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THE LAW SCHOOL PIPELINE FOR STUDENTS OF COLOR: WHAT'S CONSTRUCTING THE FLOW?

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An abbreviated version of this Article was presented at the Conference, “Collaborating To Expand the Pipeline (Let’s Get Real)–Embracing the Opportunities for Increasing the Diversity Into the Legal Profession,” held at Rice University on November 3-5, 2005 and hosted by the American Bar Association’s Presidential Advisory Council on Diversity in the Profession and Co-Sponsored by the Law School Admission Council (hereinafter “Pipeline Conference”). Although my presentation at the Pipeline Conference was limited to a scant three minutes and addressed only a few points made herein, I want to thank the organizers and sponsors of the Pipeline Conference for inviting me to make the presentation as it stimulated my thoughts on this matter and motivated me to put those thoughts in writing.
Putting aside momentarily the debate over the appropriate use of affirmative action in law school admissions, almost all would agree that increasing the number of diverse or underrepresented individuals in law schools, and subsequently the legal profession, is a laudable goal and one that will have a salutary effect on the legal profession and, ultimately, society. The debate, to date, has centered on whether affirmative action can lawfully be used to achieve that increase and, if so, whether the use of affirmative action is beneficial for its recipients. Further, both opponents and supporters of affirmative action agree that the elimination for the need for the continuing use of affirmative action is also a laudable goal and one that should be embraced societally.

1. For a recent article, see, Leslie Talof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 Neb. L. Rev. 631 (2005). For a discussion of the use of affirmative action in an environment in which a “power” test like the Law School Admission Test (LSAT) is used to screen for admission, see Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953 (1996) (authors contend that it is the use of the LSAT that is harmful to minorities and its use in admissions should be eliminated or lessened); but see, Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 Ind. L. Rev. 309 (2006) (author contends that it is the misuse of the LSAT by Deans and others in Admissions that is inimical to the interests of underrepresented minorities).

2. As discussed further, infra, see notes 00-00 and text accompanying, for this Article underrepresented individuals are those individuals, categorized by their racial identification or affiliation, who are underrepresented—when measured by their percentage in the U.S. population—in law schools and the legal profession. As such, those racial groups who are underrepresented are African-Americans (or Blacks and the terms are used interchangeably throughout), Hispanics/Latino/a’s, and Native Americans (or Indians as some would prefer to be called). Notably absent from this group are Asian-Americans (recognizing that Asian Americans is a very broad category encompassing literally scores of different ethic affiliations of different types who are at different stages of their assimilation into American society and culture) who, in this broad category, are now overrepresented in the law school population and will, if trends hold true, soon be overrepresented in the legal profession.

3. Most recently Professor Richard Sander has created a controversy with his article, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004), in which he claims that the beneficiaries of affirmative action are harmed by its use by being admitted to schools in which they can not successfully compete with those admitted without the aid of affirmative action. This controversial assertion has been debated and rebutted in several articles and is discussed in more detail infra in Part III.

4. Opponents of affirmative action concede the need for the use of affirmative action to enroll significant numbers of minorities in law school but contend that the cost of affirmative action—using race or ethnicity as a positive variable to select matriculants—is inimical to societal
The Supreme Court in its opinion in Grutter v. Bollinger\textsuperscript{5}, the case that upheld the continuing use of affirmative action in higher education, almost wistfully concludes with the dicta that affirmative action should not be necessary twenty-five years after the opinion was issued.\textsuperscript{6} I have written articles in favor of the continued use of affirmative action,\textsuperscript{7} yet I, too, believe that an optimal state of affairs in legal education is a world in which affirmative action is not used and there is nevertheless a proportionate representation of underrepresented groups in our law schools and subsequently in the legal profession. In other words, in an optimal “aracial”\textsuperscript{8} principles, violative of constitutional law and in the long run harmful to minorities and race relations given the fact that it establishes “race” as a viable factor in admissions and consequently, so the argument proceeds, “stigmatizes” minorities as unequal to whites. Supporters of affirmative action concede that some of these arguments may have merit, but believe the cost of the underrepresentation of minorities in law school is too high and warrants the continuing use of affirmative action. String Cite to Law Review Articles on Affirmative Action. Both opponents and supporters of affirmative action reach agreement that affirmative action should not be used if there is no need to increase the enrollment of minorities in law school because they are not underrepresented in a system in which affirmative action is not deployed.

