

Submission to the *STANFORD LAW REVIEW*, November 2004

This essay is subject to revision. The final version of Professor Sander's article has not yet been published.

**The Real Impact of Eliminating
Affirmative Action in American Law
Schools: An Empirical Critique of Richard
Sander's *Stanford Law Review* Study**

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I. SUMMARY OF PRINCIPAL POINTS

In his article, *A Systemic Analysis of Affirmative Action in American Law Schools*,¹ Richard Sander reviews the history of affirmative action at American law schools and the litigation in the courts. He attacks the Supreme Court's handling of the evidence before it in *Grutter v. Bollinger*, claiming that the the University of Michigan Law School gave greater weight to race in admissions than the majority of the Court recognized. The bulk of Sander's article, however, is a speculative inquiry into what would happen to matriculation, graduation and bar passage by African American students at American law schools if race were no longer taken into account in admissions decisions. It is this central section of the Sander article to which this response is addressed.

Sander makes an astonishing forecast: that there would be more black lawyers without affirmative action than there are with it. His counterintuitive prediction is based on the theory that if affirmative action in admissions were ended, some African American students who are admitted to a law school today would no longer be admitted at all, but that many more of the African Americans who would be admitted to law school by race-neutral criteria would graduate and pass the bar than is the case today. They would perform better, he argues, because, with the end of affirmative action, they would attend schools where their entering credentials are like those of their white classmates and where they would graduate and pass the bar at the same rate as whites. Spinning out a series of assumptions and projections, he concludes that, if affirmative action were ended, there would be an 8.8 percent net increase in the numbers of African American attorneys entering the bar each year. (See Table 1.)

Table 1: Sander's Estimates of the Effects of Eliminating Law School Affirmative Action on the Production of African American Attorneys (Synthesizing Data from 1991 Matriculants and 2001 Applicants)²

Stage of the system	Sander's estimate of change by eliminating affirmative action
Applicants	No Change
Admittees	-14.1%
Matriculants	-14.1%
Graduates	- 7.6%
Passing the Bar	+8.8%

¹ Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. ___ (forthcoming Nov. 2004) (October manuscript).

² *Id.* at 201-202, tbl.8.2.

The four of us have drafted this response because we believe that Sander’s forecasts are irresponsible.³ We believe that an even-handed assessment of available data on law school admissions, law school performance, and bar exam performance will show that Sander’s article is premised upon a series of statistical errors, oversights, and implausible (and at times internally contradictory) assumptions. Sander blames affirmative action for a host of performance disparities between white and African American students that the data simply do not support. Our critique combines an independent analysis of Sander’s data with other more recent sources that Sander neglected.⁴ Our own conclusion is that if affirmative action in admissions were eliminated, there would probably be a **25 to 30 percent decline** in the numbers of African Americans entering the bar, not the rosy 8.8 percent improvement that he forecasts.

Table 2: Our Preliminary Estimates of the Effects of Eliminating Law School Affirmative Action on the Production of African American Attorneys (Synthesizing Data from 1991 Matriculants and 2003-2004 Applicants)

Stage of the system	Our estimate of change by eliminating affirmative action
Applicants	-10% to -15%
Admittees	-35% to -45%
Matriculants	-40% to -45%
Graduates	-35% to -40%
Passing the Bar	-25% to -30%

Sander makes insupportable (and invariably rosy) predictions about the effects of ending affirmative action on every stage that law students pass through on their way to becoming practitioners – in particular, on application levels, matriculation, graduation and passage of the bar. Here are his most significant mistakes:

Admissions and Matriculation.

Sander acknowledges that with an end of affirmative action many African Americans who matriculate at law school would no longer be admitted at all, but, drawing on a study of admissions data from 2001, calculates that the decline in admissions and matriculation would be only 14 percent. He is wrong. The actual reduction in the numbers of African Americans who would enter law school would be much greater because:

³ We shared a number of our concerns with Sander after reading a draft version of the article that was presented at the 2004 meetings of the Law & Society Association. They ranged from suggestions that Sander present data on Table Ns and more strength of association information to questions about functional form, and sample selection bias. In revising his draft article Sander failed to address most of our concerns while he deals with some others in a cursory fashion. We have also shared other concerns outside the scope of our review, including Sander’s analysis of affirmative action in *Grutter* and *Gratz*.

- 2001 was an abnormal admissions year, with an unusually low number of white applicants and a higher than usual ratio of black to white applicants; using admissions data from 2003, which is more typical of historical patterns, we conclude that the proportion of African American students who could no longer secure admission to any law school if affirmative action ended would be at least 24 percent, not the 14 percent that Sander believes.
- In addition, Sander assumes that, after affirmative action ends, every African American who could still get into some law school somewhere would actually apply to that law school and decide to matriculate there. Every single one. This is absurd. With an end of affirmative action, applications by promising African American candidates are almost certain to decline to some extent. Some, particularly those attending highly selective undergraduate institutions now, will abandon law and pick other career paths rather than attend a law school that seems to have little prestige or attend a law school where only one or two of their classmates are black. Some others, no longer able to get into a school nearby, will be unwilling to apply to regional law schools hundreds or thousands of miles away.
- When we couple the 24 percent of African American candidates who could no longer secure admission anywhere with the additional group that might be admitted but who would no longer apply to a school that would accept them, we believe that the decline in matriculations of African American students might well approach 40 to 45 percent.

Grades in Law School and Rates of Graduation.

Sander forecasts that if affirmative action ended, African American students would attend schools where their LSAT scores and undergraduate grades would be the same as their white classmates and that they would then secure grades as high as their classmates and graduate at comparable rates. He believes they would do as well because in a study he conducted in the mid-nineties of first-semester, first-year grades, he found that once LSAT scores and UGPAs were controlled for, black law students did as well as their white classmates. However, for two reasons, it remains likely that, even if schools rigorously applied race-neutral admissions criteria, African American students would still perform less well in law school and graduate at lower rates than their white classmates.

- First, at any given school that applies race-neutral criteria and admits all their students from a pool of applicants within the same above-average range of LSAT scores and undergraduate grades, it is still highly likely that within that pool, African American applicants will have somewhat lower LSATs and UGPAs than white applicants, simply because that is the way that white and African American students are distributed in the national pool. That is to say, at any given law school, African American applicants are more likely to be in the lower half of the school's applicant pool than they are to be in the upper half. Accordingly, the African American students admitted to most law schools are highly likely to have somewhat lower entry credentials than whites who are admitted even with a race-neutral selection system. If

the LSATs and UGPAs of admitted African American students are lower, then by Sander's own reasoning, their grades in law school would likely remain lower and their rates of graduation lower as well.

- Second, despite Sander's claims, research by others strongly suggests that, in general, African American students do not in fact perform as well as whites within the same law schools even when they have similar LSATs and UGPAs. Something about the atmosphere of law school exacerbates the entering educational gaps of minority and other atypical law students. It is not African Americans alone who get lower grades than their entry numbers would predict. Latino students, Asian American students, and students who begin law school when they are 30 or older suffer a similar fate.

Bar Passage.

The most recent research on bar passage by race, conducted in the mid-1990s, found that a much higher proportion of African Americans than whites who took the bar exam one or more times never passed it. Sander believes that most of this gap in the pass rate between African Americans and whites is due to affirmative action: some African Americans fail the bar because they should never have been admitted to law school at all; others fail because they could properly be admitted to some school somewhere but have attended schools where they are over their heads and fail to learn enough to pass the bar. He believes that if they went to law schools where their entry credentials were the same as whites, they would do as well as whites. Again, his reasoning is flawed.

- In the preceding section, we pointed out the reasons why African Americans admitted to law schools under wholly race-neutral criteria are unlikely to perform as well in law school as their white classmates. Since Sander's expectation that African Americans will do as well as their white classmates on the bar is based entirely on his unjustified belief that they will do as well in law school grades, his conclusion that they will do as well on the bar is also flawed.

Overall Reduction in the Number of African American Attorneys.

Putting together the effects at admission, graduation and bar passage of ending affirmative action, we believe that, while it is probably the case that if affirmative action were ended the graduation rate of African American students would improve somewhat at the law schools they would then attend, the net impact of ending affirmative action would be calamitous – probably in the range of a 25-30 percent decline overall in the numbers of new African American attorneys each year.

Where African American Law Students Would Go to Law School with an End to Affirmative Action.

Ending affirmative action would not have the same effects across all law schools. Some law schools would perceive a benefit, particularly those in large urban areas that compete with nearby elite schools and currently have difficulty matriculating many African American students with reasonably high LSATs and UGPAs. These schools might end up with more African American students with promising admissions credentials. On the other hand, at a very large number of law

schools, a massive reduction in the numbers of African American students would almost certainly occur.

Sander concedes that ending affirmative action would reduce the percentage of African American students at the ‘most elite’ schools from their current level of around eight percent down to about one or two percent. He implies that the decrease would be very modest at schools other than the most elite. In this he surely errs again. Our analysis of the redistribution that ending affirmative action would cause is more preliminary than our analysis of total numbers above, but our estimates so far suggest that ending affirmative action and applying strictly race neutral criteria at admissions would lead to a severe decline in the number of African American students not just at the ten or twenty most selective law schools, but at least at the fifty or so most selective. We believe that the effect of cutting out about three fourths of the African American students at the country’s most highly regarded law schools would harm not only African Americans seeking to be lawyers but also white students and the nation as a whole.

Overall conclusion

We believe that performance disparities between African Americans and whites in law school and on bar exams raise serious and important issues that law schools and the profession must address, but we reject Sander’s proposal to end affirmative action as a solution. Indeed, because Sander’s conclusion -- that “blacks as a whole would be unambiguously better off” without affirmative action⁵ -- is based upon such a weak chain of untenable estimates and assumptions, we are concerned that if left unchallenged in the legal academy and elsewhere, Sander’s article may improperly discourage many African Americans from applying to law school, thus irresponsibly contributing to the very problem Sander purports to remedy.

