THE MISMATCH EFFECT:
FACT OR FICTION

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Education Law and Policy – Spring 2012
On February 12, 2012, the United States Supreme Court granted *certiorari* in the case of *Fisher v. University of Texas at Austin*, putting the concept of affirmative action in university admission policies back on the front lines. While oral arguments will not be heard until after the start of the October term, advocates on both sides of the argument are filing amicus briefs arguing various points of the issue. With a new Court in place, observers believe that the pending case will be a rematch of the tight decision in *Grutter v. Bollinger*, which set up a pattern of acceptable affirmative action programs in both university and graduate school admissions.¹

One of the most controversial advocates against the use of affirmative action policies is Mr. Richard Sander. Mr. Sander has been on the faculty of the UCLA School of Law since 1989, where he has focused his work on social and economic inequality.² In 2004, he published a comprehensive study on affirmative action in American law schools, focusing particularly on the ways in which large preferences imposed an unexpected but substantial cost on their intended beneficiaries.³ Describing this as “mismatch theory”, Sander has written numerous articles focusing on affirmative action policies and the unintended consequences in regards to California’s Proposition 209 legislation. He has taken his extensive research down south, writing an amicus curiae brief in support of the Petitioner in the upcoming Supreme Court showdown.⁴ His theory,

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² [http://www.law.ucla.edu/faculty/all-faculty-profiles/professors/Pages/richard-sander.aspx](http://www.law.ucla.edu/faculty/all-faculty-profiles/professors/Pages/richard-sander.aspx), viewed on May 12, 2012
³ Id.
⁴ Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Petitioner. (October 2011).
while controversial, appears to have some validity and support, as enrollment and graduation numbers show improvement for minorities.

I. WHAT IS MISMATCH THEORY?

Mismatch theory is a theory put forth by Sander, which argues that when a student is placed into a college where their credentials are so far below those of their classmates, that they are put at a great academic disadvantage and therefore are less likely to survive in a difficult major, let alone graduate. Because teachers tend to aim instruction at the median student, those with weaker preparation fall behind and learn less. The end result of the theory is that racial based preferences in admissions lead to damaging results for the intended beneficiaries by placing them at institutions where they are unlikely to succeed.

College administrators initially based racial preference programs on three key premises. The first was the belief that this preference program was essential for colleges to do “their part” to foster the development of minority leadership in the nation, both in politics, in the professional atmosphere and the technocratic elite. Second, administrators believes that it would take some time, perhaps a generation, for the effects of the civil rights programs to kick in and correct the effects of poverty and poor education of black students. Finally, administrators felt that their colleges would be accused of hypocrisy if they could not generate reasonably significant numbers of minority students, since preferences were already being used to recruit athletes in many private colleges.

5 Richard H. Sander, An Analysis of the Effects of Proposition 209 Upon the University of California, A Working (draft) Paper.
6 Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Petitioner. (October 2011).
According to Sander, these three circumstances made the use of a large racial preference an obvious step, with the hope that the need for such preferences would fade as the gap in academic preparedness declined.\textsuperscript{8}

This belief that the need for racial preferences would fade was based on the assumption that gaps in academic performance in general would fade. However, while access to higher education for black students has increased dramatically (black college enrollment increased nearly tenfold from 1968 through 2008), the relative level of minority preparation has improved only slightly in comparison (the median black credentials in most higher education application pools is now at the 15th or 20th percentile of white student distribution).\textsuperscript{9}

Sander’s theory is that these preferences come with costs, most specifically to the intended beneficiaries. While many hoped that minority students who were less prepared would simply “catch up” once admitted, it is now recognized that this is not the typical outcome. Instead, minority students who are admitted due to a racial preference, tend to have lower grade points, and end up at the lower end of the class’s percentile. The focus became on the controversial issue of why the data was coming back differently than expected. Where the low grades a result of preferences themselves, or did the preferences lead to other problems, such as less learning, stigma, and loss of academic self-confidence, which resulted the poor data results. The ultimate question leads Sander’s research of mismatch theory: were the students mismatched when accepted to universities for which they were not academically prepared, and did that mismatch hinder

\textsuperscript{9} Id. at page 3
their ability to succeed at the university. Due to California’s Proposition 209 legislation, he has been able to study the effects of an effective ban in affirmative action policies for the past several years. Documenting the changes in admission rates, graduation rates and ultimate success with grades.

