

Polemics Without Data
A Response to the Chambers et al. Critique
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I. Introduction

The debate about affirmative action in higher education has been heavy on rhetoric and weak on data. Critics and supporters of racial preferences devote much time and effort to talking past one another. I wrote *A Systemic Analysis of Affirmative Action in American Law Schools* (hereinafter “*Systemic Analysis*”) to inject comprehensive data and serious analysis into what was, in the law school world, a near-perfect vacuum of relevant information. Recently, several enormous, well-vetted datasets have become available¹; *Systemic Analysis* is the only piece so far to draw on all of this data in an effort to measure the parameters and effects of affirmative action in American law schools. Although the study has not yet been published, it already is having much of the desired effect. I have received scores of emails from scholars around the country downloading data I have posted, posing interesting questions about my analysis, and suggesting significant new lines of inquiry. The *Stanford Law Review* sent out invitations to dozens of eminent social scientists to respond to my piece, and over a third responded with article outlines, some of which will be published by *SLR* and many of which will no doubt find publication elsewhere. A substantive, data-driven debate on law school preferences is beginning to emerge.

Of quite a different character is the contribution of David Chambers, Timothy Clydesdale, William Kidder, and Richard Lempert (hereinafter “CCKL”). I was deeply disappointed by the tone and approach of their response to my article; it seemed designed not to advance intellectual inquiry but rather to stop it, by assuring the authors’ intended readers (law professors, law students, and journalists) that my empirical findings are just more of the same smoke and shadow, and that it is safe to sleep through the emerging debate. Articles like CCKL’s tend to flourish in the legal academy in a way they could not anywhere else, because in any scholarly discipline where most academics have had quantitative training, critical responses unsubstantiated by data or flawed by invalid methodology would simply be ignored. Unfortunately, in the legal academy, an admirable thirst for numbers often goes hand in hand with a lack of sophistication in screening them.

The CCKL critique, titled “The Real Impact of Eliminating Affirmative Action in American Law Schools,” and distributed nationally at the beginning of November 2004, was part of a preemptive response to my article that has indeed been successful in

¹ These are the Law School Admissions Council Bar Passage Study (“BPS”); the National Survey of Law Student Performance; the After the JD longitudinal study; and my own collection of admissions data from many American law schools.

capturing a remarkable amount of media coverage. It has all the key ingredients: a flat rejection of arguments in my paper, a social science aesthetic, lots of numbers, and a hyperbolic tone. CCKL know enough about affirmative action and social science analysis to write in manner likely to convince the lay reader— and indeed, Chambers and Lempert have generally been regarded as experts in the field, not least by me. This makes the lack of substance and the poor methodologies in their arguments both surprising and disappointing.

Casual readers of the CCKL critique may not notice that they do not identify a single error in my article. Indeed, several researchers have now replicated my basic results without reporting data errors or methodological mistakes. In contrast, three of CCKL's major critiques are invalid due to mathematical errors, and two other analyses rely on flatly incorrect methodologies. Still other arguments are offered without any supporting evidence, when there are recent, definitive studies that contradict their claims. Although I think CCKL make several valid points, even these are nested in terribly misleading arguments.

In this essay, I analyze in detail every claim and argument advanced by CCKL. There are many to address, so I have provided some shortcuts for readers who do not have several hours to compare carefully *Systemic Analysis*, the CCKL critique, and this response.² In the remainder of this part, I provide a tabular summary of the main arguments in *Systemic Analysis*, CCKL's critique, and my response. In Part II, I summarize why CCKL's critique largely misses the point of my article and creates controversy over positions I do not hold. In Part III, I discuss the relatively small number of arguments CCKL raise about the core of my paper (dealing with the “mismatch theory” and its empirical effects on black law students). In Part IV, I address the question of how the production of black lawyers would be affected by the complete abolition of racial preferences (something of a side issue in my paper, but the principal focus of CCKL's critique). In Part V, I urge more of those in the law school world – especially those with social science expertise or a knowledge of how preferences operate – to join in the debate.

² I have also tried in this essay to provide enough background on each point so that, for readers willing to take my statements on faith, my reply stands on its own.

Table 1
Overview of the Sander/CCKL Debate

<i>Systemic Analysis findings</i>	CCKL Critique (page # in parentheses)	Sander response (page # in parentheses)
The admissions systems used by nearly all law schools race-norm black applicants in ways that violate the law	No response	
Out of a 1000-point academic index scale, most law schools in the 1990s had a 170-point gap between white and black students	No response	
Preferences are not limited to elite law schools, but due to a “cascade effect”, ripple down the law school hierarchy intact	No response	
Blacks perform badly in law school; median black student is at 7 th percentile of white students	No response; implicitly conceded	
The reason for low black performance has little to do with race; it’s a function of the large admissions preferences, which put blacks at a big academic disadvantage. Blacks and students of all other races perform roughly as their academic credentials predict they will.	1. Because the distribution of black credentials is lower than that of whites, there would be a credentials gap even in a race-neutral world. (17-18) 2. If one runs Sander’s key regression with the “BPS” database, it shows blacks underperform their credentials; the reasons for this are complex but not really known.(19-22)	1. The “distribution effect” is real, but empirically explains only 4% of the current black/white gap. (7-9) 2. The “BPS” database does not standardize admissions credentials by school. It is therefore fatally biased as a measure of how credentials predict performance. Use of such a test for such a purpose is unheard of. Large-scale, independent research confirms my finding. (9-14)
Students with very low grades are much less likely to graduate from law school.	No response	
Students with low grades are much less likely to pass the bar	1. Since BPS analysis shows black underperformance, Sander’s analysis is flawed. 2. Since Sander’s regression only accounts for 10% of the variance in bar passage, so is too weak to count on. 3. LSAT and UGPA only predict 9% of variation in bar passage.	1. See my note above on BPS data; this claim is flatly wrong. (14-15) 2. CCKL make a math error; R2 is .32 and actual predictive accuracy of model is 76%. (15-16) 3. CCKL rely on multistate, dichotomous data, making their claim both inapposite and meaningless. Actual correlation is about .59. (16-18)
Without preferences, blacks would have go to lower prestige schools but would have higher grades, thus dramatically improving their graduation and bar passage rates	Concede this happens to some degree, but suggest that effects are small by comparing blacks at different tiers in BPS.	As Dale and Krueger have shown, comparisons of this type that do not control for unobserved differences in admissions criteria produce seriously distorted results. (18-20)

<p>Legal employers generally give more weight to performance in law school than to law school eliteness, so black earnings would go up if mismatch effects went down.</p>	<p>No response</p>	
<p>Consequently, pushing blacks into elite schools where they do badly hurts their job prospects</p>	<p>No response</p>	
<p>Because of the mismatch effect, the attrition effects of the current system threaten to swamp the pool-expanding effects of affirmative action. If black applications remained constant in a race-neutral regime, it's likely that the number of new black lawyers produced by the system would go up.</p>	<p>This is main focus of CCKL critique, but their responses generally suffer from absence of evidence.</p> <ol style="list-style-type: none"> 1. Sander's analysis was based on a year with a uniquely high black-white ratio of applicants. 2. The recent experience of Cal. and Texas proves many blacks won't apply to schools with race-neutral policies. 3. Low-prestige schools are too far away from blacks 4. If race-based scholarships disappear, blacks won't go to law school. 5. If all preferences end, the supply of qualified blacks at college level will erode. 6. If all preferences end, a simulation shows elite schools will have few blacks. 7. CCKL's simulation of race-blind system shows a 40-45% drop in black law students and a 25-30% drop in black lawyers. 	<ol style="list-style-type: none"> 1. This is demonstrably false; 2000-01 matches the average for 1997-2002. It may be true that blacks would have fared worse in 2003-04, but the long-term trend is clearly in the positive direction. (20-22) 2. A regional ban is a poor proxy for a national ban, since the law student market is national. Moreover, a recent definitive study directly undercuts CCKL's unsupported claims. (22-24) 3. CCKL's claim based on 3 assumptions, all of which appear to be mistaken. (24-26) 4. I agree aid is important under any system, but there's no evidence aid will end; note too that black expected returns (earnings, graduation, etc.) are much higher under a race-neutral system. (26-27) 5. A straw man argument; but in any case, if mismatch effect operated at undergraduate level to a degree, it is at least unclear how race neutrality would affect supply of applicants. (27-28) 6. Through a math error, CCKL make over 1/3 of the black student pop. disappear from simulation. (28-29) 7. CCKL simulation lacks sufficient supporting data and is error-ridden. (29-31)

II. Straw Men and Paper Tigers

Although CCKL's critique is long, they address only a small portion of my paper. They do not challenge or discuss my findings about how racial preferences operate in law school admissions (a topic Lempert and Chambers would seemingly be in an ideal position to discuss, from their work on *Grutter*), the problem of poor black performance in law school, the reasons for low black pass rates on the bar, or the operation of the job market. Instead, they focus on three stylized claims about the paper, around which they focus their rebuttal:

Claim One: "The bulk of Sander's article...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." (CCKL at 2) This is simply untrue. The bulk of my article tries to assess the effects of racial preferences by empirically working through the tradeoff between higher law school prestige and the lower grades blacks will receive at more elite schools. Only Part VIII of my article considers the question of what would happen without preferences. The last paragraph of Part VIII summarizes my conclusions:

"There are ... many uncertainties built into any prediction about how a change to race-blind admissions would change the production of black lawyers. There are a couple of conclusions that do seem to me very defensible (and which are the real point of my simulations and attendant discussion). First, the oft-repeated claim that the number of black lawyers would be decimated by the elimination of racial preferences is simply untrue. One can make an argument that the number might decline, but the balance of evidence suggests an increase is more likely. Second, what will change dramatically is the academic preparation of those blacks who become attorneys....." (*Systemic Analysis*, Part VIII)

CCKL seem to believe that they have accomplished their mission if they can make even a weak case that the estimates in my paper are "too rosy". I think they fail in this mission, but I would dispute in the first instance any claim that a major purpose of my paper is to prove that abolishing racial preferences would necessarily produce more black lawyers. The goal of that section of the paper was to move the debate into a more realistic range.

