admitted students, is it a surprise to see those (on average, richer) white students who elect to take the bar do better on it, especially in the portion of the sample for students from elite law schools? I would expect that the out-of-state bar-takers take a prep course, so there is seems to be insufficient control over

the heterogeneity of the population be analyzed, as none of this is considered by the PI.

Again, while I like the idea of developing the database around this natural experiment, I am not sure why the score on the exam is a more important variable than simply the pass/no-pass outcome. After all, if one passes, how important is the score, which again may just reflect the quality of the prep course for the bar? I also could not fathom hypothesis (2)(a) on page B-10; why should one expect this and what would it have to do with the mismatch-harm issue? Are you asserting that Prop 209 drove the better minority students out of the state (to law school or to something else), or out of the career-path (to be a manager, or something else).

In sum, I think the analysis of the data does not account for the alternatives that might be opened up to minorities admitted under a.a.; the reliance on bar pass rates as a measure that a.a. policy harms minorities is overly limited. I do agree that developing the data around this natural experiment and trying to assess the causes of bar failure rates is of interest, but it is not on-point for addressing the value of a.a. policy, a claim made repeatedly throughout the proposal.

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**RATING:** Excellent

**REVIEW:**

What is the intellectual merit of the proposed activity?

What are the broader impacts of the proposed activity?

Summary Statement

This proposed study will step into an area of research that is highly charged: the effects of affirmative action on its beneficiaries. The focus of attention is the "mismatch" question, namely, whether beneficiaries of affirmative action exhibit lower academic performance resulting from a credentials gap between them and most of their classmates. While the existence of mismatch effects has been a subject of heated dispute, all participants in the debate agree on the need for better data. This project promises to supply that better data with regard to law school education and performance on the bar exam.

The intellectual merit of this project is very clear, as the study will raise the bar substantially on empirical knowledge about the effects of affirmative action on beneficiaries, at least in law schools. Both proponents and opponents of affirmative action will, therefore, be highly interested in the results. Strengths of the project include the team of researchers, which includes a major contributor to debate over mismatch effects (Sander). The capacity to take advantage of the natural experiment created by Proposition 209, as well as the cooperation of California law schools and the California Committee of Bar Examiners, is a patent strong point as well. While the transferability of the results to undergraduate education will be unclear, this is a tremendous opportunity to generate better data for legal education.

A final and notable strength of the proposal is its outline of the shortcomings in the Bar Passage Study. By delimiting these shortcomings, the proposal highlights quite effectively the variety of ways the proposed study will improve measurement. Without doubt, the database created will be of enormous value in advancing knowledge on this difficult subject.

Two brief, additional points:

(1) In Footnote 2 (B-11), the authors indicate a desire to "eliminate whether a student 'passes' or 'fails' from most of our analyses." As they explain, the use of bar scores as opposed to passage rates permits this. The title of the project, however, refers to "passage rates," and so their professed desire to eliminate this way of thinking appears inconsistent.

(2) The proposal makes no mention of looking at variance by gender within racial categories, though it notes twice the inclusion of a gender variable. While the title of the study refers to "minority" bar passage rates, I hope the researchers do not repeat the pervasive error of discussing "minorities" as though they are all men, and then tacking on a brief notation to gender variance (if that proves to exist). A wealth of scholarship has now established that race and gender are interactive categories, and this scholarship should not be ignored.

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**RATING:** Excellent

**REVIEW:**

What is the intellectual merit of the proposed activity?

