

A SUMMARY OF "SYSTEMIC ANALYSIS"*

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The purpose of this piece is to provide a short summary of my recent work on affirmative action for those who do not have time to read either the full 116-page article or the many hundreds of pages of critiques, discussions, and replies that have followed in the past nine months. This summary is adapted from a series of columns I wrote for the "Volokh Conspiracy" last November and this past June, which outlined the arguments of the main article as well as the single most interesting follow-up finding from my work this year. (In the final sections, you will see references to readers of the columns who sent in comments.) You can find the full article and my "Reply to Critics" at <http://www.law.ucla.edu/sander/>; I'll also bring some reprints to the event. Many of the leading critiques of the work are also available online.¹

1. The General Operation of Racial Preferences

When law schools talk about race-based admissions preferences - something they generally discuss as little as possible -- they make three claims: (a) the preferences are small and not automatic, (b) race is one of a myriad of factors taken into account to create a diverse class, and (c) everyone admitted is fully qualified to do well at the school. These were the central messages advanced by the University of Michigan Law School in their defense of affirmative action before the Supreme Court. I found in my research that all three claims were substantially untrue, both for Michigan and for law schools generally. More interestingly, I found that each law school follows such a similar pattern that a powerful "cascade" effect sets in, creating interesting collective action

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¹ There is the original critique by David Chambers, Richard Lempert, and others, which was released a couple months before the article appeared and started the media bandwagon: <http://www.law.ucla.edu/sander/Systemic/Critics.htm>. This site also has a response by me to their specific arguments. There are also critiques published in Stanford's May issue by Ian Ayres and Richard Brooks: <http://islandia.law.yale.edu/ayers/indexcivil.htm>; a revised critique by Chambers and Lempert: <http://www.tcnj.edu/~clydesda/projects.htm>; and a critique by David Wilkins (one of the better ones, I think): [http://scholar.google.com/scholar?q=author:"WILKINS"%20intitle:"A%20Systematic%20Response%20to%20Systemic%20Disadvantage:%20A%20Response%20to%20Sander](http://scholar.google.com/scholar?q=author:). Finally, Daniel Ho has written no less than three critiques, two of which appeared in the June Yale Law Journal along with a reply by me.

problems for the system as a whole and for any school that wants to approach admissions less mechanically.

The problem that every university faces is the gap in test scores and grades between whites and Asians on the one hand, and blacks and Hispanics on the other. On a 1000-point academic scale I use throughout my paper, the median black/white gap among law school applicants was about 170 points in the early 1990s and is about 135 points today. As you may recall, the Supreme Court issued two opinions in last year's affirmative action case. In *Gratz v. Bollinger*, the Court found that the Undergraduate College at the University of Michigan violated the constitution by awarding a fixed number of points to black applications. The Law School's admissions passed muster, according to Justice O'Connor's decisive opinion, because race there was part of a complex individualized assessment of each applicant - the opposite of a mechanical award of points.

Many of O'Connor's colleagues hinted that she was elevating form over substance and with good reason. Using logistic regression and other techniques, I estimated the weight given to race and to academic numbers by the College and the Law School. The Law School's admissions were dominated by numbers, and the implicit "boost" given black applicants was larger (and as mechanical) as the College's system. The only substantive differences between the two schools is that the College gave more weight to factors such as socioeconomic background, writing samples, and extracurricular activities - differences that should have made it more constitutional in O'Connor's eyes, not less. The law school was apparently saved by the way in which they talked about their admissions system, and perhaps the plaintiff's failure to adequately demonstrate the system's actual workings.

The Michigan Law School admissions cycles litigated in *Grutter v. Bollinger* (mostly the 1995 through 1999 cycles) are highly representative of practices at law schools nationally. I gathered data from seven other public law schools through Freedom of Information Act (FOIA) requests, and analyzed another database that has data on 27,000 law students from the Class of 1994. At every law school, at least 80% of admissions decisions (and usually more like 90%) could be predicted by knowing the LSAT, undergraduate GPA, and race of the applicant. Nearly every law school used the same metric for white and black students, but either added points to eliminate the black-white gap in credentials or simply segregated admissions files by race. Furthermore, nearly every school admitted black and white applicants at rates that were statistically indistinguishable. Additionally, in the 1990's, a virtually identical 170-point gap could be found between the credentials of the median white and black matriculant

- a gap that reached from the most elite schools to the smallest regional schools (ironically, only the historically black law schools were exempt from this pattern).

