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Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It (book review)

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MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT

BY RICHARD SANDER AND STUART TAYLOR JR.

Basic Books, New York, NY, 2012. 348 pages, $28.99.

Reviewed by Michael Ariens

Mismatch is one of the most important books about law and public policy published recently. The authors, Richard H. Sander, a professor at UCLA School of Law, and Stuart Taylor Jr., a journalist with a law degree, offer a provocative and deeply researched conclusion: Empirical evidence strongly suggests that affirmative action in the admission of African-Americans and Hispanics to selective colleges and law schools is more harmful than helpful.

Mismatch has three major themes. The first concerns the results of Sander's empirical work on the efficacy of racial preferences in admission to institutions of higher learning. Some highly selective colleges and law schools give minority applicants, particularly African-American and Hispanic students, large admissions preferences based on their race or ethnicity. These preferences create what Sander and others call a "cascade" effect. The most elite schools get their pick of the most academically qualified students, including minority students (some of whom need no admissions preference). This requires second-tier schools to use significant preferences to build a representative class, and so on down the line through the eight tiers into which colleges are divided. The process works similarly in law school admissions. Sander and Taylor assert that, "[f]or many black and Hispanic students, ... the preference has proved to be a curse."

The second theme of *Mismatch* is that academics and the media tend to avoid candid discussions of the costs and benefits of racial preferences in admission to higher education institutions. Sander and Taylor investigate why affirmative action based on race and ethnicity remains so combustible a public policy issue. Closely related to the unwillingness of academics and the media to

discuss the instrumental value of affirmative action is the refusal of those who possess data that could provide evidence of mismatch (or evidence disproving mismatch) to share such data with empiricists who could analyze it objectively (and who might reach undesired conclusions). This stonewalling is both breathtaking and saddening. The authors offer several examples of efforts to limit the ability of Sander and others to evaluate (and thus, possibly, to find wanting) the effects of affirmative action based on race and ethnicity. For example, the Mellon Foundation "refused as a matter of policy to make the College and Beyond data available to other scholars to replicate and check" the conclusions supporting affirmative action made in the book *The Shape of the River* by William Bowen and Derek Bok, former presidents of Princeton and Harvard Universities. The unprofessional treatment of Sander by both the American Bar Foundation and the Law School Admission Council—treatment that was apparently due to the mismatch article that led to this book, and treatment that impinged on Sander's academic freedom—is shocking. Finally, at the time of the publication of *Mismatch*, Sander's request for data compiled by the California State Bar to test the mismatch thesis remained hostage in the California Supreme Court, where it remains at the time of this writing nearly a year later.

The third major theme of *Mismatch* is that "most universities' ... single-minded focus on racial identity" results in a "pervasive neglect of poor, working- and even middle-class students." Sander and Taylor make a persuasive argument that class-based affirmative action can be successfully undertaken and should replace affirmative action based on race and ethnicity.

In the late 1990s, half the black UCLA School of Law students graduated in the bottom 10 percent of the class, and half the Hispanic students graduated in the bottom 20 percent of the class. Both black and Hispanic UCLA graduates passed the California bar at a rate much lower than did their white classmates. Additionally, black and Hispanic UCLA School of Law graduates passed the California bar at a lower rate than did graduates of less elite law schools who
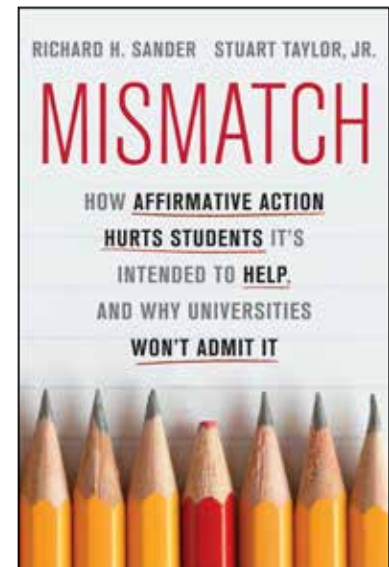
had similar LSAT scores and undergraduate grade point averages (which the authors call "academic indices"). Why? One explanation for this disparity was that the bar was racially biased. But the authors show that empirical research found no racial bias on the bar exam. The authors suggest that the reason for this disparity was "mismatch." Many though not all black and Hispanic law students were given relatively large admissions preferences based on race and ethnicity, so they were admitted to more elite law schools than were white students with similar academic indices. As a consequence, the black and Hispanic students tended to have lower academic indices than their classmates, and students with lower academic indices often graduated at or near the bottom of the class. Because the strongest predictor of bar exam passage was how well one performed in law school (no matter how elite the law school), this mismatch of students and law schools, created by affirmative action, "was roughly doubling the rate at which blacks failed bar exams."