1. This proposal rates the very top of the scale for its intellectual merit. It addresses a very significant and little-studied issue of great public interest in an extremely sophisticated way. Sander is a superb scholar whose previous papers I have read with admiration, and Stephen Klein has also written a number of fine articles that I am familiar with. Sander and his colleagues propose to extend Sander's pioneering work on the performance of African Americans in law school and on the bar exams, to address questions that remain unsettled. For at least a generation, American law schools have sought to expand minority enrollments by using race as "plus factor" in the admissions process. Most of the debate over such policies, which are in force at virtually all selective colleges and graduate schools today, has focused on the difficult moral and questions involved. Strong arguments can be made on both sides. Until recently, though, we have had precious little evidence as to the actual impact of such policies on the students who are supposed to benefit from them. Critics have suggested that when students are "mismatched" to the institutions in which they are enrolled, they will not benefit from attending in a "better" school. It is even possible that they will be worse off at a school for which they are ill-prepared. Sander's long paper in the Stanford Law Review analyzed a rich and comprehensive data set that provided considerable support for the mismatch theory, with negative mismatch effects affecting both graduation and bar passage rates. But the data were limited in a variety of ways, so his paper was far from definitive. The project for which Sander and his collaborators seek funding will greatly expand and enrich the body of relevant evidence that can be analyzed, and should do a good deal to narrow the existing disagreements over this matter. I expect that whatever analysis this teams produces will be of the same very high quality as the previous work of Sanders and Klein. Equally important, though, the new California data will be available to other investigators with different policy preferences, and it is possible that its availability for research will stimulate interest in the creation of a truly national data base on legal education outcomes. California is a particularly strategic state to look at, because the passage of Proposition 209 in 1996 put an end to the overt use of race as a factor in admission to public law schools in the state. Compliance was doubtless imperfect, but was probably great enough to permit useful comparison between state institutions bound by Proposition 209 and private law schools that were not.

What are the broader impacts of the proposed activity?

2. The project, in my view, will substantially advance discovery and understanding of an important policy issue. I am confident that Sander's report on the results will attract a good deal of scholarly attention, as his previous work has, and will similarly focus attention on empirical issues that can, at least in principle, be resolved with enough research. Furthermore, his critics will feel pressure to evaluate his empirical claims and to counter them with data-based arguments instead of moral denunciations, and will have ready access to all the evidence generated.

This proposal also may serve to broaden the effective participation of underrepresented groups in higher education. If the research lends sufficient support to the hypotheses advanced in Sander's earlier work on this subject, it could lead to a revision of law school admissions policies that would reduce the current mismatch between student levels of academic preparation and the institutions that admit them. If Sander is right, the result might be somewhat fewer African American students in the entering classes of the top law schools, but a good many more graduating and succeeding in passing the bar exams.

## Summary Statement

I have rarely seen a research proposal that more clearly merited funding. I think that it is superb in every way.

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**RATING:** No Rating

**REVIEW:**

What is the intellectual merit of the proposed activity?

In an earlier study, Sander "found evidence of large mismatch effects in law schools. He contended that large racial preferences for blacks substantially reduced black law school graduation rates and bar passage rates." As he notes, the findings were hotly debated in law and society circles. (I have heard some discussion of this debate, but have not read the published findings or critiques.)

The proposed study will use more recent and better data to test whether mismatch effects affect performance on bar exams. It will use data from California law schools to re-address the question of mismatch, taking "advantage of the natural experiment created by Proposition 209 (the 1996 California law that prohibited racial preferences at public schools)." The research team will also build a broader, multistate database to generalize results to a wider array of law schools.

Sander has put together a research team of experienced scholars and practitioners for the project. Since critique of the earlier studies seems to rest heavily on significant problems with the data, it seems reasonable to ask whether this new data set and the proposed methods eliminate those problems. These questions need to be addressed by scholars trained in quantitative methods--which I am not. I did notice that the study focuses on race, but without sufficient attention to the factors of class and gender. Its focus is also clearly on African-Americans, and it makes no mention of Native American people.

It also seems to me reasonable to ask whether Sander is the appropriate person to head a study which could potentially discredit his earlier work. Can this research team offer an "objective" perspective to answer the questions the study seeks to address?

At the time of this evaluation, the research team did not yet have permission to use one of the data sets required for the study. Hence further review of the project should be delayed until such permission has been received.

What are the broader impacts of the proposed activity?

The potential impact of this study is very significant. It goes to the heart of the question of whether affirmative action policies should be abandoned, as California voters seem to prefer.

Summary Statement

This proposal should be discussed at the panel meeting. The insights of scholars who have worked in the fields of legal education, critical race theory, and quantitative methods should be voiced. I strongly recommend that the proposal be evaluated by scholars and law professors representing minority populations.