The collective action problem arises as follows. The preferences awarded by the top tier law schools absorb all the black applicants that would be admitted, in a race-blind system, to second-tier schools. These schools must therefore choose between having essentially no black students *and* duplicating the types of preferences pursued by the top-tier schools. Nearly all of the second-tier schools choose the latter course, thus putting third-tier schools into the same bind. The net effect of this system is to move nearly all blacks up one tier (or even two) in the law school hierarchy, thus placing nearly all blacks at an enormous academic disadvantage in the schools they attend. The only net addition of blacks to the system comes in the lowest-tier schools, and the black students they admit have such marginal academic credentials that they face long odds against ever becoming attorneys.

2. The Effects of Preferences on Grades, Graduation, and the Bar

As I discussed above, a very large majority of American law schools essentially race-norm black and white academic credentials when they admit their classes. Since the black-white credentials gap in the applicant pool is quite large, a typical law school has very little overlap between the highest credentials of its black students and the lowest credentials of its white students. This would not matter very much if, as critics have long argued, the LSAT and UGPA were poor predictors of law school performance. It is true that, individual by individual, these credentials are only rough indicators of performance. However, as applied to groups, they are extremely accurate.

Consequently, blacks as a group have academic trouble in law school in very consistent and predictable patterns. At American law schools that use large racial preferences, half of all black students end up in the bottom tenth of their first-year class. Put a little differently, the median black student performs in the first-year at about the 7th percentile of the median white student. The gap is statistically no different in legal writing classes than in classes with timed exams. When adjusted for dropouts, the black-white gap gets slightly wider over the second and third year of law school.

It is important to note that this performance gap has nothing to do with race per se. Whites who attend law schools where their credentials are far below most of their peers have pretty much the same types of troubles. The performance gap is a function of preferences. (Now, it's true that the preferences come about in the first place because of the black/white credentials gap - but that is another

story, which I'm happy to address later if readers are interested.) There is no credible evidence indicating that if schools used race-blind admissions, blacks would under perform whites at all.

The most obvious consequence of the grade gap in law school is that blacks are either expelled or drop out at much higher rates than whites (19% of blacks don't complete law school compared to 8% of whites). Almost all of the attrition is among students with very low grades. The more serious consequence is that students at the bottom of the class apparently learn less than the same student would learn at a lower-tier school where the student would be closer to the middle of the class. This is what's known as the "mismatch effect."

A number of studies of college students have found various types of mismatch effects. Black law students who go to schools where their credentials are far below most of their classmates' are less likely to graduate, more likely to switch out of science majors, and more likely to abandon aspirations for an academic career than blacks who attend college where their credentials place them closer to the middle. These studies have been hampered, however, by the absence of any general test that college students take after graduation; no one could demonstrate that blacks actually learned less at more elite schools.

For my research, I was able to capitalize on a massive database compiled by the Law School Admissions Council in the 1990s, which tracked law graduates through up to five attempts to pass the bar. Even though bar exams vary state by state, they have much in common and there are ways to control for the variations. I found that law school grades predicted bar passage rates more accurately than school eliteness did and that it was more important to be near or above the middle of the class than at a higher-ranked school. This was equally true for blacks and whites. However, since the preferences system pushes most blacks to attend more elite schools, the tradeoff has devastating effects on black bar passage. Blacks are 50% to 100% more likely to fail the bar on their first attempt than are whites who started law school with identical credentials. Admission of blacks at the bottom of the law school hierarchy and very weak academic backgrounds combined; one finds that nationally blacks fail the bar at four times the white rate.

Taking the graduation effect and the bar effect together, and one finds that only 45% of blacks who started law school in 1991 graduated and passed the bar on their first attempt (compared to 80% of whites). Again, this is not a "racial" effect, but a preferences effect. I find in my analyses that the graduate-and-pass rate for blacks would rise to 64-70% in a preference-free system -- still a little lower than the white rate, but only because the distribution of black credentials is

lower than the white distribution, and not because of things law schools are doing to make the credentials gap worse.