The paper has perhaps already achieved this particular goal. During the *Grutter* litigation, it was common for the defenders of affirmative action to predict catastrophic drops of 50-90% in the black student pool if racial preferences were abolished.³ Now

³ See, e.g., the Briefs of Amicus Curiae Law School Admissions Council at 9-10, *Grutter v. Bollinger* (No. 02-241), Amicus Curiae American Bar Association at 20, and the Briefs of Amicus Curiae American Law Deans Association, all of which are available at http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html.

Lempert and his coauthors are suggesting that race-blind admissions will produce a 35-45% drop in the number of admitted black law students and a 25-30% drop in the number of new black lawyers each year. (CCKL at 3) These estimates are almost completely unsupported by data, but they are no doubt far closer to the real numbers. The leading defenders of preferences are, perhaps, starting to come to grips with hard empirical data, thus shifting the debate.

Claim Two: “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.” (CCKL at 4) This claim, too, is simply untrue. I discuss at some length why it is impossible to know what would happen to the number of black applicants in a race-blind system. There are reasons to think black applications might go up (e.g., without racial preferences, black law graduates will have dramatically better chances of passing the bar, and will generally do better on the job market). There are also reasons to think black applications might go down (e.g., reluctance to attend a less elite school). We can guess, but we do not know. What is certain and obvious is that if the system changes in important ways, some blacks who didn’t previously apply to law school will apply, and some who previously would have applied will not. In the paper, it seems to me useful to ask the question of what would happen if there was no *net change* in the number or qualifications of black applicants. From this starting assumption – as defensible as any other⁴ – one can calculate with some precision how a race-neutral system would affect black admissions, graduation, and bar passage rates, an obviously useful exercise since the numbers would change in important ways without preferences.

As we will see, CCKL all believe that black applications to law schools would drop substantially in a world without racial preferences. They enumerate the various reasons they think applications will decline, ignore the reasons why applications might increase, and come to an exact prediction without one iota of relevant documentation.

Claim Three: In reading CCKL’s commentary, a reasonable reader would conclude that I am a tireless advocate of the complete abolition of racial preferences.⁵ This, too, is false. The point of my paper is not to make policy prescriptions, but to provide rigorous quantitative evidence on the nature, operation, and unforeseen side effects of racial preferences as currently used by law schools. My goal is to stimulate debate and research about the costs and benefits of preferences, and to encourage open consideration of a range of possible alternative policies. I discuss some policy options in the conclusion and, to the extent I express a preference, it was for something I call the

⁴ More defensible, actually, since there is some systematic evidence consistent with such an assumption. See David Card and Alan Krueger, “Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas.” NBER Working Paper 10366 (March 2004).

⁵ E.g., “[W]e reject Sander’s proposal to end affirmative action as a solution” (CCKL at 6). “Sander calls for a voluntary collective agreement to end (or reduce) affirmative action in legal education.” (CCKL at 15).

“4% solution”, in which law schools limit preferences for black applicants to no more than 4% of their entering classes.

CCKL ignore all of this because of their rhetorical need to paint me as a rabid opponent of affirmative action who will bend any data and any analysis to fit my preordained policy agenda. In fact, however, one of the reasons it seemed to me important to publish my results – despite the likely unfriendly reaction of some institutions and some colleagues who have supported my work in the past – was the credibility of someone long active in civil rights and long supportive of race-conscious strategies as a critic documenting some unpleasant effects of certain of those policies.

III. “Substantive” Critiques of the Mismatch Theory⁶

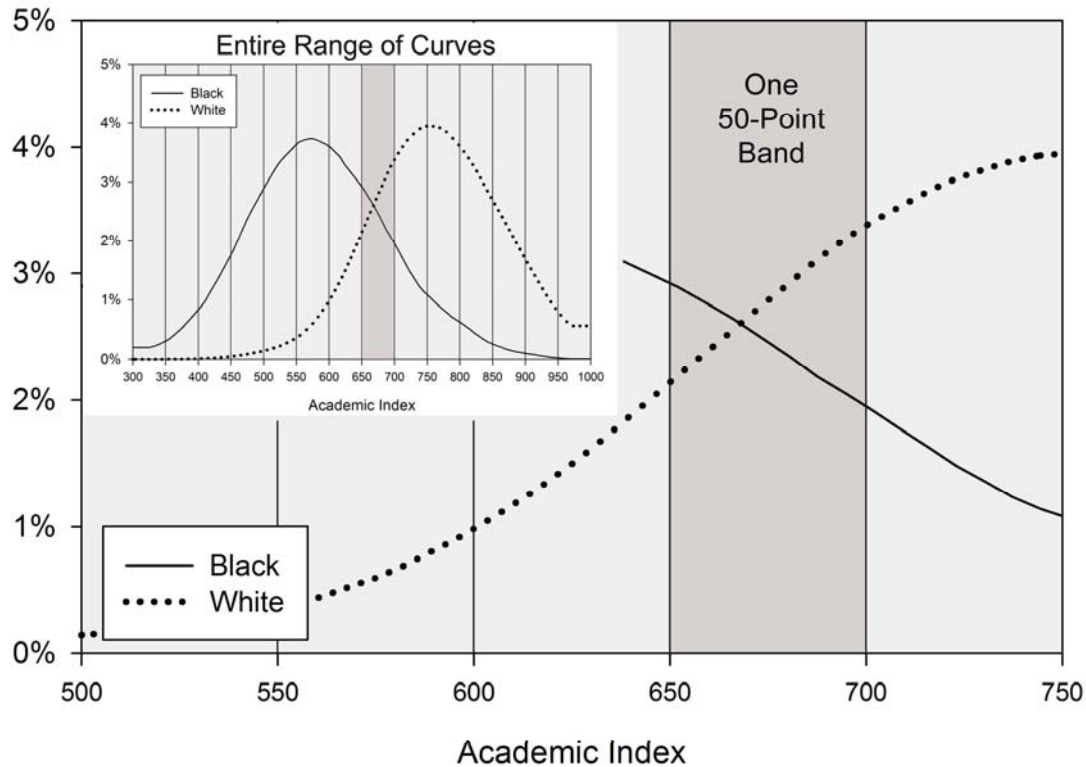
Black Performance at Law School in a Race-Neutral World

CCKL reject my argument that, in a world with no race-based preferences, black performance in law school would converge with white performance. They make two counter-arguments, neither of which survive scrutiny.

First, CCKL point out that “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.” (CCKL at 17) This is a reasonable statement; indeed, I note this myself in cautioning readers about the interpretation of two of my tables (footnote 207, following Table 6.2). Figure 1, below, illustrates the intuition behind this claim.

⁶ I am grateful for the substantive suggestions and feedback I received on Parts III and IV from Dr. Edward Johnson, an econometrician at the U.S. Bureau of Labor Statistics.

Fig. 1. Illustrating the "Distribution Effect"



Source: Author's calculations from LSAC-BPS data.

Because the distribution of black credentials is lower than the white distribution, and because both distributions are normally distributed, it's the case that if we admit students from any rigid band of scores, blacks within that band will have lower average scores than whites. To take an extreme example, consider the band of index scores from 650 to 700 in Figure 1. Whites with scores in this band are more heavily represented at the top of the band (near 700), while blacks in this band are more heavily represented at the bottom. Thus, if a school admitted all students with scores between 650 and 700, the average index of admitted blacks would be somewhat lower than the average index of admitted whites. A similar, though less dramatic effect exists in most of the other bands in the figure. For convenience, I will call this the "distribution effect."