II. THE EFFECTS OF PROPOSITION 209 ON ADMISSIONS POLICIES

In November 1996, Proposition 209, which is also known as the California Civil Rights Initiative, amended the state constitution to prohibit state government institutions from considering race, sex or ethnicity, specifically in the areas of public employment, public contracting or public education. Proposition 209 has been the subject of a variety of criticism, praise, and lawsuits, but has consistently withstood legal scrutiny. On August 2, 2010, the Supreme Court of the state of California found for the second time that Proposition 209 was constitutional.\textsuperscript{10} While this ruling was 6-1, it followed an earlier decision which also unanimously affirmed the constitutionality of the legislation.\textsuperscript{11} As recently as April 2, 2012, the Ninth Circuit Court of Appeals rejected the latest challenge to Proposition 209.

For the past three years, Sander has been working with a team of social scientists to obtain access to comprehensive data from the University of California, to review and prepare a series of studies on the impact of Prop 209. To date, the findings suggest that Prop 209 has had an overwhelmingly positive effect on the education of black and

\textsuperscript{10} Coral Construction, Inc., v. City and County of San Francisco, S152934 (August 2, 2010).
\textsuperscript{11} Hi-Voltage Wire Works v. City of San Jose, 24 Cal. 4\textsuperscript{th} 537 (2000).
Hispanic students at the University of California. Sander’s study has found that there have been significant improvements for both black students and Hispanic students in areas such as graduation trends and GPA trends. Additionally, his research as found that there has been a rising number of blacks and Hispanic students who are moving towards more difficult concentrations, especially within the sciences. Sander’s argues that during the highest periods of affirmative action polices, minorities poor academic performance (due to his mismatch theory) often lead these students away from difficult majors, or worse, to drop out of college all together. His statistics show that in the years after Prop 209 was enacted, the number of Hispanic students graduating in a science or engineering major rose by more than 25%.

Sander’s statistical analysis has lead him to the ultimate conclusion that minority students, both black and Hispanics, are now faring better within the University of California system of school than before the passage of Prop 209.

III. DISAGREEMENT AND CRITICIAL RESPONSES

Obviously the emotions behind affirmative action are strong, and steps that are taken to move away from affirmative action are met with great criticism and disagreement. While there have been a variety of articles written that try to diminish the research done by Sander and his team, there are two main approaches these articles take. The first is an attempt to discredit “mismatch” theory in general, and the second is to discuss the importance of the continued use of affirmative action, despite the negative data.

12 Richard H. Sander, An Analysis of the Effects of Proposition 209 Upon the University of California, A Working (draft) Paper, page 1
13 Id. at page 2
14 Id.
15 Id.
a. A student’s choice? Evidence regarding the rational enrollment decisions of students impacting mismatch theory.

Critics have argued that once a student’s rational enrollment decisions are taken into account, mismatch theory, as put forth by Sander, only occur if selective universities posses private information. *Ex ante* mismatch occurs when the revelation of this information (i.e.: that a student will be mismatched in the environment they are entering) would have changed the student’s choice of school. Accordingly, this is a necessary piece of information, which creates a new test regarding affirmative action policies.16

This brings to the center the *rational enrollment decision* of the minority students who are offered admission to a selective school, potentially due to an affirmative action policy.17 The question critics ask is why? Why would a student be willing to enroll themselves at a school where they could not succeed? Essentially, critics argue that a student would not rationally decide to enroll in a school where they felt that they were unable to succeed. Specifically, the new evidence and theory focuses on the “private information about the treatment effect (or value added) for the student” taken into account by a selective university.18

The argument is that in the absence of the “selective universities” private information about the student’s treatment effect, relative to attending a non-selective university, a minority student will choose to enroll in the selective university only if her treatment effect is positive.19 Given this scenario, then there is no room for any mismatch to occur post admission. Therefore, the central idea is that the presence of

17 Id. at 2
18 Id.
19 Id.
private information by a selective university is a necessary condition for mismatch as a result of affirmative action policies.\textsuperscript{20}

Essentially, the authors are attempting to recast the mismatch problem put forth by Sander. They desire to move from an assessment of the counterfactual outcome of minority students to a test, which involves whether selective universities possess private information regarding the students they admit.\textsuperscript{21} The article uses a series of complex calculations and equations to test the “new evidence” of “student treatment effect” in an attempt to discredit mismatch theory.

Ultimately, the authors seem to concede that mismatch theory may have some merit. By suggesting that university’s which use affirmative action programs release more information about the admissions criteria, the authors seem to suggest that students will in fact (and do) choose schools based on the simple fact that they got accepted, and do not take into account their level of preparedness for the school and their surroundings.

b. The negative effects of ending affirmative action policies, specifically in law schools.