3. Black Law Graduates in the Job Market

There was already some awareness before *Systemic Analysis* that for some reason blacks were having exceptional difficulties with the bar, though most of my colleagues were surprised by their scale and by the tendency of preferences to exacerbate existing gaps. However, it has been almost universally believed that an unmitigated blessing of racial preferences, from the perspective of black beneficiaries, is the entrée preferences give to good jobs. Since employers like to hire new attorneys with famous name-brands, giving blacks a boost into more elite schools is thought to enhance greatly their marketability and, eventually, their power and position in the legal hierarchy.

A new database that I describe in my article provides the first nationally representative data on young lawyers and their jobs. Although the data is not perfect, it makes it possible to weigh the effect of over a dozen background factors in shaping the types of jobs new lawyers get. Analyses of the data show, quite strikingly, that employers care — and care a lot — about how job-seekers did in law school. Law school prestige is important, but for law graduates as a whole, good grades are a much more powerful predictor of getting a higher-paying job than the eliteness of one's school.

What this implies about racial preferences is not completely obvious. One needs to estimate both how much of an "eliteness" boost the typical black applicant gets in the admissions process, and how much the average black student's law school GPA would go up if admissions were race-blind and the student attended a lower-ranked school. Both calculations are difficult, and subject to some debate. However, I think the general pattern is fairly clear. Anywhere outside the most elite schools, new black lawyers are hurt by preferences more than they are helped. For a typical black graduating from a middle-ranked law school, the grades/prestige tradeoff that goes with affirmative action lowers her earnings by about twenty percent.

I found that at the most elite (top ten) law schools, blacks gain enough from the enhanced prestige of their school to roughly offset the grade disadvantage. This seems intuitively plausible, too. Yale, Harvard, and Stanford are universally known as blue-chip schools, while many employers won't know what distinctions to draw between Fordham, Iowa, and Case Western. Although it is probably true that some very elite employers limit recruiting to the top ten

schools, I was unable to find a clear net plus for blacks from preferences — just a wash.

One might suppose that some employers use grade cutoffs, in part, as a device to discriminate against minority job candidates. This may be true for some employers, but the general pattern is just the opposite; legal employers pay a premium to recruit junior black lawyers. In other words, when one controls for various background characteristics, new black lawyers earn seven to nine percent more than other lawyers with comparable backgrounds. In fact, blacks with high GPAs do extremely well in the market regardless of where they went to school. No similar premium can be found with respect to Hispanic or Asian attorneys.

Nevertheless, the irony is as follows: Law school preferences create a situation where high-GPA blacks are a rare commodity. Blacks with very low GPAs - or even worse, blacks who have failed a bar exam once or more - are very common, and they are penalized substantially in the job market.

One by-product of this state of affairs is the large concentration of black lawyers in government and small firms. Part of this seems to reflect personal preferences. There is a variety of evidence that black lawyers, on average, do more pro bono and community service than the average white lawyer and are more inclined by personal philosophy to work in government. However, the concentration is also partly due to the preferences-low grades connection. Black law graduates academically ranked at the middle of their class or higher have a pattern of early careers that more closely resembles the white pattern than the pattern of other blacks. Jobs with local government agencies or small firms are sometimes a last resort for students with poor grades - and this is a choice blacks face far more often than they would in the absence of large admissions preferences.

My findings about the job market tradeoff between school eliteness and grades have implications for all law students, not just blacks. The implication of my findings is that going to the best law school one gets into - a strategy almost everyone seems to follow - may not be a good strategy at all. It is important for students to realistically assess how well they will do at the schools to which they are accepted, and to pick a school where they are likely to be at least in the middle of their class. Middle and low-tier law schools, under this view, deserve a great deal more respect than the hierarchical world of legal education tends to accord them.