⁵ *Id.* at 210.

II. STAGES 1, 2, AND 3: Sander Underestimates the Decline in African American Applications, Admissions and Matriculation That Would be Precipitated by an End to Affirmative Action.

Sander explicitly predicts that there would be no decline in applications to law school by African Americans with an end of affirmative action (or at least no decline among African Americans who could get into any law school).⁶ He then predicts that there would be only a 14 percent decline in the numbers of African American applicants who would be admitted to at least one law school, and he assumes that every one of those who were admitted would matriculate. Sander's predictions are completely unrealistic. He both underestimates the numbers of African American students who could not get into any law school without affirmative action and, among those who could get in, he completely ignores the high probability that many would choose other careers or would apply only where they cannot get in or would be admitted but, because of finances or other considerations, choose not to enroll.

We combine here our discussion of the three steps up through matriculation – the decision to apply, the law school's decision to extend admission offers, and the applicants' decision to matriculate – because, while we are confident that Sander underestimates the harmful effects of ending affirmative action at each step, it is at this point impossible to forecast, among African Americans who decide not to go to law school, whether their decision will come at the point of deciding not to apply or at the point of having an offer but deciding not to matriculate.

Sander rests his conclusion that ending affirmative action will produce only a 14 percent decline in African American matriculation to law school entirely on the research of Linda Wightman, then of the Law School Admission Council (LSAC).⁷ We have done the same computations using more recent LSAC data and found that Sander's projection is far too low.

Wightman, drawing upon 2001 admissions cycle data, used two different models to estimate the consequences of ending affirmative action. In the first, a so-called grid model, explained at length by Sander, Wightman projected that 14 percent fewer African American applicants to law school could secure an admission from at least one law school if affirmative action were ended.⁸ In the second, a logistic regression model, she projected post-affirmative action admissions based solely upon LSAT/UGPA within the schools to which candidates actually applied, and found a probable 38% decline in African Americans receiving admission offers in 2001 (and a staggering 79% decline in 1991).⁹ Sander dismisses Wightman's logistic regression model as “nonsensical” and adopts Wightman's 2001 grid model results as representative of what would happen if affirmative action ended tomorrow.¹⁰ We believe that the actual probable decline lies somewhere between the grid model that Sander adopted and the regression model that Sander rejected.

For two quite different sets of reasons, Sander's estimate of a 14 percent decline is deeply

⁶ *Id.* at 204.

⁷ Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. LEGAL EDUC. 229, 232-34 (2003).

⁸ *Id.* at 243 tbl.7.

⁹ *Id.* at 243 tbl.7, 244 n.26.

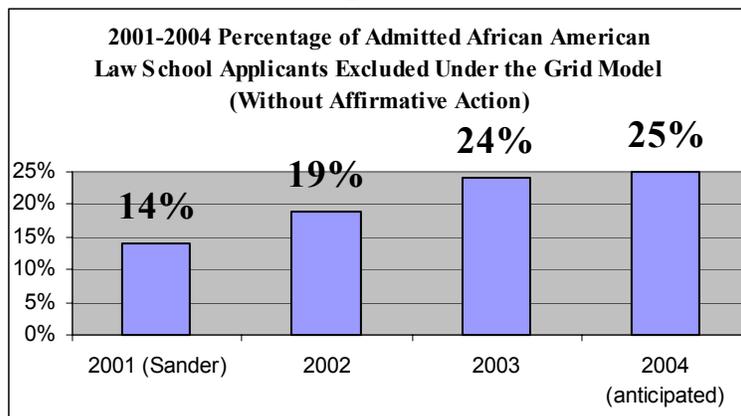
¹⁰ Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 1, at 199 n.247, 197, 200-201.

flawed. First, the year 2001, which was the most recent year available to Wightman when she wrote her article, was quite atypical. More recent data strongly suggest that the decline in numbers of black students who could get into any law school without affirmative action would be much higher than 14 percent. Sander's 2001 projections must be placed in the proper context. White applications to law school rose steadily between the mid-1980s and 1991 when it reached a peak of about 78,000 amidst a faltering economy (young white college graduates tend to stay in school when jobs are scarce).¹¹ During the more robust economy of the 1990s white applications steadily declined until the late 1990s when applications by whites bottomed out at 46,000 and then rebounded modestly in the next couple of years.¹² In 2001, the year of Wightman's study, there were 51,000 white applicants to law school.¹³

Among African American applicants the pattern has been different. During the 1990s through the early years of this century, as white applications fell, the numbers of black applicants to law school rose, then held steady and finally rose again. Thus in 2001, with a finite number of slots in American law schools there were fewer white applicants seeking to fill them and the ratio of black to white applicants was at an all-time high. In the two years since 2001 for which data are available, the numbers of white applicants has risen by over 25 percent (from 51,000 back up to 64,000).¹⁴

Using 2003 data, we have made exactly the same grid model calculation that Wightman performed for 2001. We estimate that ending affirmative action would slash African American admission offers to law school by approximately 24% in 2003 (see Figure 1). The 2003 data confirm that even if the assumptions of the grid model are sound, Sander's 2001 figures are inappropriate for estimating what would happen if affirmative action ended tomorrow.

Figure 1¹⁵



Final figures for 2004 are not yet available but probably will be in time for our final submission. Preliminary 2004 figures indicate a continued, though smaller, increase in the numbers

¹¹ LAW SCHOOL ADMISSION COUNCIL, MINORITY DATABOOK 24 tbl.V-1 (2002).

¹² *Id.*

¹³ Law School Admission Council, Average UGPA, Average LSAT, and Counts by Ethnic Group (2004) (unpublished memorandum).

¹⁴ *Id.*

¹⁵ Authors' calculations based upon Law School Admission Council, National Decision Profiles for 2001-2003 (Jan. 2002-Dec. 2003).

of white students, so the 2004 grid model estimates can be expected to again cut African American admissions by 24% or more (also shown in Figure 1).¹⁶ Moreover, early data on LSAT administrations, which Sander recognizes are a good proxy for trends in law school application volume, indicate that the 2005 admission cycle is likely to have even more applicants than 2003 and 2004.¹⁷

Second, Sander overestimates probable black matriculation in another egregious way, by taking Wightman's grid model, which she intended as a prediction of how many African American could get into some law school without affirmative action, and treating it as if it had been intended as a forecast of how many African Americans would actually apply and matriculate.¹⁸ Wightman makes clear that that is not what she was trying to do. Indeed, as far as actual matriculation is concerned, Wightman states explicitly that the grid model contains an important but unrealistic assumption, one that Sander rejects: under an affirmative action ban, it is far from clear that African Americans would in fact want to attend significantly lower-ranked law schools they never actually applied to in real life.¹⁹ Below are some of the reasons we agree with Wightman that the grid model assumptions are unrealistic for determining how many would actually apply and enroll, and why we believe that African American applications, admissions, and matriculations would decline without affirmative action to a greater extent that the grid model projects:

A) The Bottom of the Pool Will Drop Away

As a starting point, even Sander would admit (though he does not say so) that there would probably be a decline among applicants with the lowest entry credentials: the black candidates who, with an end to affirmative action, could not get in anywhere. Why apply if it is futile? Yet even among this group, there will be some black students with LSAT scores and UGPAs that could secure entry but who, believing they would no longer be seriously considered, decide not to apply. That would be a loss, and while this might be a small group, it needs to be acknowledged.

B) African Americans Will be Diverted to Other Career Choices

Sander acknowledges that some African Americans will consider a different career path than law if they figure that can no longer obtain admission to an elite or other prestigious public or regional school. Sander acknowledges that "A college student attracted to the law but not desperate to have a legal career might have second thoughts if she faced the prospect of attending a fortieth-ranked school instead of one ranked fourteenth. Other careers and other types of graduate study

¹⁶ Authors' correspondence with Law School Admission Council's Data Management Department (Aug. 2004). See also Law School Admission Council, Volume Summary Data (2004) (showing preliminary data indicating a 2.3% increase in applicants between 2003 and 2004), available at <http://www.lsac.org/LSAC.asp?url=lsac/LSAC-volume-summary.asp>.

¹⁷ Law School Admission Council, Tests Administered Data (2004) (reporting that the June 2004 LSAT had more test-takers than any other June test in the period since 1987), available at <http://www.lsac.org/LSAC.asp?url=lsac/tests-administered.asp>. See also Richard H. Sander & E. Douglas Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 453 n.48 (1989).

¹⁸ In his crucial table, Sander mistakenly labels the products of Wightman's grid as "matriculants" rather than as hypothetical admittees. Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 1, at 201 tbl. 8.2.

¹⁹ Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 18, 22-23 (1997) (pointing out the weakness of the grid model for this reason).

might loom more attractively.”²⁰ He nonetheless concludes that there would be no decline in applications because black applicants will learn of his findings and recognize that they will, in general, have a better chance of getting into the bar by going to the fortieth ranked school.²¹

We are confident that Sander is in error. Consider for example the current black graduates of Ivy League and highly selective public universities, who now often secure admission to elite law schools. Sander says that a student might balk at choosing the 40th ranked school in the future when she can get into the 14th ranked school today, but concludes that she would still decide to apply.²² Our later analysis suggests that, more realistically, many of the black students who today get into the 14th ranked school would be admitted only to the 60th or 70th ranked school, if law schools solely relied on LSAT scores and undergraduate grades, a scenario that would inch closer to reality if affirmative action were ended.²³ Whether the 40th or the 60th ranked school is the prospect, we believe that some African Americans, perhaps many, would turn to other career paths.