The distribution effect is real – but is it important? CCKL imply that the distribution effect is quite important, but they say nothing about its size. With good reason. Taking the example above, if we actually compute the mean index of all blacks and all whites with academic indices in the 650 to 700 range, we find a black/white gap

of less than three points. Real-world admissions are a little more complicated; but using a few different methods, I consistently find in simulations with actual admissions data that in a race-blind admissions regime, the distribution effect would produce, at a typical law school, a black-white index gap of about 6 points (on the 1000-point scale). The current gap at most schools, as measured by my paper, was 170 points. So CCKL are right: race-neutral admissions do not eliminate 100% of the credentials gap at individual schools; only about 96% of it.⁷

CCKL's second argument is not as cogent as their first one, but it takes longer to address. They point out that though I generally use the LSAC Bar Passage Study to document the extent of the black-white credentials and performance gap, I use a different dataset – the National Performance Study of Law Students – to determine (via multiple regression) how much of the black-white performance gap in law school is caused by the credentials gap, and how much is caused by race or factors related to race. (CCKL, 19-22) Readers will recall my finding that the performance gap is explained not by race, but by the credentials gap. These results, reported in Table 5.2 of *Systemic Analysis*, provide a useful building block for my broader argument.

CCKL suggest that I switched datasets in a crude attempt to hoodwink readers.⁸ They then present a similar regression using the LSAC-BPS dataset and, sure enough, find that race explains at least part of the performance gap (they never explain how much, but judging from their regression results it appears they believe about one-third of the performance gap is due to racial underperformance). After further criticizing my underhandedness in switching datasets, they sum up: “Our own forecast would be that, if affirmative action were ended, the numbers of African Americans who would graduate from the schools they would then attend would improve somewhat over current rates but improve less than Sander forecasts.” This seems to acknowledge that the “mismatch effect” that is central to my paper does indeed exist, but provides no information on how big they think the effect is.

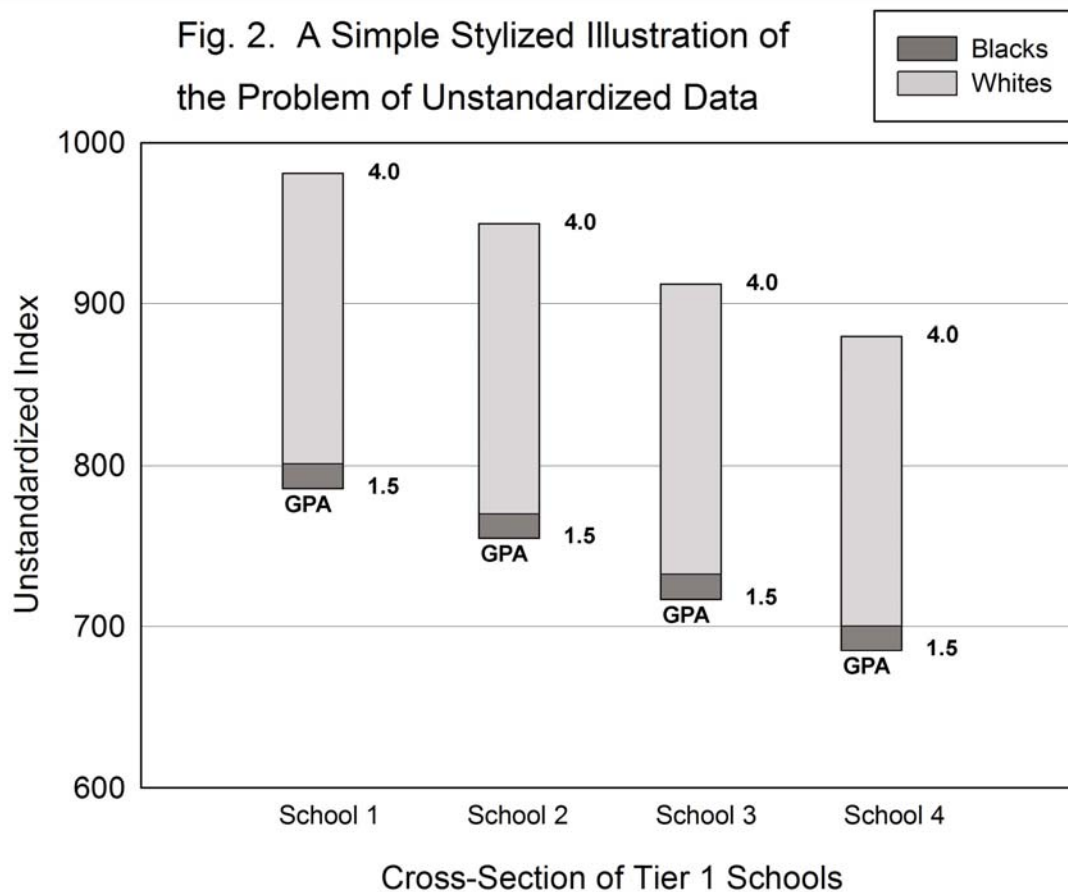
CCKL neglect a note directly under my Table 5.2, which reads as follows: “The reader may reasonably wonder why I have used a different dataset to test how well entering credentials predict first-year grades. The answer is straightforward: the LSAC-BPS dataset standardizes grades for each participating law school, but does not standardize the entering credentials of students according to the law school they attended. Nor does the dataset permit the researcher to make such a standardization. Without this standardization, regression results would be meaningless at best and highly misleading at worst. The 1995 National Survey is a smaller database, but all of its variables can be

⁷ Since $6/170 = 3.5\%$, we could expect 3.5% of the black/white gap to remain in a race-neutral regime.

⁸ CCKL's innuendos that my presentation is misleading are particularly disappointing. I discuss both datasets extensively in the paper; I have posted both datasets on my website; I explained to CCKL in emails the reasons why the BPS dataset would be inapplicable for Table 5.2. No one else among the dozens of readers who have carefully reviewed the piece has suggested that my discussion is misleading or even unclear.

identified by individual law school and the sample size is large enough to provide reliable results.”

Readers who are social scientists will instantly understand this argument and realize why it would be foolhardy to run this analysis with the LSAC-BPS data. As one statistician observed to me, “without standardized data you would be confounding the very phenomenon you are trying to measure.” For other readers, some more explanation would probably be helpful. Consider the following chart:



The concentration of blacks at the bottom of the grade/index distributions in Figures 2 and 3 is a considerable oversimplification, made only to illustrate the discussion in the text.

Figure 2 illustrates the problem one confronts with unstandardized data. Suppose we have information on students at four law schools. At each law school, GPAs range

from a high of 4.0 to a low of 1.5. Black GPAs tend to cluster near the bottom of the distribution (though not to the extent suggested by the bar graphs; this oversimplification is made to clarify the exposition, and does not change the reasoning). The academic index that measures student income credentials (a 0-to-1000 score based on LSAT scores and undergraduate GPA) varies from school to school, depending on the school's eliteness. At School 1, credentials range from 975 down to 775, while at School 4 they range from 875 to 675. Again, black credentials tend to cluster near the bottom of each range – a necessary corollary of the large preferences I document in *Systemic Analysis*.

The LSAC-BPS dataset reports grades that are standardized for each participating school. Law school GPAs are transformed into a school-by-school scale, measured in standard deviations, that essentially lets us compute each student's rank in his law school class. But LSAC did not standardize student credentials in its dataset, and it destroyed all information that could link individual students to individual schools. When CCKL try to predict law school performance based on student credentials, their measures are badly biased. Even though blacks have relatively low credentials within each school, when we conflate schools with different admissions thresholds, average black credentials will look higher than they are. The student whose credentials place her in the 3rd percentile of School 1 will be in the 50th percentile of School 4. The regression will inevitably show that blacks significantly *underperform* their entering credentials – a robust but meaningless conclusion.

An analogy may make the point clearer. Suppose I advanced the theory that household income is a good predictor of how expensive a home one lives in. A critic says this may be true in general, but doesn't apply to doctors. To prove it, the critic standardizes doctor incomes in comparison to everyone in the United States, and finds doctors average at the 97th percentile of income. The critic then standardizes the prices of homes doctors own by the *zip code* in which they live, and finds that the typical doctor's home is only at the 80th percentile of homes in the typical doctor's zip code. The critic then concludes that my theory doesn't apply to doctors, since doctor incomes appear to overpredict the actual relative price of doctor's homes. I hope it is obvious that this critic's analysis is worthless, because he uses two incommensurate measures.

CCKL might reply that the standardization problem is mitigated by their use of "tiers" in their comparisons. They would be right, if there were only trivial differences in the index distributions of all schools within a tier. In fact, however, the six BPS tiers CCKL rely upon are, internally, very heterogeneous. Not only are several of the tiers very large (containing up to fifty schools); the tiers were selected not strictly as a measure of prestige but on seven different variables, many of which are only loosely correlated with prestige.⁹ It is certainly true that the tiers, when compared with one another, form a rough hierarchy of prestige. What is completely untrue, but critical for CCKL's use of the data, is any claim that the schools within tiers are homogenous in their selectivity.

⁹ See Wightman, *User's Guide: LSAC National Longitudinal Data File* (January 1999) at 15.