4. What Would the Black Bar Look Like With a Reduction or Elimination of Law School Racial Preferences?

Perhaps one of the reasons that few legal academics have delved very deeply into the issue of law school racial preferences is the widespread assumption that, whatever the other costs and benefits of the system, admissions preferences are the only way to racially integrate the bar. The claim that has been repeated many times, and which figured prominently in the *Grutter* briefs, is that black enrollment in law school would drop 50-90% if preferences were abolished. Since a decline of that magnitude seems unimaginable, so too does a serious questioning of admissions preferences.

In my research, I found that the usual method academics use to project admissions in a race-neutral world is seriously flawed. Most such projections assume that minority students will continue to apply to the same schools, and only those schools, if preferences disappear. However, if preferences are large, and minorities (blacks in particular) take preferential policies into account in deciding where to apply, then it must necessarily be the case that minority applications will overwhelmingly be rejected in a race-neutral world.

If one, instead, asks what proportion of the black applicant pool would be admitted to *some* law school under a race-blind system, one gets a much rosier result. A 2003 study by Dr. Linda Wightman (who headed LSAC's research operations for many years) found that 86% of blacks admitted to law school in 2001 would have qualified for some law school under a race-blind system. That number has risen sharply over the past decade due to a steady rise in the number of black applicants and a gradual, but steady, narrowing of the black-white credentials gap.

Recall that, in my research, I found that racial preferences tend to systematically lower black performance in law school, black graduation rates, and black rates of success on the bar exam. Only 45% of entering blacks under the current system graduate and pass the bar exam on their first attempt and another 12% pass the bar on some later attempt. I estimate that the 45% figure would rise to 64-70% under a race-blind regime. If the pool of entering black law students shrinks a little, but their survival rate rises sharply, it's not hard to see why we might very well end up producing more, not fewer, black lawyers in a race-blind system. My best guess is that the total number of blacks passing the bar on their first attempt would rise about 22% in a race-blind system and the number passing after multiple attempts would rise 9%. The emphasis here should be on the word "guess." No one knows what would happen to black interest in attending law school in a world without preferences. Perhaps there would be a surge of interest

in a law school world where blacks perform much better, have much higher chances of success on the bar, and dispense with any stigma from affirmative action. Conversely, there could be an erosion of interest if blacks are faced with attending less elite schools or if many blacks view the end of preferences as a signal that they are unwelcome. I would hope that my findings, and those of other researchers, would reassure black applicants that attending a less elite school is an excellent career move for them, but of course no one knows. My simulations make the neutral assumption that the total volume of black applications will neither increase nor decrease.

The stories I have read about my article almost invariably cite the "9% increase in black lawyers" projection and infuse it with an air of artificial precision. That is unfortunate, even if inevitable, given the exciting aura such a claim carries with it. I am actually attempting to make two other points. First, the end of preferences clearly no longer implies a massive hit to the production of black lawyers. The claims of a 50-90% decline were misleading nonsense. (My most vocal critics are now suggesting a 25-35% decline.) I will defend my 9% increase as a much better guess, but the important point is that the range of debate has shifted.

Second, there can be no question that in a race-blind system, the black bar would be healthier in a number of ways. The proportion of practicing black attorneys who have failed the bar at least once would fall from 22% to less than 10%, and black scores on bar exams, even for those who pass the first time, would be dramatically higher. The median earnings of black attorneys, for at least the early career years I have measured, would be significantly higher, and blacks would be distributed across job sectors in a way much more similar to white patterns. Furthermore, significantly, fewer black law students would spend years earning a degree that failed to gain them admission to the legal profession. Even in light of the above, I am still not convinced that a total elimination of preferences is the best way to go. It is certainly the cleanest solution, and perhaps the only one that policy-makers could legislate. However, I think there are a variety of alternatives worth exploring. Consider, for example, what I call the "4% solution." Suppose that all law schools agreed that, if they use racial preferences for blacks, they would not apply those preferences to more than 4% of the class. Since schools would continue to admit all blacks who qualified without preferences the 4% would act as a floor, rather than a ceiling.

The beauty of the 4% approach is that it breaks the cascade effect. The top ten law schools would presumably fully use the 4%, and would thereby preserve more racial diversity at the top than we would initially have in a race-blind system. However, the next tier of schools would now have many black

applicants who formerly went to top-ten schools because they would be significantly less reliant on preferences. In the third tier and below, preferences would be nearly irrelevant. Enough blacks would have shifted down-market so that schools would have very substantial, if not greater black enrollments, with minimal or no preferences.