Indeed, even today, for many African American students applying to law school, other career paths are likely to be nearly as attractive as law. Unlike the pool of applicants to medical school, where the average candidate invests years of effort into pre-med courses and consequently applies to a dozen schools,²⁴ the average black and white law school candidate in 2001 applied to fewer than five law schools.²⁵ Thus, a large proportion of African American and other applicants to law school are much more tentative in their commitment. For many African Americans, the ending of affirmative action might be the “tipping point” away from law school and in favor of other opportunities in higher education and the labor market. The figures above on applications during the 1980s and 1990s reveal how widely applications swing in response to mild changes in the economy. And as Sander himself notes, “My own unpublished research suggests that a talented young person of any race growing up in a low-to-modest socioeconomic environment has a better chance of reaching the upper-middle class through ordinary capitalism than through a graduate degree, like law school.”²⁶ If Sander’s unpublished research is accurate here (and we have no way of confirming that), then “ordinary capitalism” is likely to look even more attractive to black students if affirmative action is ended.

Other environmental factors would also likely contribute to a decline in the African American applications, should affirmative action be discontinued. Figure 2 indicates that when affirmative action was prohibited in 1997 at the University of California and University of Texas law schools amidst considerable publicity, African American applications dropped substantially, in part because black students were understandably reluctant to study law in an atmosphere of social isolation. The data shows that at “top ten-fifteen” law schools (Boalt Hall, UCLA, University of Texas), at “top thirty-forty” law schools (UC Hastings and UC Davis), and at a “top fifty-sixty” law school

²⁰ Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 1, at 204.

²¹ *Id.*

²² *Id.*

²³ Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. LEGAL EDUC. 229, 236 tbl.2 (2003) (in the 2001 admissions cycle, LSAT and UGPA explained 70% of the variance in admission decisions for white applicants applying to ABA-accredited law schools).

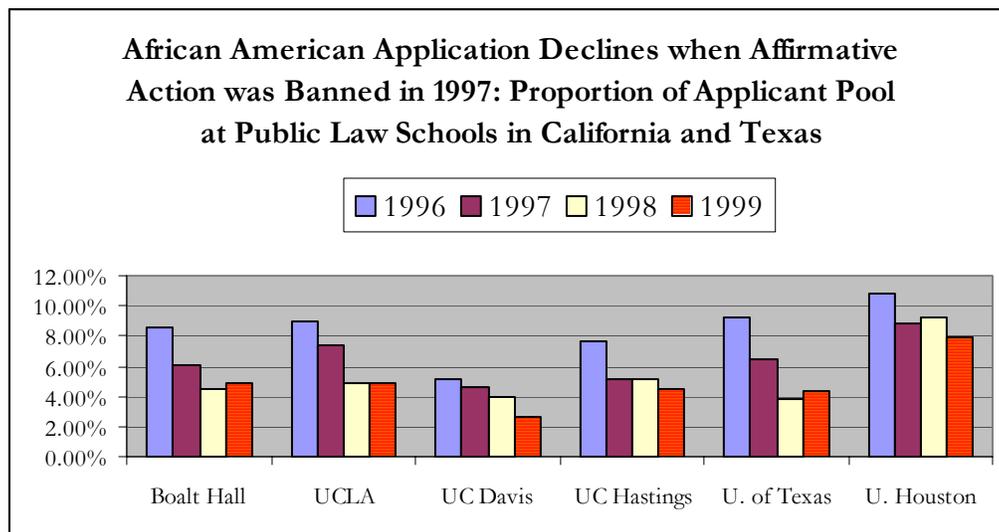
²⁴ Barbara Barzansky & Sylvia I. Etzel, *Educational Programs in U.S. Medical Schools, 2002-2003*, 290 J. AM. MEDICAL ASS’N 1190, 1192 tbl.2 (2003).

²⁵ Wightman, *The Consequences of Race-Blindness*, *supra* note ___, at 234 tbl.1. The same was true in 1991. *Id.*

²⁶ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 157 n.160.

(University of Houston) there was a consistent pattern of declining African American applications once affirmative action was prohibited. At UC, UT, and Houston, African American applications had not recovered as of 2003.²⁷ In addition, a similar decline occurred at the University of Washington Law School, a “top thirty” school where African Americans were 3.9% of applicants in the six years before Washington’s affirmative action ban took effect in 1999, compared to only 2.4% of applications in the six years since.

Figure 2²⁸



By Sander’s own estimates, without affirmative action African Americans would only be 1-2% of the student body at prestigious law schools.²⁹ Currently most elite law schools where affirmative action is permissible enroll student bodies with about 7-12% African Americans.³⁰ Thus, even those African American students who could get into elite schools without affirmative action might decide not to apply at all, rather than be a part of a tiny minority.³¹

Absent a “critical mass” of African American classmates, which the Supreme Court found to be an important factor in upholding the University of Michigan Law School’s affirmative action

²⁷ Figure 2 does not display more recent application data because to the extent Sander argues that the UC and UT Law Schools recently violated affirmative action bans, he cannot have it both ways and cite recent application data to minimize the adverse affect of ending affirmative action. In any event, the latest data available, 2003, supports our argument as well. African Americans’ share of the 2003 applicant pools were still well below 1996 levels: Boalt 4.8%, UCLA 5.9%, UC Davis 3.3%, Hastings 4.4%, UT 4.2%, and Houston 8.5%.

²⁸ Univ. of California Office of the President, Application Data on University of California’s Law Schools (Nov. 2003), available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/lawper.pdf>. The statistics for Hastings, Houston, University of Texas, and the University of Washington are from unpublished memorandum provided by the admissions or public affairs offices at those schools.

²⁹ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 210.

³⁰ AM. BAR ASS’N & LAW SCHOOL ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2003 EDITION 26-35 (2002). The top 30 law schools in *U.S. News* have entering classes with an average of 7.4% African Americans, and that includes several schools with affirmative action bans.

³¹ See e.g., Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 412 (2000).

program in *Grutter v. Bollinger*,³² it is reasonable to expect that other graduate school and career options would become more attractive to some competitive African Americans who currently apply to law school. Eliminating African Americans' critical mass at elite schools would depress applications from precisely those African American students projected to do the "heavy lifting" under Sander's model (those he projects would perform much better by attending a fortieth ranked school instead of a fourteenth ranked school, and so forth). This phenomenon would, in turn, reverberate through each level of the law school hierarchy, undermining Sander's rosy "cascade effect" estimates.

C) Geographic Location Plays a Much Larger Role than Sander Recognizes

Sander's version of the grid model assumes that so long as an African American considering law school could get into a law school anywhere in the United States she will apply to that law school even if she lives halfway across the country from the school that will admit her. That is a totally unwarranted assumption, unhinged from what is known about actual applicant behavior today and where available law schools are located.

The law schools today that have student bodies with entry credentials that might make admission accessible to African Americans in a world without affirmative action are often located at great distances from where most African Americans live and go to college, but most American law students of all races choose to attend law school closer to home. With the exception of the elite and near-elite schools that draw on a national application pool, nearly all the remaining schools in the country have student bodies that are overwhelmingly comprised of in-state residents. At public law schools (such as the fifty "group 3" schools where Sander anticipates that a great many African Americans would apply and enroll), state legislatures commonly limit the numbers of out-of-state students who may be admitted,³³ and the out-of-state applicants who are admitted tend to have higher LSATs and UGPAs than the in-state students.³⁴ Accordingly, the typical American public law school receives 27% fewer applications per year than the typical private law school, a pattern that is consistent in both periods of high and low application volume.³⁵

³² University of Michigan Law School officials sought to enroll a "critical mass" of underrepresented minority students who otherwise would not have a "meaningful representation" at the Law School, and sought to have enough diversity so that such students "do not feel isolated or like spokespersons for their race." *Grutter v. Bollinger*, 123 S.Ct. 2325, 2333-34 (2003) (quoting trial testimony of admissions director Erica Munzel and dean Jeffrey Lehman); see also *id.* at 2343 ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.").

³³ Univ. of Texas Law School, How Affirmative Action Worked (June 2001) (UT is bound by a "hard quota. Each class must be at least 80% Texan."), available at <http://tarlton.law.utexas.edu/hopwood/how.html>; Boalt Hall School of Law, Annual Admissions Report (2002) (75% California resident enrollment target at Boalt); Arturo L. Jaramillo et al., The Status of Minority Attorneys in New Mexico – An Update 1990-1999 4 (1999?) (Univ. of New Mexico Law School's policy is to enroll 85%-90% New Mexico residents), available at [http://www.nmbar.org/Content/NavigationMenu/Publications_Media/Reports_Surveys/Minority Attorneys in New Mexico/execsummaryminorityattorneys.pdf](http://www.nmbar.org/Content/NavigationMenu/Publications_Media/Reports_Surveys/Minority_Attorneys_in_New_Mexico/execsummaryminorityattorneys.pdf); Univ. of Minnesota Law School, General Information, available at <http://www.law.umn.edu/prospective/genadminfo>; (Minnesotans "receive priority consideration for admission."); Univ. of Washington School of Law, Policies for J.D. Admissions, available at <http://www.law.washington.edu/Admissions/Policies.html> (70% target for Washington residents); Univ. of Maine School of Law, 2003 Class Profile (student body is 72% Maine residents and 13% from other New England states), available at <http://mainelaw.maine.edu/admis-profile.htm>.

³⁴ See e.g., Boalt Hall School of Law, Annual Admissions Report (2003).

³⁵ Charles Longley, Law School Admissions, 1985-1995: Assessing the Effect of Application Volume, 2 tbl.1 (1998), LSAC Research Report 97-02.