\textsuperscript{5} 539 U.S. 306 (2003). Of course, the companion case to Grutter, Gratz v. Bollinger, 539 U. S. 244 (2003) found the use of certain “affirmative action practices”, e.g., automatically adding points to an applicant’s score because of the applicant’s race, to be unlawful and ruled that the University of Michigan’s undergraduate admissions practices must be eliminated or modified to comply with its opinion in Grutter.

\textsuperscript{6}

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable . . . . It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter, 539 U.S. at 342 (citations omitted).

\textsuperscript{7} See, Alex. M. Johnson, Jr, Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. Ill. L. Rev. 1043.

\textsuperscript{8} I use “aracial” in this context to mean that nothing would turn on the racial identification of the individual. The individual’s race would be the equivalent of eye color. See Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 U.C.L.A. L. Rev. 581, 586 (1977) (“Race does not function in our culture as does eye color. Eye color is an irrelevant category; nobody cares what color people’s eyes are; it is not an
society there would be no need for affirmative action and all would support the elimination of affirmative action in admissions because Blacks, Hispanics and Native Americans (the underrepresented minority groups) would be admitted to law schools at least in proportion to their percentage of the U.S. population without its use.

Quite the contrary, we do not live in an optimal “aracial” world but in a society still suffering from the effects of a historical legacy of legalized and systemic racism which was once the norm in American society. Not only does affirmative action continue to be used to increase the number of underrepresented groups (minorities) in our law schools, these groups remain underrepresented in law schools and in the legal profession. This Article addresses an important issue raised by the underrepresentation of these minority groups in law schools: What is limiting the enrollment of these underrepresented individuals in our law schools and what can be done to increase the enrollment of these very valuable students so that they are no longer underrepresented when measured by their representation in larger society?

Indeed, many in legal education, especially those of us intimately involved in admission process, have noticed that although the number of minorities applying to law schools is important cultural fact; nothing turns on what eye color you have.”).

9. See supra note 2.
10. Often ignored over the debate over the efficacy of affirmative action is why affirmative action must be used in law school admissions in order to admit and matriculate a sufficient number of minorities in law schools. I have addressed the negative impact of the Law School Admission Test (the “LSAT”) on minorities in law school admission, thus necessitating the use of affirmative action, in my recent article, The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings, supra note 1.

11. As discussed infra and in my recent article, The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings, id., affirmative action would not be needed in our society if members of underrepresented groups scored equally as well as whites and Asians on the LSAT. Hence, in one significant respect the LSAT can be viewed as “restricting the flow”. However, as I address infra no one can satisfactorily explain why these groups persistently score below that of other groups and, as a result, no one can propose an adequate remedy. See infra notes 00-00 and text accompanying. As to the facile claim that the LSAT should be abolished to increase the flow, see Johnson, supra note 1 at 000.

12. From 1989-2004 I was a volunteer for the Law School Admission Council (LSAC), the non-profit entity that produces the LSAT and that is “owned” by the American Bar Association (ABA) accredited law schools. During that fifteen year span, I rose from a member of the Minority Affairs Committee (MAC) (a LSAC standing committee devoted to increasing the number of minority students in law schools) to Chair of MAC and then Chair of the Test, Development and Research (TD&R) Committee (TD&R is the standing committee within the LSAC charged with monitoring and assessing the efficacy of the LSAT), ultimately becoming Chair of the Board of Trustees of the LSAC, the highest position a volunteer can attain within the LSAC administrative structure. As I have written previously, “[d]uring my odyssey with the
increasing slightly, the number of certain minority students (to be more precise, the underrepresented minorities which excludes Asian-Americans) admitted to and matriculating at our law schools is decreasing as an absolute number and as a percentage of those students actually attending law school. This has lead to a renewed emphasis on those factors that have caused this decline in law school matriculants and directly to this Article’s primary inquiry: What is limiting the number of minority matriculants in light of the increased number of applicants?