The above alternative approach has several advantages. First, it effectively confines the aggressive use of preferences to the top tier of schools where the academic mismatch is most benign in its effects. Second, it blunts the fear of those who believe that the most talented blacks will shift to other fields if they are unlikely to attend top-ten schools. Lastly, it mitigates the diversity impact on the most elite classrooms, and provides some reassurance that pipelines of talented blacks into prestigious clerkships and legal academia remain open.

My hope is that, by developing some rough consensus on how to model the systemic effects of affirmative action, we can have a much richer dialog and can identify and test possible compromises, like the 4% solution, that break the ideological quagmire.

5. Some follow-up research from Spring 2005

The basic argument of "Systemic Analysis" is simple: if there is a very large disparity at a school between the entering credentials of the "median" student and the credentials of students receiving large preferences, then the credentials gap will hurt those that the preferences are intended to help. A large number of those receiving large preferences will struggle academically, receive low grades, and actually learn less, in some important sense, than they would have at another school where their credentials were closer to the school median. The low grades will hurt their graduation rates, bar passage rates, and prospects in the job market. This is what I call the "mismatch effect."

My paper tested this idea by comparing the outcomes of whites (who generally receive small or no admissions preferences from law schools) with blacks (who generally receive large, race-based preferences) to compare the outcomes of students who start with similar credentials. My results are robust and, as will be discussed in coming days, have withstood criticism fairly well. However, I and everyone else agree that it would be preferable to compare blacks with other blacks. In other words, the ideal control group for examining blacks who receive large racial preferences would be a group of blacks who received smaller preferences or no preferences at all.

As I discuss in my "Reply to Critics," such a comparison group not only exists, but we have data on their outcomes. After "Systemic Analysis" had gone to press, Ian Ayres and Richard Brooks at Yale pointed out that the Law School Admissions Council, in one of the surveys administered to students in its Bar Passage Study (a major source for my paper), had asked the students in detail about how they applied to and selected the law school they attended. About ten percent of the approximately 1800 blacks in their study reported that they had chosen to pass up their "first-choice" school even though they had been admitted to that school. Most of these students apparently went to a lower-choice school because of financial aid offers or for geographic reasons. The data suggests that these black "second-choice" students had credentials substantially closer to those of their classmates. Compared to other blacks, these blacks closed nearly half the credentials gap.

These "second-choice" students are not a perfect control group since no one was randomly assigned to attend schools offering different levels of racial preference, but it is about as good of a chance to test the mismatch theory as is likely to be had for some time. If the theory is correct, then the second-choice students should have better outcomes including higher graduation rates and more success on the bar. In the table below, I make predictions about how the blacks going to their second-choice schools should perform based on simple linear assumptions. For instance, if blacks going to second-choice schools close one-third of the credentials gap with their classmates, they should close a proportionate amount of the outcomes gap once one controls for index differences. However, if the theory is wrong, then the blacks going to second-choice schools should have nearly the same outcomes as blacks who took full advantage of the preferences they were offered. In the data presented below, it would be expected that the blacks going to second-choice schools would do slightly better because they have somewhat better index scores than the average black law student. It should be noted that this difference alone would only close about one-eighth of the gap in outcomes.

The actual outcomes look like this:

Outcome	White Success Rate	Success Rate for Blacks Other Than Those Going to Second-choice school	My prediction of success rates for blacks going to second-choice school	Actual Success Rate for blacks going to second-choice school
Graduate from Law School	92.2%	81.1%	86.3%	89.9%
Pass Bar on First Attempt	92.1%	59.6%	74.8%	80.3%
Pass Bar Eventually	96.8%	77.1%	87.6%	86.1%
Proportion of Original Cohort Becoming Lawyers	83.3%	57.0%	69.3%	69.0%

The results above are remarkable. The “mismatch” predictions are either right on target or, in some cases, too low. The differences in success rates between black law students, generally, and those going to their second-choice schools are enormous. As with everyone else, the black second-choice students’ outcomes depend heavily on their grades. But these blacks are substantially less mismatched than other blacks, and they receive substantially higher grades. In fact, they average about ten percentile points higher in their classes, which is exactly in line with predictions.