And it is not formal limits alone that lead applicants to law school to apply only to schools near home. Here are some of the obvious, other reasons law students seek schools in their home states: substantially lower in-state tuition (at public schools);³⁶ the opportunity to save money by living at their parents' home, part-time jobs, spouses or responsibilities in their local community; and a long-term desire to practice in their home state and to build contacts there during their years of law school. African Americans considering law school are particularly likely to want to find a school in a location where they will feel comfortable socially. An African American living in Nashville and wanting to practice in Nashville is unlikely to move to Montana to attend law school.

Table 3 provides indirect evidence of the choices that black applicants to law school make today. It displays, in rank order, the 52 American law schools where black students are 0.0% to 4.0% of the student body. These schools with the lowest percentages, except for those in states that already prohibit affirmative action, are primarily located in states with small black populations – states in the Great Plains, Southwest, Pacific Northwest, Rocky Mountains and rural New England – schools where black students may be reluctant to apply and enroll. But these are the sorts of schools (with comparatively low LSAT/UGPA medians) that Sander assumes that black students will apply to and attend if affirmative action ended tomorrow. Because the law school admissions market is highly regional/local beyond the top tiers, Sander's assumption, that African American application volume will be unchanged, is overly optimistic.

Table 3³⁷
American Law Schools with the Lowest Percentage of African Americans
 (* = affirmative action banned at these schools)

0.0 - North Dakota	1.8 – Washington*	2.5 – Minnesota	3.3 – Widener (PA)
0.0 - Montana	1.8 - South Dakota	2.6 – Penn. State	3.3 – Campbell
0.4 - Wyoming	1.9 - Nebraska	2.7 – UC Berkeley*	3.4 – Chicago
0.7 - Idaho	2.0 - George Mason	2.7 - Cal. Western	3.4 – UC Hastings*
0.8 - Maine	2.1 – Willamette	2.8 – Arizona	3.5 – New Mexico
1.0 - Baylor *	2.1 – SMU*	2.8 – Marquette	3.5 – Santa Clara
1.2 - BYU	2.1 – Duquesne	2.9 – San Diego	3.5 – Boston U.
1.3 - Utah	2.2 – Oregon	2.9 – Notre Dame	3.8 – McGeorge
1.3 - Chapman	2.3 – Villanova	2.9 - Franklin Pierce	3.8 – UNLV
1.5 - Denver	2.3 – U. Texas*	3.0 – Kansas	3.8 – T. Jefferson
1.5 - Lewis & Clark	2.3 – Texas Tech*	3.0 – Houston*	3.8 – N. Kentucky
1.7 – Hawai'i	2.4 – UC Davis*	3.0 – Gonzaga	4.0 – Vermont
1.7 – UCLA*	2.5 - Oklahoma	3.3 - Creighton	4.0 – Colorado

D) Financial Considerations Will Reduce the Number of Applicants

³⁶ EQUAL JUSTICE WORKS ET AL., FROM PAPER CHASE TO MONEY CHASE: LAW SCHOOL DEBT DIVERTS ROAD TO PUBLIC SERVICE 12 (Nov. 2002) (2001 public in-state and out-of-state national median tuition was \$7,738 and \$17,538, respectively) available at <http://www.equaljusticeworks.org/choose/lrapsurvey.pdf>

³⁷ *Ranking the Nation's Law Schools According to Percentage of Black Students*, J. BLACKS IN HIGHER EDUC., Autumn 2001, at 86-87 (citing data from the Official Guide to ABA-Approved Law Schools).

Sander acknowledges that the availability of financial aid can affect decisions about applying to law school, but points to the “After the JD” study to show that black students receive about three times as much in “grants and aid” from law schools as did students of other races, and concludes that financial considerations will not reduce post-affirmative action law school enrollment estimates.³⁸

Here are two reasons we think he is inaccurate: First, if African American students are currently receiving grants and aid in part because of race-conscious programs, then most of such race-based grants would probably cease with the end of affirmative action. Second, even today when many African Americans receive grants and scholarships that do not have to be repaid, more African American students than white borrow to attend law school (95 percent of African Americans, 84 percent of whites) and, when they borrow, they borrow as much on average as white students do.³⁹ Thus, in deciding whether to attend a third or fourth tier law school, an African American student who could attend an elite school today is likely to be affected by how large their debt will be in relation to the earnings they can expect to receive. The “After the JD” study used the *U.S. News* rankings to divide law schools into five tiers and found a troubling relationship between debt and earnings across the tiers. Unsurprisingly, it found that the median income of recent graduates rises with each tier of law school in the prestige hierarchy. Somewhat surprisingly, it found that debts among those with debts were almost constant across tiers. Most people do not realize that many schools in the lower tiers are as expensive to attend as schools at the top (and recall that many of the inexpensive public schools are in states with low African American populations). Thus between graduates of the first and fourth tier schools, there was a difference of more than 2 to 1 in median second-year earnings (\$135,000 versus \$60,000) but very little difference in median educational debt (\$80,000 versus \$75,000).⁴⁰ In this context, many African Americans will perceive that legal education has a diminished return on investment.

E) Many Will Apply Only to Law Schools That Will not Accept Them

The geographic and financial considerations that suggest that fewer African Americans will apply to law school if affirmative action were ended also suggest that many who do apply will apply only to nearby schools that do not admit them. Even today with affirmative action in place, many African American students apply only to schools that they do not get into, and by no means are all of them students who could get in nowhere. In the year 2003, for example, 386 African American students with LSAT's scores of 150 or above were denied admission to all the ABA-accredited law schools to which they applied.⁴¹ These are the sorts of students who Sander foresees might still get into some law school somewhere. However, in a world without affirmative action, the “mismatch” between the schools that African Americans would apply to and the schools, often distant from home, where they could actually get in would significantly worsen. This mismatch is merely one example of the series of dams and levies that, in a world without affirmative action, would block the smoothly flowing “cascade effect” that Sander theorizes.

F) Some African Americans Who are Accepted Will Decide not to Matriculate

³⁸ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 204-205.

³⁹ RONIT DINOVTZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 73, tbl.10.1 (2004), available at <http://www.abf-sociolegal.org/NewPublications/AJD.pdf>.

⁴⁰ *Id.* at 44 tbl.5.2, 75 tbl.10.3.

⁴¹ Law Sch. Admission Council, 2003 Nat'l Decision Profiles, *supra* note __.

Sander also explicitly assumes that every African American who could get into any law school without affirmative action would actually accept the offer and matriculate.⁴² Even today, many African Americans admitted to one or more law schools decide not to matriculate at any of them. In the 2001-2003 admissions cycles, for example, 16 to 18 percent of African Americans admitted to at least one school chose not to enroll in law school at all.⁴³ In light of the factors relating to geography and finances we have already discussed, there is every reason to expect that even more African Americans who receive offers of admission in a post-affirmative action era, will turn them down.

G) A Realistic Affirmative Action Ban Would Apply to Undergraduate Institutions, and Would Therefore Harm African American Applications from Selective Colleges and Universities

While Sander calls for a voluntary collective agreement to end (or reduce) affirmative action in legal education, the most realistic scenario for ending affirmative action would be a reversal of *Grutter*. Such a nationwide affirmative action ban would diminish the number of Black applicants from leading undergraduate feeder institutions. Given Sander's acknowledgment that the top one hundred institutions (only 3% of U.S. colleges and universities) account for 40% of all law school applicants of all racial and ethnic backgrounds (and that the top two hundred account for 55%),⁴⁴ the prospect of ending affirmative action at the undergraduate level would have a profound impact on the law school applicant pool four to six years later.⁴⁵ For example, the top two overall producers of American law school applicants in recent years were UCLA and UC Berkeley, where affirmative action is prohibited.⁴⁶ African Americans received only 2.3% and 2.5% of the freshmen admission offers at UCLA and Berkeley in 2004, respectively, figures that are two-thirds lower than they were in 1995 with affirmative action.⁴⁷

Our Conclusion: Sander believes that ending of race-conscious affirmative action would lead, at maximum, to a 14 percent decline in the number of African Americans who enroll in law school and that the entire 14 percent decline would occur at the point of the admissions decision. He believes, that is, that every African American who could be accepted somewhere will still apply and every African American who is accepted will matriculate.

Our evidence suggests that instead of a 14 percent decline in the numbers of African

⁴² Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 1, at 201 tbl.8.2.

⁴³ Law School Admission Council, National Decision Profiles for 2001-2003, *supra* note 1.

⁴⁴ Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 1, at 142 n.114 (citing LSAC data).

⁴⁵ While Sander argues there is also a corresponding "mismatch" phenomenon at the undergraduate level that he blames on affirmative action, *id.* at 179-80, the weight of evidence regarding undergraduate graduation rates runs counter to Sander's mismatch hypothesis. See e.g., Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differentials in College Graduation Rates by Institutional Selectivity* (Aug. 2004) (paper presented at the Am. Sociological Ass'n Annual Conference, San Francisco), available at http://www.rand.org/labor/adp_pdfs/2004tienda.pdf; WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 54-68 (1998); Thomas Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 440-48 (Christopher Jencks & Meredith Phillips, eds., 1998); Theodore Cross, *The Thernstrom Fallacy: Why Affirmative Action is not Responsible for High Dropout Rates of African American College Students*, 20 J. BLACKS IN HIGHER EDUC. 91 (1998). Thus, Sander's theory overestimates law school prospects for African Americans because his model is divorced from the larger context in which a real affirmative action ban is likely to operate.

⁴⁶ William C. Kidder, *The Struggle for Access from Sweatt to Grutter A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 35 (2003).

⁴⁷ Eva Paterson, *New Laws Must Counter Resegregation in Higher Education*, L.A./S.F. DAILY J., June 23, 2004, at 4.