Moreover, because fewer members of these underrepresented groups are matriculating at law schools, fewer members of these underrepresented minority groups are graduating from law school and even fewer are passing any bar examination and achieving their ultimate goal of becoming a practicing attorney. Although many point to law school attrition as a major factor in the underrepresentation of certain minority groups, that focus is largely of historical value. Further, I will demonstrate that once members of these underrepresented groups matriculate, they graduate at the same rate as their white peers. I make this point now to emphasize how important the “matriculation” decision is for underrepresented students. It is that decision—to matriculate— not performance in law school, that realistically determines how many law graduates there will be to take the bar examination from these underrepresented groups. The bar exam, however, is a different story, serving to severely and disproportionately limit the number of underrepresented minorities who will obtain a license to practice law.

As a result, this Article addresses the issues that are, continuing the metaphor, restricting the flow of minorities into our law schools and thence the legal profession. These issues are identified these issues not because I will propose a definitive solution or answer to remediate all those factors inhibiting or restricting the flow of these students in the pipeline. These issues are addressed for two important reasons: First the primary challenge to the underrepresentation of

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LSAC I learned much about the LSAT test, its use in Admissions, and its impact on matriculants to Law School.” Johnson, supra note 2 at 310. In addition, for several years I served as a member of the faculty-run Admissions Committee while on the faculty of the University of Virginia School of Law. While Dean at Minnesota I was heavily involved in our efforts to recruit a more diverse student body. Suffice it to say, I also learned a lot about admissions (especially its impact on the rankings produced by U.S. News & World Report) during my four year tenure as Dean of the University of Minnesota School of Law. Id.

13. For further discussion of this disturbing trend, see infra notes 00-00 and text accompanying.

14. See infra Part III for an in-depth discussion of this thesis.

15. This is also discussed in Part IV. The bottom line, however, is that bar passage rates are significantly different–lower--for members of underrepresented minority groups. As discussed infra at notes 00-00 and text accompanying, almost all whites pass the bar examination within two administrations whereas, for example, only 78% of African-American exam takers pass the bar examination after multiple examinations (so-called “eventual bar outcome”).
minorities and the legal profession is not the continued use of affirmative action or its lack of use. 16 I think the continuing debate over the legality and the efficacy of affirmative action in law school admission is misguided and largely irrelevant today with respect to the diversification of law schools and the legal profession. 17 In other words, those interested or supportive of the increase in the number of minorities in law school may be focusing on the wrong issue in their quest to increase diversity in the legal profession.

Which leads to my second and more important point: By identifying those bottlenecks in the pipeline that are constricting the flow of minority matriculants to the legal profession at law school and beyond, 18 I hope to educate those who control or can influence these bottlenecks to take whatever necessary steps to reduce or eliminate the impact of these bottlenecks on the admission and matriculation of minority students to law schools in the United States. These steps may be as simple as educating and encouraging placement officials to correctly and appropriately advise applicants to apply to law schools that they have a realistic chance of gaining admission in order to minimize the “leakage” in the application process that occurs with misapplication. 19

Conversely, some remedial steps may be nearly impossible to achieve in the near term (like encouraging law school faculties and administrators to appropriately use the LSAT in the admission process by focusing on the whole person irrespective of the impact that such use would have on the law school’s median LSAT score and, concomitantly, on that school’s ranking in U.S. News and World Report 20) However, in the near term certain “neutral” actions such as

16. As Dr. Linda Wightman has demonstrated in her article, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997), eliminating affirmative action based on the race of the applicant would have a disastrous effect on the number of members of underrepresented minority groups attending elite law schools today. For a more complete discussion of this point, see infra notes 00-00 and text accompanying. I take this as a given. My point, however, is that Dr. Wightman’s data is most accurate and most telling when the LSAT score is used as the sole or predominant variable in the admissions process to make the admissions determination. If it is, however, one of many variable employed in an holistic approach the need for the use of affirmative action lessons. For a discussion of the holistic approach in admissions, see Johnson, supra note 1.