Another critical response to Sander’s theory is from those who fully support affirmative action policies as a necessary means to an end, regardless of the statistics. Specifically, that Sander has only forced people to take a look at affirmative action, but that his findings have overestimated the costs of affirmative to action, failing to demonstrate any benefits from ending the programs.\textsuperscript{22} On top of this lack of demonstrated benefit, critics fear how African Americans will be distributed across a

\textsuperscript{20} Id.
\textsuperscript{21} Id.
range of American law schools without the use of affirmative action policies. Accordingly, the article contrasts Sander’s numbers, which produce only a 14% decline in African American matriculation to law schools, with their data, which estimates about a 32.5% reduction.

More striking though is the contention of these critics that without affirmative action policies, African American students would no longer be as drawn to the legal profession. The article admits that affirmative action allows students who have such low LSAT scores and GPA’s that they would normally not get into any school despite the broad range of schools for which they apply. Despite this admission, they argue that ending affirmative action would restricting the range of schools available to most African American applications, and would increase the number of futile applications.

The article moves next to Sander’s contention that by ending affirmative action policies, African American students would attend law schools where they would have the same entry credentials as their non-minority counterparts, and therefore would be more on par to receive the same grades, graduate at the same rates and ultimately pass the bar at the same rate. Again, the critics argue that Sander’s statics overestimate the ability of African Americans to receive similar grades of non-minorities because their entry credentials would not be the same. Even if “race-neutral” polices are used, African American students would come in with a lower average range of LSAT score and GPAs, simply because “that is where African American students fall in the overall national pool of applicants.”

23 Id. at 1858
24 Id. at 1867
25 Id. at 1874
Ultimately, the article finds that the social effects of ending affirmative action outweigh any evidence presented by Sander regarding the low grades, graduation rates and bar passage rates. First, it is argued that “very able African Americans who would not want to be part of a tiny racial minority would decide not to apply” to any law school, reducing the number of African American students. Second, those who did not “matriculate” would feel isolated, participate less in class, and otherwise contribute less to the intellectual life around them. Third, white students at these schools would lose the opportunity to learn from and interact with African American students.

The article concludes that without affirmative action, African American enrollment in law schools and their subsequent move into profession of American lawyers would significantly decline.

**IV. CONCLUSION**

In 1978, Justice Blackmun wrote for the dissent in *Regents of the University of California v. Bakke*, that he hoped the time would come when affirmative action polices are unnecessary and only a relic of the past. It has been thirty-five years since the Court first addressed the constitutionality of race-conscious university admissions policies in *Regents of the University of California v. Bakke*. Twenty-five years later, the Supreme Court...

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26 Id. at 1895
29 438 U.S. 265 (1978)
30 438 U.S. 265 (1978)
Court endorsed Justice Powell’s opinion, which stated, “student body diversity is a compelling state interest that can justify the use of race in university admissions.”

Despite Justice Blackmun’s hope, it is clear that affirmative action policies are still high profile constitutional issues. As evidenced by the recent challenges to Proposition 209 in California, the passage of a similar civil rights initiative in Michigan, and the upcoming Supreme Court case of *Fisher v. University of Texas, et. al*, the continued use of affirmative action policies is ever evolving and ever challenged.

Both sides of the argument have their data, and their interpretation of that data, leading, of course, to different results. However, while those in favor of continuing affirmative action policies present data, it is mixed with emotion. They agree that the statics regarding preparedness of African American students and then percentage of graduation rates are in fact lower than their non-minority counterparts. Further, they agree that without affirmative action programs, many minorities would not be afforded the opportunity to attend top tier schools. However, they ignore the cost of those polices, and focus on the emotional aspect of “fairness” and “cultural diversity.” Mr. Sandidy not present the most appeasing or politically correct theory, but he does it without emotion, or concern with “fairness.” In fact, he argues that it is ultimately not fair to these students to place them in schools where they are under qualified.

Mr. Sandidy’s research, while controversial, brings to the heart of the debate the question of qualification of student admissions, and brings up the stereotypes that many feel but feel guilty discussion. While many do not agree with his numbers, logic or theory, it leads to an important discussion: Are African American students, who are under

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qualified, being granted admission to schools because of their race, and what is the effect of that disparity on both those students and those in the classroom with them? At the end of the day this goes beyond affirmative action policies and concentrates on the educational system as a whole.

Once the education system, starting from primary school and through high school, was reformed, most students would be equally qualified to attend all schools, based not on their race, but on their grades and academic readiness. They may be unpopular, but the implication of Proposition 209, and other similar legislation, may be the push necessary to force a change to the educational system as a whole, so that African American students are given more opportunities from the start, instead of being granted admission based on race.

Whether Sander’s data and theories are correct is a difficult question to answer. He presents valid points though that forces the conversation where it needs to go: what are the practical results of affirmative action and is this the best route for our nation’s students? He pushes us towards this conversation without emotion or the desire to be “fair” to everyone seeking a college education or higher. That is the importance of his work, and that is where he makes strides in the debate about affirmative action policies.