American students who could be admitted to some law school somewhere, the more accurate figure, based on more recent information, is around 24 or 25 percent. And, beyond this 24 percent, we believe that an additional significant number of persons currently applying to law school who could still get into law school will never matriculate because they will choose not to apply, or they will apply only to schools that do not admit them, or they will be admitted but decline the offer. We believe that a decline of an additional 15 to 20 percent of current students would occur on top of the 25 percent. Thus, through the stage of matriculation, we would anticipate a drop of 40 percent to 45 percent in the numbers of African American students at American law schools.

III. STAGE 4: Performance in Law School -- Sander has no adequate foundation for concluding that, if affirmative action were ended, African American students would perform as well as whites in the law schools they would then attend and graduate at the same rate. In fact, African American students would almost certainly perform less well than whites. Sander also treats LSAT and UGPA in a contradictory manner that artificially boosts his estimates.

Sander believes that if affirmative action were ended, African American students would attend law schools where their admissions credentials were like those of whites, that they would perform in law school as well as the white students and graduate at the same rates. “The data shows,” he says bluntly, “that if blacks were admitted to law schools through race-neutral selection, they would perform as well as whites.”⁴⁸ A starting comment about Sander’s belief about what “would” happen (one that applies to many parts of his projections) is simply that few people, even few economists, believe that they can accurately predict complex human behavior in the future with such certainty even when they have much more complete and current information than Sander had available to him.

But even accepting Sander’s predictions as simply optimistic guesses, his optimism is unjustified on the basis of the very data that he uses at other points in his article.

His starting point for his prediction about how African American students would perform in law school appears plausible. He is correct that the LSAT and UGPA are moderately predictive of law school performance, and thus it seems reasonable to expect that if more African American students attended law schools where their LSAT scores and undergraduate grades approximated those of the white students, the gap between white and African American grade-point averages that Sander observes today would be narrowed and the numbers of African American students who would graduate could increase. However, Sander is almost certainly wrong that, in the absence of affirmative action, African American and white students attending the same law school would have the same distribution of grades. Sad to say, the evidence strongly suggests that African American students admitted to law schools on a race-neutral basis would still receive lower grades than white students.

⁴⁸ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 161 n.167.

A) Even in a Race-Neutral Admissions System, Disparities between White and African American LSAT scores and UGPAs Will Continue

Sander's first error is that he assumes that if affirmative action were ended, the entry credentials of black and white students at any given school would be the same, thus eliminating three-quarters of existing law school grade and bar exam disparities.⁴⁹ He seems to assume, for example, that there would be as high a proportion of blacks as whites in the top quarter or top half of each school's admittees and entering class as measured by LSAT scores and UGPA. However, it is indisputable that a substantial portion of the black-white test score gap in selective higher education institutions is not attributable to affirmative action. Indeed, Bowen and Bok, in *The Shape of the River*, demonstrate that for statistical reasons having to do with the distribution of scores within the applicant pool, under nearly all "race-neutral" admission practices at selective schools, completely erasing the test score gap is not likely: "The only way to create a class in which black and white students had the same average [test] scores would be to discriminate *against* black candidates."⁵⁰ Other respected scholars have corroborated the same point.⁵¹

Thus, if a law school adopted a strictly race-neutral admissions process and selected all its white and African American students from a common pool of students within the same above-average range of LSAT scores and UGPAs, it would still be the case that, within that range, the African American applicants would more frequently than whites have lower LSATs and UGPAs, because that is where African American students fall in the overall national pool of applicants.⁵² That is exactly what happened at Boalt Hall and UCLA in the years immediately after affirmative action

⁴⁹ *Id.* at 202 n.252.

⁵⁰ WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 16 (1998) (emphasis in original).

⁵¹ Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1064 (2002); Expert Report of Claude M. Steele in *Grutter v. Bollinger* and *Gratz v. Bollinger*, reprinted in 5 MICH. J. RACE & L. 439, ___ (1999); Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17, 19-20 (Gary Orfield & Edward Miller, eds., 1998); INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH 46 (Claude S. Fischer et al., eds., 1996).

Yet some ardent affirmative action critics persist with patently false claims. See Robert Lerner & Althea K. Nagai, *Affirmative Action in Colorado Higher Education* 1 (1997) (researchers for the Center for Equal Opportunity argue: "All public colleges and universities in Colorado use Affirmative Action in undergraduate admissions to increase black enrollment. There was no school at which the black median SAT score, ACT score, or GPA was higher than the white median in 1995." Lerner and Nagai cite this as "incontrovertible evidence," boldly claiming that the likelihood of these results occurring by chance are the "same as the probability of flipping a coin and getting 31 heads in a row." Lerner and Nagai's claim is even more ridiculous in light of the fact that many of these Colorado schools are essentially non-selective, admitting 96-100% of applicants), available at <http://www.ceousa.org/colorado.html>; see also RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 451-55 (1994).

⁵² Fischer et al., *supra* note ___, at 46 ("Race-neutral selection processes pass disparities in the applicant pool through the freshman class. Therefore, we cannot read a gap in test scores as if it reflected an edge that the admission process gives to some students at the expense of others."). Giving Sander the benefit of the doubt, he may wrongly be assuming that law school matriculation conforms to a version of the following scenario described by Dickens and Kane. William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye*, 38 INDUS. REL. 331, 338 (1999) ("As long as the distribution of test scores is normal, blacks and whites meeting the same standard will have different average test scores unless the standard is so narrow as to specify that everybody must have the same test score.").

ended, years when even Sander concedes that the schools were rigorously applying race-neutral criteria⁵³: as a group, the few African Americans who were admitted had lower LSATs and UGPAs than the whites who were admitted.⁵⁴ (Sander believes that cheating by admissions staffs has gone on more recently, but entirely without cheating, a gap in admissions credentials is certain to continue).

Since a gap in entry credentials of matriculating white and African American students will inevitably continue, then, even if Sander were correct that entry credentials are all that matter in explaining law school performance, it would still be the case that African American students, who would have somewhat lower entry credentials, would, on average, earn lower grades in law school than whites and, using Sander's own calculations, would be somewhat less likely than whites to graduate. Sander's inflated estimates stem partly from the way he treats LSAT and UGPA in an internally contradictory manner, at once proclaiming that credential disparities explain virtually all African American-white law school grade and bar exam differences, then ignoring inevitable credential disparities that would remain in a post-affirmative action landscape.

⁵³ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 150 n.137; Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997); Richard Sander, *Colleges Will Just Disguise Racial Quotas*, L.A. TIMES, June 30, 2003, at B11.

⁵⁴ Ellen Cook, UC Admissions Data Vault (2003), available at http://home.sandiego.edu/~e_cook/.

B) Sander's errs in his conclusion that entry credentials – LSAT scores and UGPAs – are all that matter in explaining law school performance differences between whites and African Americans

There is a second, equally fundamental error in Sander's prediction that, within the same schools, African American students would perform as well as whites absent affirmative action. Sander simply lacks an adequate statistical basis for his projection and ignores better evidence that points in the opposite direction. His discussion of law school performance and graduation is the strangest part of his article. He begins this section by leading the reader to believe that his analysis will rest entirely on the Law School Admission Council's Bar Passage Study (the BPS), extolling the BPS as a "uniquely comprehensive resource for examining law school performance."⁵⁵ The first table in the section, on the next page, draws upon the BPS to show the much lower grades of African American than white students at elite law schools (Table 5.1). Then, immediately after this Table, without any explanation in the text, Sander switches from the BPS to an entirely different dataset that he himself assembled in the mid-1990s and calls the National Survey of Law Student Performance (NSLSP). This second dataset contains first-semester first year grades from twenty schools and a very limited range of other information for each student. Using the NSLSP, Sander finds, as he reports in Table 5.2, that once undergraduate grades and LSAT scores are controlled, race is no longer significantly related to performance and African American students do as well as whites. This becomes the foundation for his prediction that runs through the rest of the article that if African American law students attended schools where their entry credentials were the same as whites, they would perform as well as whites.

Contrary to Sander, we believe that the rich data in the BPS remain the better dataset to use for understanding law school performance and that, to the extent that its use poses limitations, Sander's own National Survey is even more problematic as a basis for his conclusions.⁵⁶ Sander objects to the BPS as a proper database for analyzing law school grades because it does not standardize for each law school, the LSAT scores and undergraduate grades of its students.⁵⁷ While standardizing grades would have been optimal, the BPS does permit taking into account which "tier" among six hierarchically arranged tiers of law schools each student attended, which we believe serves much the same function. When we run essentially the same analysis that Sander does, using the BPS dataset rather than his National Survey and controlling by tier, we reach very different results than Sander does.

Table 4 displays our analysis. Using the BPS, with (and without) law school tier as a control, we find that being African American remains strongly and highly significantly related to grades even after LSAT's scores and UGPAs are taken into account. We find, that is, that when white and black students within the same law school tier have the same entry credentials, black students still receive lower grades than whites.⁵⁸

⁵⁵ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 158.

⁵⁶ Sander argues that because the BPS does not standardize, for each law school, the LSAT scores and undergraduate grades of its students, regression results on law school performance using the BPS would "be meaningless at best" and "highly misleading at worst" *Id.* at 160 n.164.