17. See infra notes 00-00 and text accompanying.

18. Here I am referring to the impact of the bar exam on members of underrepresented minority groups which is discussed infra in Part IV.

19. See infra notes 00-00 and text accompanying.

20. See infra notes 00-00 and text accompanying. Although it may seem futile to continue to call for action that has little or no chance of succeeding, I believe positive value is gained by continuing to press the issue if for no reason other than the fact that law schools will have to internalize the fact that in their chase for higher rankings they are sacrificing their expressed goal to achieve meaningful diversity in their respective student bodies. What I hope to
the recent attempts to toughen state bar exams by raising passing scores (apparently advocated predominantly in order to make passing the Bar harder\footnote{21}), which do have a disproportionate impact on members of certain minority groups, need to be identified and addressed as inimical to the interests of diversification of the Bar by lawyers of color.\footnote{22}

Consequently, by identifying those facts that are restricting the flow I hope to shed light on disparate facts which taken together have a tremendous and detrimental affect and impact on the number of minorities attending our law schools today and subsequently successfully passing a bar examination. If the diversification of the Bar is going to continue to occur, many of these inhibiting factors will have to be successfully addressed. My objective is to identify these factors in a rather linear, chronological fashion and to urge those stationed along the pipeline to take appropriate action to reduce or eliminate the bottlenecks I have identified.

In order to accomplish this objective I divide this Article into four parts, including one rather large, comprehensive section (Part II) that focuses on what I contend is the leading cause of the leakage in the pipeline—misapplication coupled with the use (actually, misuse) of the LSAT in the admission process. In the brief Part I, however, I set the stage for the rest of the Article by defining what “underrepresentation” means in the law school context by providing statistical and other facts regarding the applicable pool of law school applicants. In addition, I use this part to focus on the leakage that occurs to underrepresented minority students at the application stage of the process to law school.

Taking a chronological approach, in the second and most substantive Part, I focus directly on the admission process and look briefly at the deleterious use and impact on minority matriculants of the LSAT in the admission process.\footnote{23} It is in Part II that I detail the most egregious leakage in the pipeline from members of underrepresented minority groups that occurs at the stage of admissions. I detail the loss of several thousand (ultimately) underrepresented minority lawyers who, due to misapplication and misuse of the LSAT, fail to gain entry to any force law schools to confront is the conflict between their desire to increase their rankings and their frequent misuse and overemphasis on the LSAT to achieve that increased ranking. See Johnson, supra note 1 at 000. Perhaps one day a principled dean will direct his or her admission director to value diversity more than the rankings.

\footnote{21} These attempts to “toughen” state bar examinations, lead by the infamous Dr. Stephen Klein, seem to serve only two purposes: to line the pockets of Dr. Klein and to give satisfaction to state bar examiners that their state’s bar exam is a tough as [fill in the blank]. In other words, there doesn’t seem to be any data or even any attempt to demonstrate that there is some correlation between increasing the score needed to pass a bar exam and producing better and more competent lawyers for that state’s population of consumers. This is discussed further, infra, at notes 00-00 and text accompanying.

\footnote{22} See infra notes 00-00 and text accompanying.

\footnote{23} This part is relatively brief because I have addressed this issue comprehensively in a previous article. See Johnson supra note 1.
law school and, therefore, conclude their brief sojourn into the legal profession with the receipt of their LSAT score. I conclude this Part with advice for both applicants and law schools regarding the application process and, relatedly, how applicants should be evaluated by law schools.