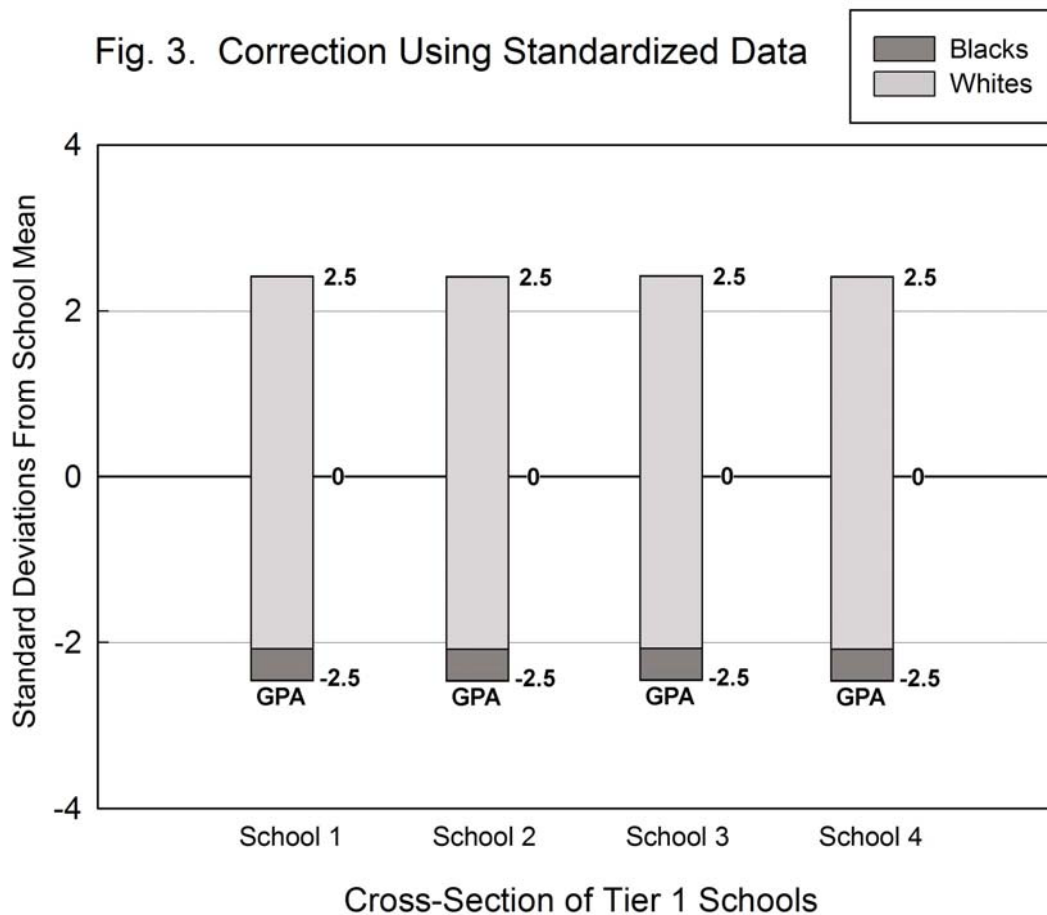


Figure 3 shows the correct way to conduct this analysis. One must find data that allows the researcher to standardize both grades and entering credentials for each school, so that we are comparing each student's index strictly in comparison to her classmates – that is, the same way we compute her class rank. (In the figure, each school's index distribution has been standardized to a mean of 0 and a standard deviation of 1.) The dataset that I use in Table 5.2 of *Systemic Analysis* does permit that type of school-by-school standardization. It is, therefore, a valid way to make the comparison.

To make this same point another way, consider Table 3, below. The left-hand column replicates Table 5.2 from my paper. The right-hand column replicates Table 5.2, but unstandardizes the data on credentials. Just as the above discussion would predict, the essentially neutral effects of race in the standardized analysis turn into large, negative, and statistically significant racial effects in the unstandardized analysis – the very effects CCKL would like to show from the data.

Table 2
The Effect of Using Unstandardized Data on Race Variables
In Predicting First-Semester Grades

Variable	Model with LSAT & UGPA Standardized by School		Model with LSAT & UGPA Unstandardized by School	
	Standardized Coefficient	P-value	Standardized Coefficient	P-Value
LSAT	.38	< .0001	.230	< .0001
UGPA	.21	<.0001	.083	< .0001
Male	.018	.20	.030	< .05
Asian	-.007	.61	-.032	< .01
Other	-.020	.14	-.029	< .05
Black	-.007	.63	-.070	< .0001
Hispanic	-.011	.43	-.078	< .0001
Observations: 4,258 Adj. R2: .19			Observations: 4,258 Adj. R2: .10	

Source: National Study of Law Student Performance

CCKL’s reliance on unstandardized data for the central analysis in their rebuttal is profoundly incorrect as a form of quantitative analysis. Using unstandardized data in this context is not a matter of style; it is simply wrong. In my twenty years as a social scientist, I have never heard anyone dispute this point. It is very disappointing to see a distinguished social scientist like Richard Lempert pretend otherwise.

* * * *

Setting aside the issues of methodology, the substantive point in dispute is whether the grade gap in law school is predominantly due to a large “credentials gap” between blacks and whites (my claim), or whether it is largely due to blacks simply underperforming (CCKL’s claim). At the time I wrote my paper, I was unaware of any other, recent large-scale study examining this question, but in fact one exists.¹⁰ Lisa Anthony and Mei Liu, researchers at the Law School Admissions Council (LSAC), analyzed the first-year grades of some ninety thousand law students who entered one of 167 law schools in 1996, 1997, or 1998. Anthony and Liu found that a combination of LSAT scores and undergraduate GPA produced “the most accurate prediction of first-year grades.” They found some evidence of underperformance by blacks, but the effect was “very slight” – about one-eighth of a standard deviation, to be precise. Since the general grade gap between blacks and whites in the BPS data is roughly two standard deviations, this suggests that black underperformance could explain about 6% of the black-white gap, with the other 94% explained by the credentials gap.

¹⁰ Anthony and Liu, “Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on the 1996-1998 Entering Law School Classes,” LSAT Technical Report 00-02 (Law School Admission Council, April 2003).

Anthony and Liu's analysis of this question certainly seems definitive. Moreover, it almost precisely matches the results I get with my 1995 database when I define my race variables the same way Anthony and Liu do (see note 172 in *Systemic Analysis*).¹¹ A slight level of black underperformance is also implicit in my finding that black grades fall a bit relative to white grades between the first and third years. My own suspicion is that these minor underperformance effects are principally side-effects of racial preferences (e.g., stereotype threat, discouragement, stress, etc.) and would largely disappear in a race-neutral regime. But the important point is that preferences clearly dominate, by an overwhelming margin, any explanation of the black-white performance gap.

Of course, a pervasive theme in *Systemic Analysis* is that blacks end up with lower grades than whites with similar credentials. This is true when we look at legal education as a systemic whole, because racial preferences elevate a black student with an academic index of "X" to a much more elite school than the typical white student with the same index will attend. The low grades that blacks end up with at the elite school are not a result of "underperformance"; these students are performing pretty much as any student with Index X would perform at that elite school. When CCKL contend that blacks "underperform", they mean that blacks get lower grades than even their index would predict at the schools they attend. My analysis, and that of Anthony and Liu, shows that such underperformance is a minor issue at best.

Passing the Bar

One of the core contentions of my paper is that the dramatic difference in black and white passage rates on the bar is due in very significant part to racial preferences. Without preferences, the very weakest black students would not be admitted to any law school, and the large majority who are admitted would have substantially higher grades and, hence, much stronger performance on the bar. The rate at which blacks fail the bar on their first attempt would consequently fall by nearly half; the rate at which blacks fail after multiple attempts would fall even more sharply.

CCKL offer three lines of reasoning for discarding this analysis. First, they believe that their earlier arguments about black performance in law school contaminate my bar analysis. (CCKL at 22-23) This would be a reasonable point – if they were correct in claiming that blacks would get bad grades in the absence of preferences, then my analysis would be too optimistic. But since CCKL's two arguments about black performance are, respectively, trivial and wrong, the carry-over argument is similarly misguided.

¹¹ And indeed, these results are reconcilable with the BPS data. Bureau of Labor Standards economist Edward Johnson, in his own research aimed at replicating and elaborating on my results, found that the apparent underperformance reported by CCKL disappears if one assumes that the variance among students within a tier is twice as large as the variance among students within a typical school in that tier – a very reasonable assumption.

CCKL's second argument is worth quoting in full: "Sander does not acknowledge 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...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." (CCKL at 23)

Here again, a central CCKL argument founders on an outright error. It is true that if one examines the logistic regression output behind Table 6.1 in *Systemic Analysis*, most statistics programs will report something labeled "R-square" with a value of 0.105. And it is true that in multivariate *linear* regression, the R-square value measures the proportion of dependent variable variance accounted for by the model. In logistic regression, however, the R-square value is calculated in an entirely different way (and for that reason, is generally referred to as a "pseudo-R-square"). For one thing, the pseudo-R-square is calculated on a scale that depends on how often the dependent variable can take a "yes" value. In the regression behind Table 6.1, the *maximum* possible value of the R-square is about 0.33. It is thus simply incorrect to say that the model "is able to account for only 10 percent of the variance..." The pseudo-R-square here is nearly one-third of its maximum possible value. And, indeed, statistics programs that report the pseudo-R-square also report the "max-rescaled-R-square", which resets the R-square value on a 0 to 1 scale, in this case turning the 0.105 value into 0.318. At most, then, what CCKL can honestly claim is that the R-square value of the regression in Table 6.1 is "only" about .32 – a comparatively high value in most social science analysis.