When many critics of “Systemic Analysis” come to the question of why black law students have such low graduation and bar passage rates, they either offer no explanation or wearily suggest a “something about race” problem. This data offers a clear example of how well blacks can perform.

There are two sorts of objections one might raise about this data. First, are the samples involved large enough to produce statistically significant, reliable results, or could these results somehow be a fluke? And second, is there some way that the blacks going to second-choice schools are systematically different

(other than their slightly higher credentials) from other black law students? I think the answers are (a) the results are very reliable and (b) there are no alternative explanations for these results.

First, are the results significant and reliable? The database for this analysis includes 1,757 black students entering law school in 1991. Just under one-tenth of these students (171) were admitted to their first-choice law school but chose to go to another school. This is a fairly large sample which means that any outcome, where the success rate of the two groups of blacks is more than six or seven points apart (e.g., 80% vs. 87%), will be statistically significant. Pretty much all of the outcomes for black, second-choice students are, in fact, better than the outcomes for other black students by at least that margin (and sometimes by as much as 20 percentage points). So the answer to the first question is a resounding yes.

Second, are there differences between the black second-choice students, and other black law students, that might account for their different rates of success? The one important difference between those two groups is that the blacks who chose their second-choice school have, as a group, slightly higher average credentials than other black students. That difference accounts for about one-seventh of their higher performance. Otherwise, the black, second-choice students are largely indistinguishable from other blacks at the outset of their law school careers. They are about equally likely to have a parent who attended law school (6% for the second-choicers vs. 7% for other blacks), to have a “burning desire” to become a lawyer (30% vs. 30%), to be “very concerned” about getting good grades (89% vs. 88%), and to believe that they experienced discrimination during college (68% vs. 64%).

The factor that makes second-choice blacks truly different is that they are less mismatched with their classmates than other blacks are because they have turned down their “first-choice” school. Therefore, they are at a school where, on average, their “academic index” is only 93 points below the class mean, compared with the 140-point deficit for other blacks. This means that, in general, they get significantly higher grades, which appears to make all the difference for their future outcomes.

Going back to the technical discussion and controlling for differences in entering credentials makes only one of the six interesting outcomes for these two groups statistically insignificant (ultimate bar passage). However, the other five outcomes (first-year grades, third-year grades, graduation rate, first-time bar passage, and rate at which matriculants become lawyers) *are* statistically significant, and all six outcomes are much higher for the second-choice blacks.

One can debate what the proper controls should be but I have seen no analysis in which the second-choice blacks do not substantially outperform the comparison black group. Furthermore, I have seen no analysis in which at least some of the differences are highly statistically significant.

Moreover, since the findings of the mismatch theory came from an entirely different analysis (comparing blacks and whites), but predicts with great precision the actual improvements in outcomes for the black second-choice students, it would be hard to imagine a more compelling confirmation of its basic theses.

6. Responding to comments

Mahan Atma² says that the above results are “nonsense” because the blacks going to second-choice schools are not randomly selected; without randomization, there can be no true statistical significance. However, this assertion is not true. It is, of course, possible to determine the significance of a difference between two groups that have not been randomly selected. In this context, all that significance means is that the difference is almost certainly not due to randomness, but to some real distinction between the two samples. The crucial issue then is what variable accounts for this difference. The point of all regression analysis in the social sciences is to control for plausible differences that might explain why two groups have different outcomes. I find that when one uses these controls, the performance gap between the black second-choice students and others is largely intact and statistically significant.

Michael³ contends that the BPS dataset is too “noisy” to be useful. However, I only counted as “second-choice” students those who said that they had been admitted to more than one law school and who did not attend their first-choice school for an identified reason (usually geographic or financial constraints). Moreover, we can accurately estimate the size of the mismatch these students faced at their schools. Certainly it’s possible that some of the students I’ve identified as black “second-choice” students had their hearts set on going to UCLA, but went to their second-choice, Harvard, because Harvard offered them more money. But there cannot be many such students or the average size of the mismatch these students face wouldn’t show up as being as small as it does.