In Part III of the Article, I begin by addressing an issue that is of historical import: the impact of attrition on the pipeline and conclude that although attrition once was a major problem obstructing the pipeline, it no longer represents a significant issue, especially at selective law schools. I spend the bulk of this Part addressing an issue that has only recently come to fore as an alleged barrier to an increased number of minority lawyers: the claim made by Professor Richard Sander that the continued use of affirmative action results in fewer African-American lawyers that would be produced in the absence of what Professor Sander characterizes as “preferences” in admission.24 To be clear, in Part III I pay particular and exacting attention to Professor Sander’s recent claim that there would be more African-American lawyers if affirmative action is not used in admissions in legal education.25 Professor Sander is making the claim, obliquely, that the policy of affirmative action contributes materially to the leakage that is the focus of this Article by claiming that fewer African-Americans pass the bar exam because affirmative action is used in admissions.26 This controversial thesis that alleges that fewer blacks would be admitted to law school, but more would be admitted to the Bar (and become lawyers) must be addressed to determine if, indeed, affirmative action has a detrimental effect on the

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24. See, Sanders, supra, note 3.
25. Id. at 00; for an analysis of this claim, see infra notes 00-00 and text accompanying.
26. The focus of Professor Sander’s article is on African-Americans only and not on members of other underrepresented minority groups.

My exposition and analysis in this Article focus on blacks and whites. I do this principally for the sake of simplicity and concreteness. Many of the ideas that follow are complicated; to discuss them in the nuanced way necessary to take account of American Indians, Hispanics, and Asians would force me to make the narrative either hopelessly tangled or unacceptably long. And if one is going to choose a single group to highlight, blacks are the obvious choice: the case for affirmative action is most compelling for blacks; the data on blacks is most extensive; and law school admissions officers treat “blacks” as a group quite uniformly—something that is not generally true for Hispanics or Asians. I concede that any discussion of affirmative action that ignores other ethnic groups (who often make up a majority of the recipients of preferences) is seriously incomplete. I am nearing completion of a larger work (to be published as a book) that, among other things, replicates many of the analyses found in this Article for other racial groups.

Id. at 370.
pipeline. This Part, then, focuses on those matters, attrition and affirmative action, that I contend have minimal or no impact on the creation of diverse classes in law schools in order to allow focus on those inhibiting factors, like misapplication, that do indeed detrimentally impact the numbers of minorities to law schools.

In the concluding Part IV of the Article, I continue the focus on the real and concrete barriers to increasing the number of minorities in the legal profession after minority applicants have been admitted and have matriculated by focusing directly on the obstruction in the pipeline created by the bar examination. Instead of focusing on grades attained by minority students and their impact on bar passage, Part IV examines directly bar passage rates in different jurisdictions (37 to be exact) to determine what impact different passing standards in different bar examination jurisdictions have on potential minority attorneys in the pipeline given the significant differential pass rates of whites and underrepresented minorities.

In this Part I detail the fact that the last and serious threat to minority participation in the legal profession is posed by Professor Stephen Klein and others who support raising the scores for bar passage in various states for apparently no reason other than it creates a lower pass rate for that state. This lower pass rate does disproportionately impact members of underrepresented minority groups (especially African-Americans) and represents serious and damaging leakage in the pipeline that I attribute to the same score scale differential that is present in other standardized tests.27

Given what we know about minority performance on standardized tests–especially high-stakes power tests–it stands to reason that any increase in the score needed to pass the bar examination will disproportionately negatively impact these same minorities. Hence, I allege that unless the increase in exam pass scores is (and can be proven to have) some positive and proven correlation to increasing the quality of those practicing law, said scores should not be raised due to the “cost” of its impact (less diversity) on the legal profession. Indeed, unless there is some benefit that outweighs this harmful cost, the case can plausibly made that perhaps the primary motivation to increase bar scores and limit bar passage rates is to maintain the dominance of white males in the legal profession–a motivation that must be rejected by all.