⁵⁷ *Id.*

⁵⁸ To check our own regressions, we have also analyzed law school grades for African Americans and whites for each of the six tiers of law schools separately and find, over and over, when we subdivide each tier's students into deciles by

**Table 4 (Replication of Sander’s Table 5.2)
Modeling First-Year GPAs, Using OLS and Heckman Regression with BPS data**

	OLS Regression Unstandardized Coefficients			Heckman Regression Unstandardized Coefficients	
	Model 1	2		3	4
			<i>Substantive Model</i>	(n=24,836)	
Constant	.008***	-.223***	Constant	.170***	-.229***
zLSAT	.217***	.293***	zLSAT	.225***	.307***
zUGPA	.111***	.154***	zUGPA	.117***	.163***
Asian	-.450***	-.384***	Asian	-.441***	-.372***
Black	-.718***	-.687***	Black	-.685***	-.647***
Hispanic	-.490***	-.429***	Hispanic	-.460***	-.395***
Other Race	-.693***	-.615***	Other Race	-.683***	-.598***
Male	.003**	.003**	Male	.029*	.029*
LS Type: 1 st -tier “public ivy”		.154***	LS Type: 1 st -tier “public ivy”		.226***
LS Type: 2 nd -tier mostly public		.210***	LS Type: 2 nd -tier mostly public		.274***
LS Type: 2 nd -tier mostly private		.371***	LS Type: 2 nd -tier mostly private		.439***
LS Type: 3 rd -tier mostly private		.526***	LS Type: 3 rd -tier mostly private		.597***
LS Type: 3 rd -tier hist. minority		1.164***	LS Type: 3 rd -tier hist. minority		1.233***
			<i>Selection Model</i>	(n=2,150)	
			Constant	2.600***	2.419***
			Low LSAT indicator (-2 std dev below LS type attended)	-.187***	-.127***
			Law school type rank	-.154***	-.095***
			Age (with mean substitution)	-.022***	-.024***
			Wald Chi ²	5125.4***	6310.9***
			LR test (rho=0) Chi ²	155.14***	11.88***
Adjusted R ²	.169	.199	Adjusted R ²	.169	.199
Total N	24,998		Total N	26,986	

Our analysis of the BPS thus strongly suggests that Sander is just wrong when he concludes that lower performance by blacks in law school is “a simple and direct consequence of the disparity in entering credentials between blacks and whites” and wrong again when he rejects the possibility that lower black performance is affected by “test anxiety” or by “some special difficulty blacks in general have with law school.”⁵⁹ Something more than entry credentials seems to affect performance. Our co-author Timothy Clydesdale thoroughly analyzed law school performance using the BPS data in a forthcoming *Law & Social Inquiry* article. He finds, contrary to Sander, that something about the educational process at American law schools “exacerbates the entering

entry credentials, black students in the same deciles as white students earned lower grades both in the first year and across all three years cumulatively.

⁵⁹ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 159.

educational gaps of minority and other atypical law students.”⁶⁰ It is not African Americans alone, he finds, who get lower grades than their entry numbers would predict. Latino students, Asian American students, and students who begin law school when they are 30 or older suffer a similar fate.⁶¹

We are thus dismayed by Sander’s shift away from the BPS data to the NSLSP for this one critical table. (Every other table in section 5 of the paper is drawn from the BPS.) Readers who do not read all the footnotes may not realize that the shift ever occurred at all. At an absolute minimum, given the centrality of the BPS to his analysis, Sander should have revealed to readers the results that are reached when the BPS is used and then explained why they are less reliable than the results of his study. No place does he do so.

Moreover, at no point does Sander acknowledge the several ways in which the BPS is superior to the NSLSP for performing an analysis of the factors associated with law school grades. The BPS includes data from nearly every ABA accredited law school, while the NSLSP is limited to data from twenty schools not picked at random. The BPS includes both first year and final law school averages. The NSLSP includes only first semester first year grades (not the whole of law school, not the whole first year, just the first semester), and Sander offers no evidence whatever that first-semester grades are an adequate guide to overall law school performance. Finally, his survey gathered very little information apart from first semester grades. Apparently the only other information was each student’s sex, race, LSAT score and undergraduate grade-point average. That’s it. Using such a narrow dataset, Sander cannot explore any of the dozens of factors other than entry credentials that might affect first year performance. It is true that with his few variables he explains 19 percent of the variance in performance, but he has no capacity to look for what explains the other 81 percent – or indeed whether some other factors that he cannot identify would substantially reduce the apparent significance of numerical entry credentials. By contrast, the BPS includes several hundred variables and reveals many factors other than grades that are significantly related to law school grades, such as financial responsibilities, socioeconomic status, and age.

Sander concludes his section on law school performance with a discussion of graduation rates. The BPS found that 19.2% of African American students and 8.2% of white students who started law school in 1991 failed to complete law school within six years. To explore factors associated with graduation, Sander returns to the BPS dataset and finds that law school grades are by far the best predictor of who graduates and that once law school grades are taken into account, being African American is unrelated to graduation. From this, building on his predictions about grades, he concludes that ending affirmative action would mean that African Americans and whites would graduate from law school at the same rate.

Since, for the two different reasons above, we believe that Sander is wrong that, in the future world he projects, African American students will receive grades as high as whites from the same schools, we also believe that he is erroneous in his projection of probable rates of graduation. Our own forecast would be that, if affirmative action were ended, the numbers of African

⁶⁰ Timothy T. Clydesdale, *A Forked River Runs Through the Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY __ (forthcoming 2004). See also Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. L. REV. 721, 774 (1996).

⁶¹ Clydesdale, *Id.*

Americans who would graduate from the schools they would then attend would improve somewhat over current rates but improve less than Sander forecasts.

IV. STAGE 5: Passing the Bar -- Sander lacks an adequate foundation for predicting that, if affirmative action were ended, African American students would pass the bar at much higher rates than they do today.

The BPS was undertaken by LSAC (and supported by the ABA, National Conference of Bar Examiners, and others) to explore whether whites, African Americans and other racial and ethnic groups passed the bar at comparable rates and, more broadly, what factors account for who does and does not pass the bar.⁶² Resting on surveys of the entering law school class of 1991, it remains the only substantial national study ever conducted of African American and white bar passage. The BPS reached discouraging results. It found that, among bar exam takers who graduated from law school in 1994 or 1995 and who took a bar exam up to five times, 96.7 percent of whites but only 77.6 percent of African Americans eventually pass. Sad to say, 3.3 percent of whites and 22.4 percent of African Americans who take a bar exam at least once never pass. Sander believes that, if affirmative action ended, African Americans would pass the bar at the same rate as their white classmates at the same school and thus that much of the gap between white and African American bar passage rates would be eliminated.

A) Sander's Flawed Analysis of Law School Admissions and Grades Result in an Equally Flawed Analysis of Bar Performance

Sander's forecast of bar passage again rests on the BPS dataset. He finds, as he did with graduation rates, that once law school grades are taken into account, race is of no significance in explaining passing the bar.⁶³ After controlling for eliteness of law school, he finds that whites and African Americans with similar grades in law school pass the bar at essentially the same rate. The high failure rate of African Americans, he thus concludes, is almost entirely due to their poor grades in law school. He speculates that the reason why African American students who finish law school but have low grades never pass the bar today is that they are typically attending law schools where they are over their heads academically, they become discouraged and alienated, they work hard but learn less, and, most importantly, they fail to learn what they need to know to pass the bar.⁶⁴

Sander's forecast regarding bar passage in the absence of affirmative action is almost certainly too optimistic – primarily for the same reason that his forecast was too optimistic about how well African American law students would likely perform in law school without affirmative action. That is, as we demonstrated in the preceding section, even if affirmative action were ended, African American students would likely arrive at law school with lower entry credentials, on average, than their white classmates, and, even when their credentials were the same, they would likely, even at these lower prestige schools, earn lower grades than their white classmates. If this were so then, by Sander's own theory, African American graduates' bar passage rates would remain lower than that of whites from the same schools. Sander's theory is also contradicted by other data

⁶² Henry Ramsey, Jr., *Historical Introduction*, in LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY iii-vii (1998).

⁶³ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 174 tbl.6.1.

⁶⁴ *Id.* at 177-83.

in the BPS. For instance, Asian Americans entering law school in 1991 had nearly identical credentials to whites, yet had significantly lower bar passage rates.⁶⁵

Sander’s confidence in his conclusion that bar passage rates within schools would be the same for whites and African Americans is misguided for a broader reason. He is making a huge leap when he moves from his finding of a strong relation between law school grades and performance on a bar examination to his conclusion that, by putting African American students into settings where they will earn higher grades, they will pass the bar at the same rate as their white classmates. What Sander does not acknowledge is the difficulty of predicting a future very different from the present. Readers of Sander’s article may be interested to know that upon replicating Sander’s BPS regression, we found that he is able to account for only 10 percent of the variance in bar passage, displayed below in Table 5. Thus, ninety percent of the factors affecting bar passage remain a mystery. We simply do not know enough about human behavior to make the brazen predictions about the effect on bar passage that a change in admissions decisions would have.

**Table 5: Predictors of Eventual Bar Passage
(Partial replication of Sander’s Table 7.1)**

	Logistic Regression			Heckman Probit Regression	
	Model 1	Model 2		Model 3	Model 4
			<i>Substantive Model</i>	(n=22,783)	(n=21,470)
Constant	3.501***	3.073***	Constant	1.901***	1.758***
Cumul. Law School GPA		1.384***	Cumul. Law School GPA		.623***
zLSAT	.799***	.500***	zLSAT	.348***	.242***
zUGPA	.405***	.210***	zUGPA	.173***	.107***
Law School Tier (Rank)	-.018	.253***	Law School Tier (Rank)	.007	.113
Male	.142*	.197**	Male	.041	.085*
Asian	-.635***	-.253	Asian	-.297***	-.118
Black	-.742***	-.140	Black	-.337***	-.094
Hispanic	-.600***	-.165	Hispanic	-.281***	-.098
Other Race	-.728*	-.151	Other Race	-.363*	-.116
			<i>Selection Model</i>	(n=4310)	(n=4310)
			Constant	-1.196***	1.998***
			Age (with mean subs.)	-.028***	-.030***
			1 st Year Law School GPA (with mean subs.)	.412***	.390***
			1 st Year Law School GPA – Missing Dummy	-1.247***	-2.130***

⁶⁵ William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 575-76 (2004).