² See Posting of Mahan Atma to Richard Sander (guest-blogging), *Responding to Critics (2): “Second Choice” Students*, at <http://www.volokh.com/posts/1118720537.shtml> (June 14, 2005, 11:21 EST) (last visited Aug. 4, 2006).

³ See Posting of Michael @ CIR to Richard Sander (guest-blogging), *Responding to Critics (2): “Second Choice” Students*, at <http://www.volokh.com/posts/1118720537.shtml> (June 14, 2005, 12:00 EST) (last visited Aug. 4, 2006)

Lastly, and to the extent such noise exists in the data, it simply implies that the results were strong enough to show through that noise.

Several others⁴ wondered how the “second-choice” effects would play out for whites. My response can be summarized as follows: The substantial number of whites who indicated they turned down their first-choice school (largely for the same reasons as blacks) tended to end up with a “positive mismatch;” that is, they had higher credentials than most of their classmates. This predictably leads to higher grades in law school – well above the class median. In the top half of the class at most law schools, however, there isn’t much difference in graduation and bar outcomes – the vast majority of students graduate and pass the bar. Consequently, the benefits from a “positive mismatch” are much smaller than the harms of a large “negative mismatch.” So “theory” predicts that whites going to second-choice schools will see little if any improvement in graduation and bar passage rates, and that’s borne out by the data. (The white “second-choice” students may see significant job market benefits, but I haven’t tested that idea yet.)

7. The Problem of Selection Bias

Data shows that blacks who pass up the best law school that admits them and go to their “second-choice” school are closer in credentials to their classmates and have much better outcomes during and after law school. The postings of this data have generated much discussion.⁵ Professor Dirk Jenter,⁶ while defending me from the social science nihilism of “Mahan Atma,”⁷ offers a pointed critique of the “second-choice” analysis.

Professor Jenter’s criticism may be phrased in question form in the following manner: isn’t the analysis contaminated by self-selection? Of course, the students going to their second-choice schools are doing so consciously. Perhaps this means that they are a group that believes they will optimize performance at a less elite school. If this is, in fact, true it makes their

⁴ By others, I mean other bloggers on THE VOLOKH CONSPIRACY website at <http://www.volokh.com/posts/1118720537.shtml> (last visited Aug. 4, 2006).

⁵ See Richard Sander, *Responding to Critics (2): “Second Choice” Students*, in THE VOLOKH CONSPIRACY, June 13, 2005, at <http://www.volokh.com/posts/1118720537.shtml> (last visited Aug. 4, 2006).

⁶ See Posting of Dirk Jenter to Richard Sander (guest-blogging), *Responding to Critics (2): “Second Choice” Students*, at <http://www.volokh.com/posts/1118720537.shtml> (June 14, 2005, 11:02 EST) (last visited Aug. 4, 2006).

⁷ Atma, *supra* note 2.

subsequent, superior performance at those schools and on the bar exam less surprising.

Selection-bias problems are an ever-present danger in this type of observational data, creating pitfalls which more than one of my critics have fallen into. It, likely, is not possible to entirely eliminate all danger of selection-bias in this comparison of first- and second-choice students. However, I am fairly confident that there is little, or no, such bias here for several different reasons.

First, these students chose responses indicating that financial or geographic factors led them to turn down their first choice school and go elsewhere. Furthermore, their other answers to the detailed surveys they completed were consistent with their responses regarding financial and geographic factors. This, of course, is not to say that the students surveyed did not care about school eliteness. However, it would appear that these students cared as much, if not more, about “cost” and “financial aid” as they did about status. Thus, the motivations of these students did not appear to be related to some kind of strategy of seeking out a less competitive environment.

Second, we have a wealth of data about the strategies employed by these students as they started law school. In every measurable way, they seem to be approaching law school with strategies and expectations that are indistinguishable from all other black students. For example, both the second-choice and other students are equally likely to respond that they are “very concerned” about earning good grades in law school (89% vs. 88%), and both groups are equally likely to think they are going to end up in the top tenth of their law school classes (37% vs. 38%). Blacks in general express more concern in the survey data about passing the bar – but, ironically enough, both blacks going to second-choice schools and all of the other blacks tend to think that going to a more elite school will improve their chances on the bar. All of the above data weighs against a finding of selection bias.