Consequently, my focus is on yet another version of “misapplication” in the selection of bar exams taking by underrepresented minorities. The solution proposed is a national bar examination that equalizes the playing field for all prospective attorneys and removes incentives, addressed infra, to create artificial barriers to the practice of law that have a disproportionate impact on law graduates of color.28 I buttress my claim for a national bar exam by tracing recent developments in international law that will inevitably lead to the creation of a national bar with a

27. See infra notes 00-00 and text accompanying for a discussion this differential and its presence in every significant standardized tests given to members of underrepresented minority groups.
28. See notes 000-000 and text accompanying.
national bar examination.

Part I
The Size of the Pipeline

Almost fifteen years ago I attended a conference in Atlanta, Georgia sponsored by the Law School Admission Council (LSAC). The invitees to the Conference were Presidents and Pre-Law advisors from Historically Black Colleges and Universities (HBCU’s) and representative and officials from the LSAC. The goal of the Conference was to increase the dialogue between the HBCU’s and the LSAC in order to increase the number of HBCU applicants to law schools. Representatives of the LSAC circulated amongst the HBCU officials extolling the virtues of a legal education and the opportunities afforded thereby.29

At one point I do recall speaking to an HCBU President and exhorting him to encourage his graduates to apply to the University of Virginia School of Law (the Law School at which I was then a Professor of Law). That President pointed out a fact which needs to be acknowledged as part of this discussion. The President informed me that although he thought the goal of increasing minority representation in law schools and, hence, the Bar is a laudable one, it was not one he could support with any great enthusiasm. When I asked him to explain his view, he stated that law schools and the legal profession get their fair share of his graduates and, by extrapolation, African-Americans, generally. He stated he was much more concerned about the paucity of his graduates pursuing graduate degrees in the humanities and the “hard sciences”.30 And he was correct. The paucity of African-Americans receiving doctorates in these fields is indeed alarming.31 In addition, the number of African-Americans receiving advanced or terminal

29. LSAC member law schools are all law schools who are accredited by the American Bar Association’s Section on Legal Education. Currently there are over 190 ABA approved law schools and therefore over 190 member law schools of the LSAC.
30. His concerns are borne out by the data. According to the American Council on Higher Education of the Doctoral Degrees awarded to U.S. Citizens in 1998 only 3.4 % were awarded to African-Americans, 2.8 to Hispanics and 0.4 percent to Native Americans or American Indians. This notwithstanding the fact that 15.8 percent of African Americans between the ages of 25-29 in 1998 had graduated from College. Examining other statistical data, African American’s for example, were awarded 8.3% of all bachelor degrees awarded in 1998. All of this statistical data is detailed in Gita Z. Wilder, The Road to Law School and Beyond: Examining Challenges to Racial and Ethnic Diversity in the Legal Profession, Law School Admission Council Research Report 02-10, August 2003 at 11-13.
31. As noted by Professor Sander in his Article:

According to the 2002 Statistical Abstract of the United States, blacks secured 8.2% of master’s degrees granted in 2001, along with 4.9% of
degrees in the other professions (my non-exhaustive lists includes most prominently, medicine, business, architecture and engineering) is also a matter of serious concern.32

Thus, the point being made by the President of the HCBU, and I point with which I concur, is that the mega-problem is that the pipeline (comprised of those who have received a bachelor of science or a bachelor of arts degree from a four year university or college) supplying all the professions and academia is constricted. Furthermore, all of these disciplines could benefit from more representation from members of underrepresented groups. If there were, for example, more African-Americans graduating from college (proportionate to their representation in the United States) there would be more graduates pursuing advanced degrees of all types, including professional degrees.

Hence, this debate over the pipeline and untying the knots that are constricting its flow raises a larger issue that is not the subject of this particular Article: the paucity of African-Americans and members of other underrepresented groups attending and graduating from college who are thereby qualified to pursue terminal and professional degrees. This is indeed a societal problem that appears to be getting worse rather than better, especially as it pertains to African-American and African-American males in particular.33

Sander, supra note 3 at 375, n. 14.

32. Again the data produced in Wilder, id., amply supports this assertion. In examining the first professional degrees awarded in 1999-2000, African Americans were awarded a total of 5,553 first professional degrees. Of that number, 2771 were awarded in Law, dwarfing and doubling the number of first professional degrees awarded in the next most popular field, medicine (with 1,106 medical degrees awarded).