More to the point, however, R-square measures are simply not very useful in assessing the robustness of a logistic regression model (which is why in the paper, I report only R-square values for the linear regressions). Since the dependent variable in a logistic regression can take on only two values, there is not much "variance" to explain. A much better measure of the overall explanatory power of a logistic regression is the Somers' D. In calculating a Somers' D, a computer program examines every possible pair of observations from the dataset and assesses, from the model's coefficients, which of the pair would be more likely to take on a "yes" value, and which would be more likely to take on a "no" value. If the two observations actually do take on different values, the program compares the model's predictions with the real values. In the Table 6.1 regression, the model's predictions were correct 88.15% of the time, and incorrect 11.85% of the time. The difference of these two, 0.763, is the Somers' D. Since one would be correct 50% of the time simply by guessing, the Somers' D is a measure of how much one's model improves on random guessing, with a value of 0 representing no improvement and a value of 1.0 representing perfect prediction.

This has been a lengthy digression, but a necessary one. The reader should review again CCKL's statement. Their claim that my model only explains 10% of the

variance is simply false, based on a gross error. Their insinuation that my paper is misleading is not only flatly wrong but rather ironic. And their larger argument – that one should not draw big conclusions from models with weak explanatory power – is interesting but quite inapposite here. A Somers' D of 0.763 indicates an unusually powerful and robust regression.

CCKL's third argument in this section is similar, but even less to the point and no less filled with errors. Again, it is worth quoting at some length:

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 explained "well over 35%" of variance in bar performances. 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. In addition, Sander's claim, while not inconsistent with Klein's study of the July 1992 California bar exam, is contradicted by several more recent articles by Dr. Klein. (CCKL at 24)

CCKL aren't really making an "argument" here, since the passage they are criticizing is not from my analysis of the effects of affirmative action on black bar passage rates (Part VI of the paper) but rather from Part IV ("An Aside on the Value of Academic Indices").¹² Even if the passage they refer to was incorrect – even, for that matter, if all of Part IV was incorrect – it would have no bearing on the central arguments of *Systemic Analysis*. In my view (and in the models of *Systemic Analysis*), law school GPA is the primary predictor of bar passage. The passage, and the section, are "asides" because in them, I attempted to shed light on another issue: the persistently misleading arguments made in legal academic debates about the general predictive power of academic indices. My goal in this section was not to demonstrate that LSAT and UGPA determine bar passage (though they do have a fair amount of predictive power), but to explain why they are given a lot of weight in the law school admissions process.

¹² My passage reads as follows: "Another way to avoid the weaknesses of conventional validation studies [of how well LSAT and UGPA predict subsequent performance] is to use academic indices to predict performance on bar exams. Bar exams are taken by a broad cross-section of law graduates of many different schools, which greatly reduces the restriction-of-range and biased-selection problems. Little research has been done because bar authorities tend to jealously guard exam data. However, some recent validation studies have succeeded in matching undergraduate grades and LSAT scores with raw cores on the California bar exam. The studies find the predictive power of the LSAT is quite good. LSAT scores have a 0.61 correlation with multistate exam scores (even though the tests are usually taken four years apart), and a correlation of 0.59 with overall exam results (including the eight-hour essay exam and eight-hour practice exam). Adding undergraduate grades to the predictor produces a further, modest increase in correlations. The R² of these academic indices with bar results is, therefore, well over 35%." The reader can decide whether I do any "lamenting" in this excerpt, or whether CCKL's use of that term is simply another casual distortion.

The passage I quote above from CCKL is a good example of the type of misleading discussion that concerns me. CCKL are claiming that different studies produce wildly different results, and that the result I am citing is a very high and misleading outlier. In fact, there is no inconsistency in any of these results; they simply result from very different methodologies. The result I cite (one of many nearly identical studies I could have cited) uses the correct methodology for the issue I am addressing. The results CCKL cite are not on point because they are addressing other questions with very different restrictions on their data.

For example, Wightman¹³ finds a relatively low correlation (0.3 correlation, 0.09 R²) between her LSAT/UGPA index and bar results because of two limitations in her data: she is running her correlation across dozens of different jurisdictions (all of which have different pass thresholds) and, more importantly, her measure of bar results is simply whether takers pass or fail (known in the trade as a “point-biserial correlation”). This gives rise to the problem I noted earlier: one can do correlations between continuous variables and dichotomous variables, but the results are not very robust and this is certainly not a meaningful way of assessing the predictive power of the LSAT and UGPA. If one simplified LSAT scores to two values (“above 150” and “below 150”) and did the same to UGPA (“above 3.0” and “below 3.0”), one could make the correlations even lower, but what would that prove?

The correlation I reported in Part IV (a 0.59 correlation between LSAT and actual bar scores) compares test-takers in the national’s largest state (California). Since it compares two continuous variables (LSAT score and raw bar scores) and only compares test-takers within a single jurisdiction, it uses exactly the right database for the question I want to answer – how well LSAT correlates with bar performance when we compare a broad range of students.

CCKL’s discussion of Dr. Stephen Klein’s research is likewise misleading. Klein, who is the nation’s leading expert on these issues by a wide margin, has published dozens of studies examining the predictive power of the LSAT, UGPA, and law school grades on bar results. Klein has found modest correlations (0.20 to 0.45) between LSAT and bar scores when the analysis is limited to an individual school – an obvious consequence of the restriction of range problem involved in single-school validation studies. He has found, in a long string of studies, high correlations (generally 0.57 to 0.59) between LSAT and bar scores when comparing larger pools of law school graduates drawn from many schools – the consequence of removing the restriction of range.¹⁴ He has found extremely high correlations (0.90 to 0.98) between the overall bar

¹³ “The Threat to Diversity in Legal Education,” 72 *N.Y.U. Law Review* 1, 38-39 (1997).

¹⁴ These correlations -- just under .6 -- produce an R² of about .35, meaning that one can predict 35% of the variation in bar scores in California by knowing the LSAT and UGPA of a bar-taker, irrespective of where they attend law school. While this supports the use of LSAT and UGPA for law school admissions, it is important to remember that law school grades (by themselves) are even more highly correlated with bar scores (correlation of about 0.7, R² of about 0.50). Thus, going to a law school where one will get decent grades is vitally important to one’s prospects on the bar no matter what one’s LSAT score is.

passage rate of students at law schools across a state and each law school's median LSAT score (tying into the point I make later in Part IV that modest individual-level correlations become powerful group-level correlations). There is no internal inconsistency in any of these results – they vary depending on what one is trying to measure.

I have no doubt that Dr. Klein, if asked, would agree with my interpretation of his data. For CCKL to suggest that these various studies are inconsistent with one another means one of two things: either they do not understand the research in this area, or they are deliberately seeking to confuse their readers.

Comparing Blacks with Blacks

One of the few genuinely interesting arguments advanced by CCKL begins on page 25 of their paper. They contend that if the arguments in my paper are true, then blacks in lower-tier schools should have higher graduation rates and higher bar-passage rates than blacks in higher-tier schools *with similar credentials*. They then present an analysis that purports to compare blacks in this way, and purports to find that usually (but not always) the comparisons favor the survival chances of blacks at more elite schools.

This is an intriguing approach, but there are a few problems with the CCKL presentation. First, they do not give enough details on their methods to allow anyone else to replicate their work. Second, they do not discuss the problem of small “n”. Since the great majority of law applicants go to the most elite school that admits them, there are very few black “comparison” students at lower-tier schools. Many of the CCKL comparisons are based on such small samples that the results are, by their own admission, not statistically significant. Inexplicably, they report results that do not meet even their own significance tests as a “prediction” “for” or “against” my hypothesis.

There is a much more fundamental flaw in this analysis, however – one recognized by other social scientists working on the mismatch hypothesis. The pairs of students used in an analysis like this – black students with similar credentials but attending schools of differing prestige – are unlikely to be truly comparable to one another, precisely because one of the students is attending a more elite school. Consider two black students in the LSAC-BPS dataset with LSATs of 158 and undergraduate GPAs of 3.4. We can compute an academic index for each student based on these numbers, but of course admissions officers know much more about them. If one of the students attended Yale College and took a challenging curriculum while holding down part-time jobs, but the other student attended a community college, took easy courses and held no job, the first student is much more likely to get admissions offers from elite schools. A comparison of two black students at different tier law schools – based only on academic index scores -- is thus certain to be biased in favor of the more elite student.

This point was well understood by Stacy Dale and Alan Krueger.¹⁵ Dale, who had done some of the number-crunching for Bok and Bowen in *Shape of the River*, recognized that some of the black-on-black comparisons made in that book incorporated this bias. Dale and Krueger realized that truly valid comparisons between students at schools of differing prestige required them to identify pairs of students who had both been admitted to the same set of schools. If two students are *both* admitted to Harvard and Boston College, but one decides to attend Harvard and the other decides to attend Boston College, it is much more reasonable to assume the two students really were academically comparable. This change in methodology dramatically shifts the analytical results. If one compares students controlling only for some of their entering credentials (the Bowen and Bok method), one finds that graduates of more elite schools saw their earnings rise about 8% for every 100-point increase in their colleges' mean SAT score. But if one compares thousands of pairs of students who were admitted to the same sets of schools, but where one member of the pair went to a more elite school than the other, one finds that after these students enter the workforce, the more elite members of each pair tend to have *lower* earnings. Indeed, earnings *drop* about 10% with every 100-point increase in the colleges' mean SAT score.