One reason mismatch produced such a large negative effect on law school performance (and thus lesser success on the bar examination) was the way law professors teach. Most professors teach to the broad middle of the class. The farther a person's academic index is from the median of the student body, the more difficult it becomes to master the material. To describe

this effect, Sander used two hypothetical students, one black and one white, with the same academic index in college. The black student, he hypothesized, attended Columbia Law School, while the white students attended Fordham University School of Law, a very good law school but not as elite as Columbia. If the black student found himself in the bottom tenth of the graduating class at Columbia, and the white student graduated in the middle of the class at Fordham, the former was "three times as likely to fail the New York bar as his white Fordham counterpart." The reason was that the Columbia graduate's grades demonstrated "not only that he learned less than his Columbia classmates, *but less than his counterpart at Fordham*."

As of the early 2000s, "about 47 percent [of black law students who enrolled in law school] were becoming lawyers," whereas "83 percent of entering white students were becoming lawyers." At that time, admissions preferences increased the overall pool of black law students by 14 percent, but less than a third of that 14 percent became lawyers. If the 86 percent of black students who would have been admitted to law school without affirmative action passed the bar exam at the rate their white academic counterparts did, then, with the addition of the fraction of the 14 percent who became lawyers, the overall result would be an increase in the number of black lawyers. But Sander found that mismatch "appeared to reduce the other 86 percent's chances of becoming lawyers by nearly a third." Sander concludes: "Admittedly, these were estimates; nonetheless, the negative effect on the success of black law students was clearly much larger than the positive effect of racial preferences in expanding the pool of blacks admitted into law schools." Even a critic of Sander's thesis acknowledged that, if law school admissions preferences were removed, the number of black law students who would become lawyers by passing a bar exam would remain steady.

This counterintuitive notion, that at least the same number of black law students will be licensed as lawyers without race-based admissions preferences as with such preferences, is based in large part on the theory that "[s]tudents who have much lower academic preparation than their classmates will not only learn less than those around them, but less than they would have learned in an environment where the academic index gap

was smaller or did not exist." This sobering assessment suggests that some black and Hispanic students have been admitted to law school to make law school faculty and administrators (and their university counterparts) feel better about themselves, even as they consign those students to a reduced chance of becoming lawyers. Sander also found that affirmative action did not lead to increased overall earnings for minority students based on the credentialing effect of graduating from a more elite law school. Instead, such students will too often carry a large debt for student loans and relatively little means to pay off those loans. Given the wrenching reduction in opportunities for legal employment, the affirmative action mismatch problem requires an open discussion of the instrumental value of affirmative action.

Mismatch's second theme—suppressing discussion of the actual costs and benefits of race- and ethnicity-based affirmative action—is distressing precisely because critics of Sander's work too often chose not to rebut it with other careful empirical work, but to make it hard for Sander to see if his mismatch research was replicable. As Sander makes clear in the preface, he views himself as a progressive, as one interested in the economic and professional advancement of those who have suffered from discrimination. His opposition to race-based affirmative action is wholly instrumental, not ideological. Affirmative action isn't working, and so must be changed. He and Taylor provide a variety of examples of institutional suppression of empirical work that might question the value of affirmative action. These examples describe a pattern that goes well beyond good faith disagreements about protecting the privacy interests of those individuals studied. A fair conclusion is that these examples constitute institutional malfeasance.

The problem of under-representation of African-Americans and Hispanics in the American legal profession is a continuing problem. But the work of Richard Sander strongly indicates that placing all our hopes in the power of affirmative action has generated deleterious effects for those this "solution" was designed to aid. Sander and Taylor suggest, echoing the work of others before them, that the proper turn should be to preferences based on class rather than race. They also suggest that this turn is not as difficult to implement as feared by those who continue to defend race-based affirmative

action. Discussing the issue of race is fraught with problems, but American lawyers and American society would do well to face this issue directly. ☉

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THE DIVORCE PAPERS
BY SUSAN RIEGER
Crown Publishers, New York, NY, 2014. 461 pages, $25.00.

Reviewed by JoAnn Baca

This first novel by lawyer Susan Rieger is a charming account of a divorce. If that sounds improbable, it is because you have not yet cracked the covers of this unusual and engaging novel. It is not only a terrific story, but the protagonist, Sophie Diehl, is as three-dimensional as a character on paper can be.

The Divorce Papers has no narrator, but is told through e-mails, memoranda, letters, draft agreements, and other documents pertaining to Diehl's first divorce case and to her personal life during the case. Diehl is an almost-30-year-old associate in the prestigious firm of Traynor, Hand, Wyzanski in New Salem, a fictitious city in the fictitious state of Narragansett. She has specialized in criminal defense work during her year and a half with the firm. She likes criminal law and is good at it, having settled in comfortably at the firm and gained a mentor with whom she has an easy camaraderie. When Maria Durkheim, the daughter of a major client, comes to the firm to find a lawyer to handle her divorce, none of the firm's divorce specialists is immediately available, and Diehl reluctantly steps in to do the intake interview. Diehl advises the client to have one of the divorce specialists handle her case, but, unfortunately—in Diehl's view as well as that of some of the partners—the client ignores Diehl's advice and insists that Diehl represent her. Diehl tries to convince the partners that her "rank inexperience as a lawyer who's never done a civil case, let alone a divorce," should preclude her from handling the case. She adds, "I am ill equipped tem-