33. See, e.g., Ron Matus, "The Invisible Men," St. Petersburg Times, April 17, 2005:

At virtually every crack in the education pipeline, black males are falling through at rates higher than other groups.

They are more likely to be placed in special education programs, to score poorly on standardized tests, to be suspended or expelled. Fewer than half will graduate with traditional diplomas. Barely a third will go to college. Barely a third of them will earn degrees.

Meanwhile, black females are making strides.

The result: a decidedly male tilt to the achievement gap, the gulf in
Although I disagreed with this President’s view that law schools received their fair or adequate share of African-American college graduates, I did agree with his larger point that there are not enough of such graduates to populate all of the professions and academia. My point herein is not that law and the legal profession fail to attract its fair share of members from underrepresented groups. Quite the contrary, the numbers below present a strong argument that the legal profession is doing quite well in attracting highly sought-after members of these prized groups to apply to law school and pursue a legal career. My point, and it is a simple one, is that the leakage in the pipeline of members of underrepresented groups is not a zero-sum game that will inevitably benefit other professions or allow those failing to attend law school to pursue other advanced degrees.

Although there has been, to my knowledge, no study done to date, my surmise is that most of those who have expressed an interest in becoming members of the legal profession by applying to law school choose not to pursue another advanced degree when they apply to and academic performance that separates black and white students across the United States.

The tilt is most obvious on college campuses. At nine of Florida’s 11 public universities, black women outnumber black men 2-to-1.

I did concede, however, that the legal profession would be extremely attractive for members of underrepresented groups when compared to other professions and academia for several reasons primarily because law school is open to anyone with a B.A. or B.S. degree and requires no particular major or prerequisites. Indeed, the only prerequisite to an admit decision at a prestigious law school (defined as a law school that receives ten times as many applications as it has seats for matriculants) is a high LSAT score (see infra notes 00 and text accompanying for further discussion). Moreover, when the time to completion for a terminal degree is three years rather than the seven or eight necessary for a doctorate and the average starting salary is double or triple that of one holding a doctorate in academia or elsewhere (cite to appropriate salary data), one can understand why law and the legal profession may be more attractive than pursuing a doctorate to a prospective student.

I do not believe that anyone would dispute the assertion that American society needs to do a better job in educating all of its children but especially members of underrepresented minority groups and providing access for these students to pursue higher education in a cost-effective manner.

By focusing on those applying to law school I am conceding that many applicants who choose to take the LSAT have, to some degree, expressed an interest in pursuing a law degree and perhaps entering the legal profession. However, those who take the LSAT and choose not to apply to law school may do so for a number of reasons including financial, timing, health, etc. Indeed, it seems quite obvious that those who do very well on the LSAT may have other options and choose to explore those options including attending business school, medical school, or graduate programs, to name a few. Or these individuals may simply choose to begin work and
ultimately do not **matriculate** at a law school.\textsuperscript{37} Hence, my contention is that the vast majority of those who apply to a law school and ultimately fail to matriculate (whether admitted or not) do not pursue formal educational opportunities beyond that which they have already received.\textsuperscript{38}

I support this contention based on the view that the primary reason that these individuals do not matriculate at any law school is because they were not admitted to a law school that they deemed acceptable. And, as I document, if that assumption is correct, the primary reason that the individual failed to obtain admission at his or her law school of choice would inevitably be attributable to that individual receiving an LSAT score well-below that of the other admitted students at the law school of his or her choice.\textsuperscript{39} If that is indeed the case, the odds of that individual doing well or significantly better on other standardized tests, which are prerequisites not continue their tenure in higher education. As to these individuals, individuals whom I deem have viable choices and choose not to apply to law school, I do not think it fair to include them within the category of those for whom there are knots in the pipeline that limit their flow through the pipeline. As to these individuals I think it fair to say that they have chosen not to enter the pipeline even though their ride through the pipeline would be a smooth one. At the other end of the spectrum are those who take the LSAT and receive such a low score that they believe that applying to a law school would not be a viable option or, simply put, a waste of time. With these later individuals, dubbed non-qualifying test-takers, the choice is made not to apply to a law school for perhaps rational reasons (later, see infra text at 00-00 and notes accompanying, I argue that there is indeed a law school for everyone and that we shouldn’t lose any test-taker from an underrepresented minority group). What is important for my thesis is that these non-qualifying test takers have not taken the next step, have not tested the waters, to determine if they are admissible so there is no way of discerning why these individuals have chosen not to pursue a legal career.