The lesson from Dale and Krueger is clear: comparing student outcomes without controlling in some way for the differences among students not captured by academic indices produces a natural bias in favor of more elite schools.

The analysis offered by CCKL is much less sophisticated and more flawed than even the Bowen and Bok analysis. Bowen and Bok knew exactly which school different students were attending, and therefore could make precise comparisons between more elite and less elite schools. CCKL are limited to six extremely broad groups of schools that were "clustered" using several criteria, only one of which is prestige. Their results can't possibly be meaningful.¹⁶

¹⁵ Dale and Krueger, "Estimating the Payoff to Attending a More Selective College," *Quarterly Journal of Economics* (Nov. 2002) 1491, 1507.

¹⁶ Why, then, (a reader may ask) is there no "hidden credentials" issue when, in *Systemic Analysis*, I compare blacks from more elite schools with whites from less elite schools? There are three reasons. First, the bias that might arise from such a comparison is a bias *in favor* of more elite schools. Since my analyses consistently show whites at less elite schools have better outcomes than similar blacks at more elite schools, this finding is "swimming upstream" and overcoming any bias that might exist. (If "hidden credentials" were playing an important role, then we'd expect blacks to do better than their observable credentials predict, thus erasing the mismatch effect). Second, I don't rely on the inexact BPS clusters to compare students with similar credentials. But third and most importantly, the bias problem is effectively mooted because blacks and whites are admitted under largely independent admissions systems. As I show in Parts II and III of *Systemic Analysis*, affirmative action policies in the legal education system are specifically designed to admit blacks and whites with similar credentials to law schools of differing eliteness. If we are comparing a black with a 650 index at a Tier 2 school against a white with a 650 index at a Tier 3 school, there is no reason to believe that these two students differ, on average, in their unobserved credentials. Because whites are admitted by rules that do not apply to blacks, they provide a nearly ideal "control" group against which we can compare black outcomes under the "treatment" of being placed in more elite schools with well below-average credentials. The regressions in Tables 5.2 and 6.1 of *Systemic Analysis* help confirm that these comparisons are valid.

Of course, if we could figure out a way to compare pairs of blacks admitted to similar law schools but who made differing choices about the importance of attending an elite school – and track their relative fortunes over time – we would have a valid and interesting new test of the mismatch theory. As it happens, a team of leading scholars have come up with just such a test, and their results should be available soon.

Summary

The half-dozen criticisms I have addressed in this section are the sum total of CCKL's critique of Parts I through VII of *Systemic Analysis* – that is, the substantive core of the paper. One of CCKL's observations, concerning the distribution effect, is valid, though neither original nor important. The rest of their critiques are not merely unsuccessful; they founder on crude methodological blunders. I regret that CCKL chose to nationally distribute this work in the most public manner possible without, apparently, first taking the counsel of good scholars.

IV. The Number of Black Law Students in a Race-Blind Regime

The other half of the CCKL critique concerns Part VIII of *Systemic Analysis*: my argument that the current system of racial preferences does not necessarily end up producing more black lawyers than would a race-blind system. CCKL ignore the real point of the section: that our current preferences produce such high attrition rates among blacks that they may well overwhelm the pool-expanding effects of affirmative action. Instead, CCKL pour most of their energy into a tendentious, speculative argument about how the size of the black applicant pool might be affected by a complete legal abolition of affirmative action. CCKL would like to shift the debate from what my article is about – the mismatch effect and its impact on blacks – to a debate about whether all forms of racial preferences in law schools should be abolished. For that reason, I was at first inclined to simply ignore this part of the CCKL response. As I did further research, however, I realized that every one of CCKL's arguments was refuted by available data and scholarly analysis. With the caveat that this discussion is largely a distraction from the real arguments in my paper, I offer my findings on each of their claims.

Matriculation

My projection (in Part VIII of *Systemic Analysis*) about the effects of moving to race-blind admissions takes as its starting point Linda Wightman's recent finding that 86% of the blacks admitted to law schools in 2001 had strong enough credentials to be admitted to some law school in that year if schools had applied the same criteria to whites and blacks.¹⁷ CCKL say that this estimate is "deeply flawed" because "the year

¹⁷ I had enough data on the 2001 applicant pools to replicate Wightman's finding myself.

2001...was quite atypical.” White applications were unusually depressed that year, they suggest, because of the booming economy. “Thus in 2001 ... the ratio of black to white applications was at an all-time high.” To rely on the 2000-01 admissions cycle, CCKL conclude, creates a highly misleading and overly “rosy” view of how blacks would fare in a race-blind system.

Wightman’s analysis is based on internal data from the Law School Admissions Council (LSAC). This data is not generally available to members of the public, but I have in my possession a volume issued by LSAC last year, entitled the *National Statistical Report, 1997-98 through 2001-02*. Table 1 summarizes the relevant data from this report.

Table 3
Applications to American Law Schools, 1997-2002

Application Cycle	Total Applicants			Black applicants as % of	
	Black	White	Total	White apps.	Total apps.
1997-98	8,216	46,170	71,726	17.8%	11.5%
1998-99	8,375	47,787	74,380	17.5%	11.3%
1999-00	8,503	48,684	74,550	17.5%	11.4%
2000-01	8,648	51,190	77,235	16.9%	11.2%
2001-02	9,703	59,573	90,853	16.3%	10.7%
Average for five years	8,689	50,681	77,748	17.1%	11.2%

Source: Law School Admissions Council, *National Statistical Report, 1997-98 through 2001-02*

As the reader can see, the year Wightman chose for her analysis (2000-01) is not an outlier year for the number of black applicants, the number of white applicants, or the proportion of blacks in the applicant pool. In fact, **in each column of Table 1, the 2000-01 year comes closer to the five-year average in this table than any other year.** CCKL’s claim that the 2000-01 admissions cycle was “quite atypical” is simply false. Their statement that the ratio of black-to-white law school applicants was at “an all-time high” in 2001 is false as well.¹⁸

It is true that the black-white ratio is declining slightly over this period, and it is thus plausibly true that, as the authors claim (without providing any supporting data), that the black-white ratio was lower in 2002-03 than in the year of Wightman’s calculations. But it is far more plausible to argue that this dip in the black-white ratio is a temporary phenomenon. The dominant trend over the past thirty years has been a steady rise in the

¹⁸ Chambers et al. note ominously that the number of white applicants rose sharply after 2000-01. (CCKL at 8) They completely fail to mention that the number of black applicants rose nearly as quickly. For the 2001 to 2002 year for which I have data, the increases were 16% for whites and 12% for blacks. See Table 3.

black-white ratio of applicants, as the college graduation rate among blacks gradually catches up with the white rate. As I document in Part VIII of *Systemic Analysis*, there has also been a very consistent trend of the black applicant pool becoming steadily stronger relative to the white pool, with both the LSAT gap and the UGPA gap slowly narrowing. There may be year-to-year fluctuations in the number and ratio of black-to-white applicants, but it is hard to deny that over the next ten years, the proportion of blacks admitted under race-blind standards will continue to rise. If CCKL believe that all of the long-term trends are about to reverse themselves, they should explain why, and provide some relevant evidence.

It is also worth pointing out that if one accepts CCKL's estimate that the proportion of blacks admitted to some law school in 2004 would be 76%, rather than the 86% Wightman estimated for 2001, the legal education system would still be essentially neutral in its production of black lawyers, once attrition effects are taken into account. Duplicating the methods I used in Part VIII of *Systemic Analysis*, the admission of the top 76% of current black law students under a race-blind regime would produce an 11% increase in the number of black lawyers passing the bar on the first attempt, and a 1% decline in the number of black lawyers passing the bar after multiple attempts.

In short, for CCKL's general argument – that ending racial preferences would be a disaster for blacks – to work, they must show that black interest in law school would substantially decline in a race neutral world.

The Example of Local Prohibitions

To support their claim that the ending of racial preferences will lead to dramatic declines in the applicant pool, CCKL point to the experiences of schools in California and Texas that were affected by legal prohibitions on the use of race in admissions (Proposition 209 in California, and *Hopwood* in Texas) beginning in the mid-1990s. They show (their Figure 2) that blacks as a proportion of the applicant pool declined after 1996 at six California and Texas law schools, by amounts that appear to range from 25% to 55%. CCKL do not claim that the exact same thing would happen under a national ban – in fact, they draw no specific conclusion at all from this analysis – but that seems to be their intended implication.