Model Chi ²	1352.99***	2350.60***	Wald Chi ²	1190.94***	1084.18***
			LR test (rho=0) Chi ²	171.85***	22.22***
Pseudo R ²	.061	.104	Pseudo R ²	.104	.172
Total N	21,470		Total N	27,093	25,780

Sander's bar performance data is also quite misleading. Sander laments that there is "little research" on the correlation between bar exams and LSAT/UGPA, then claims based on a California study by Stephen Klein that LSAT and UGPA combined explain "well over 35%" of variance in bar performances.⁶⁶ However, Sander's avoidance of the BPS dataset to support his argument here is as puzzling as his earlier switch from the BPS to his study of twenty law schools.

In fact, the BPS analysis published by Wightman reveals that LSAT and UGPA, when optimally combined, explain **merely 9%** of the variance in bar exam pass/fail status nationwide, a far cry from the 35% or more claimed by Sander, even if adjusted for restriction of range.⁶⁷ In addition, Sander's claim, while not inconsistent with Klein's study of the July 1992 California bar exam,⁶⁸ is contradicted by several more recent articles by Dr. Klein.⁶⁹

Sander's questionable estimate about a strong link between LSAT/UGPA and bar performance, based on California data (and his use of the "Far West" region of the BPS as a proxy for California), reflect a poor understanding of bar exam psychometrics. Sander does not appear to realize that California has the most difficult bar result in the U.S. as measured by scaled Multistate Bar passing standards, meaning that California's low pass rate is not simply a misleading artifact of a broader test-taking population that includes non-ABA graduates, as Sander suggests.⁷⁰ Sander's argument about the value of LSATs and UGPAs in predicting bar performance draws unwarranted inferences from atypical California data, while Sander's own data, the BPS, establishes that entering credentials have a very modest relationship to the bar exam. For the same reason, Sander's comparison of recent black-white pass rate disparities on the California bar exam is also an exaggeration of bar disparities nationwide.⁷¹

⁶⁶ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 153.

⁶⁷ Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 38-39 (1997).

⁶⁸ STEPHEN P. KLEIN, SUMMARY OF RESEARCH ON THE MULTISTATE BAR EXAMINATION 26 (1993).

⁶⁹ Stephen P. Klein, *Law School Admissions, LSATs, and the Bar*, 15 ACADEMIC QUESTIONS 33, 36 tbl.1 (Winter 2001-2002) (e.g., stating that bar pass rates for the "typical California law school" do not vary much by LSAT scores: 81% for students in the top fifth of LSAT scores, 63% for those in the middle fifth, and 61% for students in the bottom fifth); Stephen Klein, *The Educational Effects of Assessment Policies: What the Legal Community is Learning*, 4 PEER REV. 29, 32 n.5 (Winter-Spring 2002) ("The correlation between LSAT and bar exam scores is about 0.35 [12% of variance] when the student is used as the unit of analysis..."); Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, BAR EXAMINER, Nov. 1997, at 8, 12 tbl.3 (LSAT correlates .27-.49 with bar passage at four law schools, probably in California).

⁷⁰ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 172 n.187. *But see* Stephen P. Klein, *Panelist and Reader Judgments Regarding the Passing Score on the Florida Bar Exam*, App. A (expert report commissioned by the Florida Board of Bar Examiners, Aug. 1999, on file with authors) (California and Delaware tied for first, with a 144 MBE scaled requirement, compared to the national average of 134).

⁷¹ *See* Klein, *The Educational Effects of Assessment Policies*, *supra* note __, at 29 ("[I]he overall passing rate in California would increase from about 50 percent to 85 percent if it adopted New York's standard.").

B) Sander Systematically Ignores Data that Contradicts His Unfounded Assumptions

Sander's "mismatch" hypothesis yields a clear prediction, which he neglected to analyze, about how black law students with similar admissions credentials should fare in different tier law schools. Put simply, the expectation is that the students in the less selective law school would on average fare better, in terms of both graduation and the likelihood of passing the bar. This is because compared to students with similar credentials who attended the more selective tiers, the students' admissions credentials in the lower tiers will be relatively stronger vis-à-vis the credentials of their white classmates. Thus, if Sander's assumptions hold, the black students in lower tier schools should, on average, get higher grades than similarly credentialed students in higher tier schools and so should be more likely to graduate and, having graduated, to pass the bar.

Tables 6 and 7 shows the results we get when we test these assumptions using the 1991 Bar Passage data in a series of logistic regressions that look at how black student graduation and bar passage rates vary across law school tiers after controlling for admission index scores. We see from Tables 6 and 7 that Sander's predictions are unsupported, indeed largely refuted, by Sander's core dataset. Eleven of 13 relationships between graduation and law school tier are the opposite of what Sander predicted as are 8 of 13 relationships between law school tier and the likelihood that a student who has begin law school will eventually pass the bar.⁷² Whatever the complex relationships between law school grades and law school graduation,⁷³ Sander's prediction about the relationship between fit and graduation rates simply does not hold.

⁷² To be conservative, we did not venture predictions for tiers that were relative close on black admissions index scores (i.e., where the "mismatch" differences might be slight), including public and private tier 2 schools and tier 3 and historical minority schools. However, since the median admissions index score of tier 2 public schools was higher in 1991 than that of tier 2 private schools, and since the median index of the historical minority schools was higher than the median for the tier 3 schools (contrary to their order in the table), had we included such predictions we would find yet more of the relationships are the opposite of what Sander's analysis would lead one to expect.

⁷³ These performance relationships are complex and still not entirely understood. See Henry Braddock II & William T. Trent, *Correlates of Academic Performance among Black Graduate and Professional Students*, in COLLEGE IN BLACK AND WHITE: AFRICAN AMERICAN STUDENTS IN PREDOMINANTLY WHITE AND IN HISTORICALLY BLACK PUBLIC UNIVERSITIES 161, 173 (Walter R. Allen et al. eds., 1991) ("For Black professional students, grade performance is explained by a more diverse set of factors including social background factors such as sex and age, major-field competitiveness, interaction with white faculty, and the presence and role of Black faculty in the students' programs.").

Table 6⁷⁴

Black Graduation Rates as a Function of Index Scores and Original Law School Tier

P = Relationship in Sander’s predicted direction

X = Relationship Away from Sander’s Predicted Direction

	<i>ELITE</i>	<i>PUBLIC IVY</i>	<i>TIER 2 PRIVATE</i>	<i>TIER 2 PUBLIC</i>	<i>TIER 3</i>	<i>MINORITY</i>	<i>Total Predictions For/Against Sander</i>
ELITE		X	X**	X**	X**	X	0/5
PUBLIC IVY			X	X	X**	X	0/4
TIER 2 PRIVATE				-	X	P	1/1
TIER 2 PUBLIC					X	P	1/1
TIER 3						_*	
MINORITY							

* = significant at < .10

** = significant at < .05

Table 7⁷⁵

Bar Passage among Black Law Students by Index Score and Original Law School Tier

P = Relationship in Sander’s predicted direction

X = Relationship Away from Sander’s Predicted Direction

	<i>ELITE</i>	<i>PUBLIC IVY</i>	<i>TIER 2 PRIVATE</i>	<i>TIER 2 PUBLIC</i>	<i>TIER 3</i>	<i>MINORITY</i>	<i>Total Predictions For/Against Sander</i>
ELITE		X**	X**	X	X**	X	0/5
PUBLIC IVY			P	P*	X	P**	3/1
TIER 2 PRIVATE				_*	X	P**	1/1
TIER 2 PUBLIC					X	P	1/1
TIER 3						_*	
MINORITY							

* = significant at < .10

** = significant at < .05

In summary, Table 6 and 7 confirm that the BPS dataset contains precious little evidence for Sander’s cascade hypothesis. The cascading Sander advocates would reduce rather than raise graduation rates among black law students.

Summary of effects of ending affirmative action on numbers of black attorneys:

⁷⁴ No prediction is made between public and private tier 2 schools or between tier 3 and minority schools because there appears to be no strong relationship in the relative strengths of their student bodies. A + sign indicates relationship favors row school, a – sign indicates relationship favors column school.

Results are based on logistic regressions in which Graduation is the dependent variable and Index Scores and School Tier of Original Law School are the independent variables. School tier effects were evaluated by excluding each tier in turn from a regression equation that contained all other tiers.

⁷⁵ *Infra* footnote accompanying Table 6. Results are based on logistic regressions in which Bar Passage of Those Who Started Law School is the dependent variable and Index Scores and School Tier of Original Law School are the independent variables.

We began this section with a pair of tables that displayed the difference between Sander’s projections and ours regarding the effects of ending affirmative action on the numbers of new African American attorneys. Our conclusions are more tentative than Sander’s. We are not so bold as to make projections of the future out to the tenth of a percentage point, but we believe that the ranges of effects that we predict in Table 8 are more likely to be accurate than his. Here again are Sander’s and our estimates.

Table 8

Stage of the process	Sander’s estimate of change by eliminating affirmative action	Our estimate of change by eliminating affirmative action
Applicants	Unchanged	-10% to -15%
Admittees	-14.1%	-35% to -45%
Matriculants	-14.1%	-40% to -45%
Graduates	- 7.6%	-35% to -40%
Passing the Bar	+8.8%	-25% to - 30%

V. THE REDISTRIBUTION OF STUDENTS AMONG LAW SCHOOLS

The extent to which the end of affirmative action leads to resegregation at prestigious law schools was a hotly contested issue in *Grutter*;⁷⁶ the Court recognized that highly selective law schools produce a disproportionate share of America’s leaders.⁷⁷ Consequently, Sander’s projections -- about how African Americans, post-affirmative action, would be distributed among the various tiers of legal education -- are potentially relevant at both a public policy level, as well as regarding the legal issue of narrow tailoring.