Third, it is important to keep in mind that this entire exploration of the “second-choice” phenomenon is a way of confirming the hypotheses I developed and tested with entirely different data in my original article. I did not observe this high performance among blacks going to second-choice schools, and then construct a theory around it. Rather, this data was brought to light by others after “Systemic Analysis” had gone to press. In “Systemic Analysis,” I compared blacks (as a group that generally is boosted into more elite schools by racial preferences) against whites (who sometimes receive preferences, but generally do not), while controlling for entering credentials. Certainly there is no self-selection process there (or only a little, accounting for students with mixed-race

backgrounds). What is nice about the first-choice/second-choice analysis is that it avoids the arguable pitfalls of the white/black analysis and vice versa. Nevertheless, both methods produce essentially identical results.

Michael⁸ raises another interesting issue. In estimating the average “credentials gap” facing blacks at their second-choice schools (and comparing that with the credentials gap facing other blacks), I use the six loosely-defined “tiers” in the LSAC-BPS database. The creators of this database grouped schools into “clusters” by using some indicators of prestige (e.g., student scores) and some indicators unrelated to prestige (e.g., public sector vs. private sector). The six tiers certainly correlate substantially with school prestige, however they also overlap. Thus, the most elite Tier 2 schools are almost certainly ranked higher than the least elite Tier 1 schools. This is so, even though Tier 1 as a whole is clearly more elite than Tier 2 as a whole.

Consequently, one needs to use care when using the LSAC tier system. In the second-choice analysis, I know each student’s grades (standardized by school) and individual outcomes (e.g., graduation). However, in terms of school identity, I only know what tier they are in. I compared each student’s index score to the median index score of students in the same tier to estimate the typical credentials gap between students and their classmates. Despite the fact that this is a rough measure, the key concern is whether there is reason to believe that this factor of the second-choice analysis is biased in a way that helps my analysis. I do not believe that such bias is present here. Blacks, other than the second-choice students, should be distributed more or less randomly across the six tiers. The blacks going to second-choice schools should also be randomly distributed with one exception. In Tier 1, they are more likely to be in schools near the bottom of that elite tier rather than at the top (since they have generally rejected a more elite school, they are unlikely to be going to Harvard or Yale). However such a distortion would mean that I was overstating their actual mismatch with their fellow students, which cuts against my analysis, not in favor of it. In any event, any such distortion is likely to be quite small for the whole group of students.

Consider, by way of contrast, an analysis conducted by Dan Ho (a recent Yale graduate and Harvard Ph.D. whose critique, and my reply, are in the June issue of the Yale Law Journal).⁹ Ho compared blacks who had the same index

⁸ See Michael, *supra* note 3 (arguing that “it is a bit disingenuous [sic] to say that the “second choice” group of blacks had average academic index ‘only 93 points below the *class* mean, compared with a 140-point deficit for other blacks.’... the LSAC destroyed the data for individual schools.” (quoting Richard Sander, *supra* note 2.))

⁹ See Richard Sander, *A Reply to Critics*, 114 YALE L.J. 2005 (2005); see also Daniel E. Ho, *Affirmative Action’s Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2001 (2005).

scores but attended schools in adjacent tiers. Dr. Ho's argument was as follows: if two blacks with the same entering credentials went to adjacent tiers, and passed the bar at the same rate, then there is no penalty to blacks for going to higher tier schools, and Sander is wrong. But of course, if the BPS tiers overlap, then for any analysis which selects blacks from Tier 1 and Tier 2 schools who have matching index scores, it's quite likely that these students are actually going to schools of equivalent eliteness. Here the bias is likely to be quite significant, and it is all in the direction of the results Dr. Ho wants. Dr. Ho's analysis is invalid for other demonstrable reasons, but I offer it here as an example of an improper use of tiers.

As a final point, I wish to point out that others have also asked whether we know if the blacks going to their second-choice schools were actually accepted at their first-choice school. The answer is yes. The questionnaire asks that question and we used it as a filter.