For CCKL's analogy to work, two things must be true. First, it must be the case not just that black applications fell, but that the number of applications from blacks who would qualify under race-neutral standards fell as well. Otherwise, all CCKL are showing is that black applicants had better information about admissions standards after preferences were eliminated, and made more efficient decisions about where to apply. There is actually some authoritative data available on this point. David Card and Alan Krueger, two of the most eminent labor economists in the country, have conducted a detailed analysis of how the application behavior of strong minority candidates in

California and Texas changed after the elimination of racial preferences.¹⁹ Using comprehensive data on high school students taking the SAT, they examined where minorities who had good (but diminished) chances of being accepted by elite public schools like Berkeley, UCLA, and the University of Texas directed the Educational Testing Service to send their scores (behavior that correlates highly with subsequent applications). They found “the elimination of race-based admissions preferences in California and Texas had little or no effect on the decisions of highly qualified minorities to submit their SAT scores (and presumably apply) to the selective institutions in the two states.”²⁰ This suggests that “the application decisions of highly qualified minority students are not very sensitive to changes in the racial and ethnic composition of the student bodies at selective public colleges and universities caused by ending affirmative action.”

What about the black applicants who, without preferences, would not qualify for admission at elite schools like Boalt, UCLA, and the University of Texas? Did these students redirect their applications to other schools, as my “cascade theory” would predict, or did they simply drop out of the system? Once again, CCKL do not provide any data on this key issue. The data I have found is consistent with the cascade theory. The number of law school applicants of all races fell sharply during the period from 1992 to 1998, and black applications fell too – but at a much slower rate than white applications, so the ratio of black applicants to white applicants rose steadily from 1:7 in 1993 to 1:6 in the late 1990s. The absolute number of black applicants rose every year from 1999 through 2002. These trends are certainly inconsistent with the theory that significant numbers of blacks were discouraged from applying to law school in California, Texas, or anywhere else after 1996.

CCKL make many assertions about the behavior of black applicants. “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.” (p. 10) “African American applications dropped substantially, *in part because black students were understandably reluctant to study law in an atmosphere of social isolation.*” (p. 10, italics added) “Absent a ‘critical mass’ of African American classmates....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.” (pp. 11-12) “Eliminating African Americans’ critical mass at elite schools would depress applications from precisely those African American students project to do the ‘heavy lifting’ under Sander’s model.” (p. 12) CCKL sound so confident in these statements that readers might not notice that they do not cite a single piece of evidence in support of any of them. But Card and Krueger’s large, systematic

¹⁹ David Card and Alan Krueger, “Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas,” NBER Working Paper 10366 (March 2004).

²⁰ *Id.* at 25.

analysis of applicant behavior in California and Texas directly contradicts all of these claims.

At the risk of repeating myself, let me remind the reader that *Systemic Analysis* is not a brief for ending affirmative action. It is a detailed study of how racial preferences operate in law schools, and how preferences help or hurt specific groups of black recipients. An immediate end to racial preferences is one possible response to these findings, but it is far from the only response and it is not my preferred solution. The questions CCKL raise in their piece are interesting to a degree, but they are also largely a distraction from the real question: how to best address the serious mismatch problem.

CCKL's Geography Argument

CCKL argue at some length that black applications will go down because if affirmative action ends, blacks will find themselves at excessively great distances from the law schools that will admit them. Their argument is not easy to follow. So far as I can make out, CCKL believe that low-ranking schools are disproportionately concentrated in the Great Plains and Rocky Mountain states – areas where many blacks may be reluctant to attend either because the schools are far from home or because they are located in predominantly white areas.

For this argument to make any sense, three things would have to be true: (a) low-tier schools would have to be, in general, significantly more remote from the major concentrations of blacks in America than high-tier schools; (b) it would have to be impossible for the low-tier schools that *are* near black population centers to absorb the black students in those areas seeking to attend law school; and (c) it would have to be the case that black law students were not generally very mobile. All three of these things would have to be true. But in fact, *none* of these things are true.

As most of us know, blacks (like nearly all American ethnic groups) are not evenly distributed through the general population; blacks are concentrated in the South and in what used to be known as the major industrial states. Twenty southern and industrial states account for a large majority of the black population. These states also account for two-thirds (67.3%) of the law school places in the lower tiers (rank 100 and below) of American law schools. This is slightly higher than the proportion of seats in elite law schools (rank 20 and above) located in these states – 64.9%. In other words, seats in less elite schools are found in higher numbers in states with large black populations than are seats in elite schools.

Even were this not the case, it would hardly matter. Every state with a large black population has at least one non-elite law school, and frequently several. Moreover, in all of these states the number of seats available in lower-tier law schools exceeds by far the total number of black law students currently attending any law school in those states.

But even setting aside these facts, where do CCKL come up with their premise that blacks have some unique incapacity to attend law school far from home? How do they imagine blacks behave in the current regime of racial preferences – wouldn't blacks be more likely to move across country, if necessary, to attend the most elite school that admitted them? Fortunately, we don't have to speculate: there is some real data on this point. The National Study of Law Student Performance asked law students various questions about their living arrangements and distance from home. Some of this data is summarized in Table 2, below.

Table 4
Indicators of Geographic Mobility Among Law Students, 1995

Group	Percent Attending a Law School Within 50 Miles of Where They Grew Up	Percent Living with Spouse or Partner
Blacks	24%	16%
Whites	26%	28%
All races	27%	25%

Source: National Study of Law Student Performance, 1995

It turns out that, as best we can tell, blacks are not the least mobile of contemporary law students – they are among the *most* mobile. This might be because relatively few of them are married at the time they begin law school, or for other reasons. As I noted earlier, each of the three empirical premises behind CCKL's argument are contradicted by the facts.

I must add that it is a little hard to believe that CCKL are even advancing their geography argument in good faith.²¹ All of the data I just referred to is available to CCKL. How could they have missed such easy checks on their conclusions? More fundamentally, CCKL's argument doesn't make sense in theoretical terms. Recall -- their basic assertion is that blacks are more likely to be forced to travel across country to attend law school if large racial preferences are modified or eliminated altogether. But most of us in the law school world know as a matter of common knowledge that students are more likely to move across country to attend law school if we are choosing between a #10-ranked school and a #15-ranked school – not if we are choosing between a #50 and

²¹ This data has been posted on my website for months, but CCKL declined to make use of it to see whether their assertions had any empirical basis.

#55-ranked school. Our intuition is that students at elite schools are more likely to live far from home, other things being equal, than are students at non-elite schools.

Again, this intuition can be checked against real data. Table 4 shows the relationship between attendance at elite schools and living close to home. For all groups, attending an elite school more commonly entails living far from home. But this is *particularly* true for black students. The facts behind the geography argument cut directly against the assertions of CCKL.

Table 5
Eliteness and Residency, by Race

Group	Percent of Law Students Attending a Law School Within 50 Miles of Where They Grew Up	
	Schools Among “Top 25”	All Other Law Schools
Blacks	14%	29%
Whites	20%	30%
All races	21%	30%

Source: National Study of Law Student Performance, 1995

Financial Considerations

CCKL argue that financial issues would also erode black interest in law school under a race-neutral regime. They offer two specific arguments. First, they are concerned that if race-based preferences in admissions end, then blacks will no longer receive a disproportionately large share of financial aid, and this will hurt black applications. I think this is a reasonable concern. In fact, I raised this issue in Part VIII of my paper and supported it with previously unpublished data, which is apparently where CCKL got their argument. This is one of many examples in the paper where I try hard to consider seriously both sides of each issue I analyze.²²

CCKL’s second argument runs like this: since race-neutral admissions will send blacks to generally less elite schools, black law graduates will earn less and be less able to handle debt they accumulate in law school. Since applicants will calculate their “return on investment” before starting law school, fewer blacks will apply.

²² There are some good reasons to think the financial aid issue should not be a major concern. Law schools in the UC system found various methods of continuing to recruit blacks with generous financial aid packages after the passage of Prop 209. And the blacks whose decisions are most affected by financial considerations – those with genuine hardship – should continue to receive aid under any regime.

What CCKL fail to notice is that this argument directly undercuts their general critique. I show in detail, in Part VII of *Systemic Analysis*, that the typical black lawyer's earnings would be substantially higher under a race-neutral regime than they are under the current system. I also show, in Parts VI and VIII, that blacks starting law school would have a dramatically higher chance of graduating and passing the bar under a race-neutral regime than under the current system. If the number of black applications will be shaped by prospective students weighing their long-term return on investment from three years of law school, then a shift to race-neutrality should significantly increase, not decrease, the number of black applicants.

CCKL may disagree, of course, but if they do, they need to address directly the arguments in my paper rather than talking past them.

The Undergraduate Effect

CCKL's last argument about black applications is titled "A Realistic Affirmative Action Ban Would Apply to Undergraduate Institutions, and Would Therefore Harm African American Applications from Selective College and Universities." (p. 15) This pretty much sums up their claim. Their argument runs like this: (1) elite colleges provide a disproportionate share of current law students. (2) If affirmative action ends at undergraduate schools, then fewer blacks will be at the most elite colleges and more will be at less elite colleges. (3) Therefore, fewer blacks will apply or be qualified for law school. They provide evidence on only the first of these three points.