Sander acknowledges that if law schools stopped practicing affirmative action in admissions, there would be a huge reduction in the numbers of African American students at the “most elite law schools.”⁷⁸ Today, at the most selective law schools, roughly eight percent of the student bodies are African American. With an end of affirmative action, Sander estimates that the numbers would probably be “in the range of one or two percent.”⁷⁹ Many readers will read Sander as assuming that at schools other than the most elite, the numbers of African American students would change very little: the African American students who now attend the most elite schools will

⁷⁶ Compare Brief for the American Educational Research Ass’n et al. as Amici Curiae in *Grutter v. Bollinger* 27-29 (Feb. 2003), (affirmative action bans in California, Texas, and Washington caused substantial resegregation at prestigious public law schools), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/AERA-gru.pdf; with Brief Amici Curiae Center for Equal Opportunity et al., in Support of Petitioner in *Grutter v. Bollinger* and *Gratz v. Bollinger*, 29-30 (Jan. 2003), (“A ruling on behalf of Ms. Grutter and Ms. Gratz will not close doors to higher education for African Americans and Hispanics.”) available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/ceo-both.pdf.

⁷⁷ 123 S.Ct. at 2340-41.

⁷⁸ Sander, *Systemic Analysis of Affirmative Action*, *supra* note 1, at 210.

⁷⁹ *Id.*

enroll instead at the next-most-elite schools; those who now attend the next-most-elite will attend the next group down the hierarchy; and so forth.

Our own analysis of the redistribution that would occur is less complete at this point than our analysis of the issues in Part II above, but our preliminary work suggests at some schools, particularly schools in what Wightman and Sander call the second and third tier private schools there might well be an increase in African American enrollment (and those who do enroll would have higher entry credentials than the African American students enrolling there today). Consider the private urban law school that currently has a difficult time attracting highly able African American students in the competition with other more ‘elite’ schools in the same area. In a post-affirmative action world, that law school might benefit considerably by the decline in African American enrollments at the elite schools. On the other hand, we believe that African American enrollment would significantly decline not just at the ten or twenty most elite schools (as Sander seems to expect) but probably at the fifty or even seventy-five most selective and that the impact on American legal education and the profession would be profound.

Much of the difference between Sander’s apparent expectation that only the ‘most elite’ schools would face a significant decline and our belief that the decline would be much more pervasive rests on the difference between us in our assumptions about how many white Americans with high LSAT and UGPAs numbers will be applying to law school. You will recall that Sander relies on 2001 data for his conclusion that an end of affirmative action will lead to only a fourteen percent decline in African American enrollments in law schools. 2001 was a year of near record low numbers of white applicants in comparison with African Americans. There were only 51,000 white applicants that year. Since then white applicants have increased by 25 percent, to 64,000, while the absolute increase in the number of African American applicants has been much less. Since the number of first year slots available in law schools has grown very little over that time, the additional 13,000 white applicants, who have in general higher LSAT and UGPAs than the African American applicants, would, in the absence of affirmative action, simply fill more and more of the openings at the most selective law schools. It is thus our guess that if affirmative action were ended, there would be a huge decline in African American enrollments at a great many more law schools than Sanders implies.

We have not yet succeeded in identifying a fully satisfactory way to model the likely impact of ending affirmative action at each of the tiers of law schools. We have, however, performed a simple analysis that illustrates what the effect might look like if schools based admissions solely on LSAT score and undergraduate grades, ignoring not only race but also other “soft” admissions information such as public service, job experience, extra-curriculars, and legacy status. This assumption – of a system based totally on scores and grades -- is not totally implausible. It is in fact what many who ardently oppose affirmative action seem to favor. Believing that test scores and grades are synonymous with merit and suspicious that any deviation from relying solely on scores and grades opens opportunities for law schools to cheat by taking race into account, they advocate that law schools give little weight to soft considerations.

Table 9 illustrates the results of admissions based solely on LSATs and UGPAs, using 2003 admissions information. In this analysis, we borrowed the rankings system developed by *U.S. News*

and *World Report* (for want of anything better)⁸⁰ and divided all schools into six tiers. Applying to each applicant Sander's formula for a combined index of LSAT score and UGPA, we simply assumed that all the first-year places available at the top 10 schools would be filled by the students with the highest indexes, all the places at the 11th through 25th school would be filled with those with the next highest indices and so forth. As you can see in the table below, by this process, only 0.75 percent of students at the Top 10 schools, 1.01 percent at the next fifteen schools, and 1.68 percent at the next 25 would be African American. Only 1.25 percent of students at the top ranked 50 schools, taken as a group, would be African American. Think about the consequences. If African Americans were only 1.25 percent of the student bodies of these schools, rather than the roughly 8 percent that they are today, then a law school that had 80 students in each of four first-year sections could expect to have only 1 African American student in each section, in comparison to the 6 or 7 African American students in each such section today.

Table 9
Illustration of African American Enrollments at U.S. Law Schools
if LSAT and UGPA were the sole criteria for selection,
Using schools as ranked by *U.S. News* and 2003 admissions data from LSAC

Range of Law Schools	Top 10	11 th -25 th	26 th -50 th	51 st -100 th	Tier 3	Tier 4
Number of African American students	23	44	99	292	263	574
% of Student Body that would be African American	0.75%	1.01%	1.68%	2.38%	3.72%	4.69%

We readily concede, of course, that the figures in Table 9 are unrealistically bleak. We know that many white applicants with very high LSAT scores and law school grades choose schools that are not among the top ranked fifty and that some pick another graduate discipline altogether. We know also that law schools do consider factors other than scores and grades and will almost certainly continue to rely on them in the future. Accordingly, as a very rough way of portraying a race-neutral admissions system that still gives weight to soft factors such as jobs and extra-curriculars, assume with us for a minute that the percentage figures in table 9 are off by as much as a factor of two – that the actual percentage of African American students at each tier after the end of affirmative action would be twice as high as that depicted in the Table, that at the Top ten

⁸⁰ *Schools of Law*, U.S. NEWS & WORLD REPORT, April 12, 2004, at 69. Admittedly, these rankings are controversial and warrant criticism. Richard O. Lempert, *Of Polls and Prestige: One Faculty Member's Candid Views*, 34 LAW QUADRANGLE NOTES 62, 68 (1990) (criticizing the *U.S. News* rankings). However, our options are limited because, for confidentiality reasons, none of the LSAC-BPS publications list the names of the law schools in each cluster. See e.g., Linda F. Wightman, Clustering U.S. Law Schools Using Variables That Describe Size, Cost, Selectivity, and Student Body Characteristics, LSAC Research Report 93-04 (1993). In any event, the BPS clusters and *U.S. News* rankings are likely to overlap considerably given that both are strongly associated with entering students' LSATs and UGPAs. See Stephen P. Klein & Laura Hamilton, The Validity of the U.S. News and World Report Ranking of ABA Law Schools (Feb. 1998) (student selectivity explained about 90% of the variance in ranking among law schools in *U.S. News*), available at: <http://www.aals.org/validity.html>.

schools African Americans would represent 1.5 percent of the student bodies, instead of the 0.75 percent shown in the Table and at the top fifty schools taken together, they would be about 2.5 percent of the student bodies, rather than 1.25 percent. Even with such a doubling, there would still be an enormous decline at these fifty schools from the current average of 7 -8 percent of enrollments.

With a decline of this scale, two harmful phenomena are likely to occur. First, some very able African Americans who do not want to be at a school where they would be part of a tiny racial minority will decide not to apply to any law school at all. Second, when the numbers of African American students at each school are so low, those who do choose to matriculate are likely to feel isolated and participate less in class or otherwise contribute less to the intellectual life around them.

There would be other, broader harms that would flow from cutting African American enrollments by over two-thirds at the most selective fifty or so law schools. These schools produce a very high proportion of the leaders of the American bar, of elected and appointed officials, and of policymakers and opinion shapers in the country. Over the past 30 years, affirmative action has permitted thousands of African Americans to attend these schools and to become part of the next generation of leaders. Of course, many white and minority leaders have also attended law schools farther down the U.S. News rankings, but the ranges of career opportunities are simply narrower at the less prestigious schools.

Effects would be particularly severe in law school teaching, since a very small number of high-ranked law schools provide the lion's share of the nation's law professors.⁸¹ One study, for example, found that Harvard Law School graduates comprise 13% of tenure-track American law professors, that half of all law professors graduated from the top 13 law schools, and that 60% of law professors graduated from the top 25 schools.⁸² Many, perhaps most, of the current African American law professors are graduates of these schools. This is a major concern in and of itself, but it is also true that the absence of faculty diversity diminishes the quality of the legal education students receive, particularly underrepresented minority students.⁸³

In addition, white students at these fifty schools would also lose. Today, many of the white students at these schools have grown up in overwhelming white neighborhoods and attended overwhelmingly white elementary and secondary schools. If affirmative action is ended at colleges and professional schools, then, until residential segregation ends in this country, the majority of white persons going to these law schools will spend their entire educational lives without studying with and getting to know African Americans. We live today in a multiracial society, but one that still endows race with great social significance. Racial understanding comes in significant part from actual interaction. We cannot as a nation afford the resegregation of our professional schools.

Over the weeks before finishing this response, we plan to work on other models for forecasting what impacts the end of affirmative action in admissions would have on the

⁸¹ Deborah Jones Merritt & Barbara F. Reskin, *Race, Sex, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 248-49 (1997).

⁸² Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 227 tbl.27 (1991) (sample of 872 law professors).

⁸³ Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11, 44-46 (2003).

enrollments of African American students at various levels and types of law schools. Our efforts in this regard will be included in the final version.