It is worth noting how opportunistic CCKL are in their arguments. A few pages earlier, they confidently assert that if racial preferences dried up in law school, talented blacks would shift their interests to other forms of graduate education that still granted preferences. In this section, they assume that if racial preferences disappear in law school, they will disappear throughout higher education. Whatever image of reality best suits the argument of the moment is invariably the one CCKL project.

Two responses seem relevant. First, I certainly hope it is not true that the only way for law schools to address problems in the current system of racial preferences is to be forced by the courts to completely abandon them. I don't think that the best solution is immediate, total abandonment of preferences, and I think changes in policy will be more honest and transparent if they are undertaken by law schools themselves rather than by the courts. I think that *Grutter* provides us with a grace period to see if we can mend some serious problems in legal education's system of preferences.

Second, although the findings in my paper apply only to legal education, there is certainly a good deal of evidence that mismatch problems exist at the undergraduate level as well. One cannot simply assume that the displacement of blacks from elite undergraduate institutions to less elite colleges would automatically shrink the pool of prospective black law school applicants. It could very plausibly strengthen that pool. As

we saw earlier, the way to explore this question is to compare the UGPAs and LSAT scores of pairs of black students admitted to the same set of colleges, with one choosing to take advantage of preferences and attend an elite school, and the other choosing a less elite school. If CCKL can show that black students choosing the less elite schools have weaker credentials for applying to law school, then they have the makings of an argument. Otherwise, they simply have empty rhetoric.

Redistributing Students

In Part V of their paper, CCKL argue that if racial preferences in law school admissions are completely eliminated, the distribution of blacks across law schools will shift dramatically down the prestige hierarchy. They run a simple simulation to illustrate just how dramatic they think the change might be.

CCKL's simulation shows nearly 65% of all black law students shifted into law schools outside the top 100 (that is, ranked 101st to 185th). They concede that this is an overestimate, since their model rigidly allocates students based only on academic index. I agree that the shift downwards would not be as large as they suggest, based on my own model (which I will detail in a forthcoming paper) that very accurately simulates the current distribution of white students.

CCKL's Table 9 shows their projected distribution of students. The numbers look dismal – only 23 first-year black students in the top ten schools combined; only 44 in the next fifteen schools. . . . when I first looked at the table, I couldn't believe that even under CCKL's highly pessimistic projections, the numbers would be that bad. I was right. The total number of first-year black law students CCKL show in all tiers in their Table 9 is 1,295. That would be a 63% drop from current enrollment. But in the rest of their paper, CCKL argue that first-year enrollments would drop “40% to 45%”. Somewhere between page 27 and 29 of their critique, they lose seven hundred black students. CCKL's estimates, in other words, are not only detached from any real world data; they are also detached from one another.

This might be a good place to point out that the policy suggestion in my paper, which I call the “4% solution”, would greatly mitigate the redistribution of students towards lower-tier schools. Under this approach, law schools only use race-based preferences for blacks to the extent necessary to prevent black enrollment from falling below 4%. There are several virtues this approach has over the current philosophy of proportional representation: the 4% solution breaks the cascade effect, leading to smaller preferences at the top and the complete disappearance of preferences fairly high up in the law school hierarchy. Even though none of the elites would lose more than about half of their current black students, I estimate that the 4% solution would eliminate about 80% of the current mismatch effect, sharply reducing current attrition rates and improving job outcomes.

Overall Effects

At the beginning and the end of their paper, CCKL present specific forecasts about what would happen to the production of black lawyers if racial preferences were ended. Their forecasts are summarized in Table 6, below:

Table 6
Sander and CCKL Simulations of Black Outcomes
In a Race-Blind Law School Admissions System, Class of 2004
 (from *Systemic Analysis* and Tables 2 and 8 of CCKL)

Stage of the Process	My estimate	CCKL's estimate
Applicants	Unchanged	-10% to -15%
Admittees	-14.1%	-35% to -45%
Matriculants	-14.1%	-40% to -45%
Graduates	-8.1%	-35% to -40%
Graduates taking the bar	-6.8%	No estimate
Passing the bar, 1 st time	+20.1%	No estimate
Passing the bar, eventual	+7.9%	-25% to -30%

As I explain in *Systemic Analysis*, my estimates are based on three assumptions. First, I accept as reasonable Linda Wightman's 2003 estimate that about 86% of current blacks admitted to law school in the 2000-01 admissions cycle would still have been admitted to an accredited law school in the absence of any racial preferences. Second, I assume that the net number of blacks applying to law schools (and matriculating if they received offers) would remain unchanged. Third, I assume that in a regime free of preferences, blacks would graduate and pass the bar at the same rates as whites with similar academic indices. My first and third assumptions are based on very extensive evidence, and I concede (and discuss at some length) the difficulty of making any firm prediction about my second assumption. Moreover, readers can easily replicate my estimates by using data and programs I have posted on my website, or by independently securing data from the Law School Admissions Council.

Compare this with the "methods" behind the CCKL forecasts:

- 1) CCKL estimate that the number of black applicants will drop 10-15% under a race-blind regime. They speculate about why this might be so (and I have shown above that most of their speculations are flat wrong), but never offer a single piece of quantitative evidence from which one can derive their 10-15% estimate.
- 2) CCKL estimate that the number of black admittees will drop by 35-45%. If they had combined the Wightman estimate with their own estimate of the decline in

- applications, their projected drop would be 22-27%. Since they concede that Wightman's calculations are correct for the entering cohort of 2001 (the graduating Class of 2004), then to make a fair comparison with my table, their table should show a 22-27% drop in admissions. Setting this point aside, let us accept for the moment as accurate their own analysis of 2002-03 data, showing a 24% decline in admissions for a static applicant pool for the Class of 2006. Even here, their math does not add up. If we multiply the 10-15% drop in applications with a 76% acceptance rate, we get a range of 32-36%, not 35-45%.²³
- 3) CCKL estimate that a higher proportion of blacks will decide not to accept offers of admission than is the case now. This is an entirely ad hoc, undocumented claim. CCKL do not offer a single piece of evidence to support it.²⁴ And once again, CCKL's math doesn't make sense. Based on some unstated non-matriculation rate, they get from a 35-45% drop in line 2 of their simulation to a 40-45% drop in line 3. How is it that their attrition rate lowers the upper bound estimate but leaves the lower bound intact?
 - 4) CCKL seem to concede in their text that the mismatch effect operates to some degree. "Our own forecast would be that, if affirmative action were ended, the numbers of African Americans who would graduate from the schools they would then attend would improve somewhat over current rates but improve less than Sander forecasts." (pp. 21-22) In their projections, however, CCKL seem to take into account only the lower overall attrition rates that result from not admitting the weakest students. Of course, since CCKL provide no documentation and no calculations to show where their numbers come from, I can only speculate about their methods.

In an email exchange this summer, Richard Lempert urged me to simply pull my Part VIII estimates from the article, on the grounds that they were too speculative. He added, "...in this connection I think it is absolutely essential from the standpoint of good social science and good policy research that you present and discuss not point estimates but 95% confidence intervals."²⁵ This was an interesting but unworkable idea – generating confidence intervals would have required many different datasets like the BPS, which would allow one to assess the degree of variation from year to year in patterns of white and black attrition. I nonetheless find it extraordinary that Lempert would consider my estimates too loose, and proceed to disseminate to a national audience

²³ Moreover, CCKL's 76% estimate is itself based on a steady-state world of a constant applicant pool. If the applicant pool has shrunk, and shrunk disproportionately at the bottom (as they contend it will on page 9), then the proportion admitted in their models would be higher than 76%.

²⁴ The only cite in this section is to a claim that 16-18% of blacks accepted don't go....this is (a) wrong and (b) irrelevant to the issue of whether more blacks would not matriculate under race-blind system...

²⁵ Email of Richard Lempert to the author, July 24, 2004. I would not ordinarily cite email correspondence in the interest of candid academic exchange, but since CCKL refer to this same email in their critique (CCKL footnote 3), I feel they have put it in the public domain.

estimates that have no documentation, little if any supporting evidence, incorrect calculations, inconsistent assumptions – and, incidentally, no “95% confidence intervals.”

V. Conclusion

There will be a great deal of discussion of both *Systemic Analysis* (and the broader preference issues it addresses) in the media and in the legal academy during the coming year. Though the issue is intrinsically emotional, it is important that this discussion be as sober, as thoughtful, and as grounded in real data as possible.

CCKL’s essay was designed to hijack the debate. This is evident from its extreme statements, its one-sided tone, its release to the press two months before publication of my article, and its dissemination on the day of its public release to every law school dean in the country. So far, it has been quite successful in identifying itself and its authors as the official voice of the affirmative action establishment. This makes life easy for me personally, since the apparent conflict increases the notoriety and attention given to the article and the substantive criticisms are easy to refute. But it very poorly serves the debate by focusing attention on claims unsupported by facts and issues that don’t really exist.

I would therefore like to urge knowledgeable readers to become more involved in the debate. If you have social science expertise, read the CCKL critique and my response and weigh in on which arguments are valid. Put forward your own views on what the genuine issues in dispute should be. Affirmative action debates in the past have too often been characterized by a race to the bottom. Broad, engaged involvement is the best way to elevate the debate.