\textsuperscript{37} I choose matriculation or attendance at law school at this stage as opposed to acceptance to a law school because as discussed infra, see notes 00-00 and text accompanying, those accepted at a law school but not attending any law school are part of the unacceptable leakage that occurs in the pipeline that must be stanched.

\textsuperscript{38} Of course, it is true that some of the individuals included in this category will attend other professional schools or pursue other opportunities. Anecdotally, I have encountered several individuals during my career in academia who have simultaneously applied to business, law and graduate schools. Several of them, mostly older students, have chosen to attend business schools (some have chosen to pursue the dual degree route leading to the MBA/JD) given the shorter time to degree (two versus three years) and the career rewards. Several younger, more academically minded students, have opted for graduate degrees in areas of specialization including pursuing medical and doctorate degrees.

\textsuperscript{39} By “well-below”, I mean they score more than 10 points below the median of the other students admitted to that law school on a test that has a score scale of 120-160 wherein the median score for all test takers is roughly 153 and a ten point difference represents one standard deviation in the score achieved. Cite to LSAC data. For further information, see infra at notes 00-00 and text accompanying.
for admission into these other areas, is also very low.\textsuperscript{40}

Moreover, it follows, that since there are so many seats available in law schools for so many different individuals in every state except Alaska,\textsuperscript{41} in a discipline that essentially has no academic prerequisite except that the individual think logically, analytically and read comprehensively,\textsuperscript{42} that an individual who does relatively poorly in this process (especially when compared to the other applicants partaking of the same process), will likely do poorly when compared to applicants in other professions and graduate programs. Hence, to cut to the chase, it is assumed that when the applicants to law schools leak from the pipeline they do not enter into another pipeline for another profession or graduate program. Other professions or programs do not benefit from the leakage.\textsuperscript{43}

Where does the leakage begin? To start, let me state my underlying premise with respect to the definition of underrepresentation. I start from the simple and basic premise that all people are inherently equal as it pertains to the possession or distribution of important attributes like intelligence, talent, athletic ability, etc.\textsuperscript{44} In other words, I take as a given for the purpose of this Article that there are no inherent genetic differences between individuals of different races.\textsuperscript{45}

\begin{footnotesize}
\begin{enumerate}
\item With the recent addition of the University of Nevada School of Law, Alaska is now the only state not served by at least one law school. Given that there are over 190 ABA approved law schools, see supra note 00, and scads of unapproved law schools in certain states like California, there are usually multiple law schools in each state willing to enroll those interested in pursuing the legal profession as a career.
\item The current iteration of the LSAT has three scored sections that ultimately produce the LSAT score: Logical Reasoning, Analytical Reasoning and Reading Comprehension. The writing portion of the LSAT (the so-called writing sample) is not scored and provided to the evaluator for self-assessment.
\item If, as I contend, that these individuals do not pursue another degree or specialize in another profession and if the advanced degree represented by the juris doctorate is viewed as a societal positive, the leakage that is the subject of this Article is a net loss for society.
\item I have made this argument in several articles including most recently, Johnson, supra note 1 at 335. See also, Alex M. Johnson, Jr. How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods, 143 U. Pa. L. Rev. 1595 (1995).
\item As Thomas Sowell as noted, the concept of race has a certain fluidity that has changed/evolved over time to fit the societal context.
\end{enumerate}
\end{footnotesize}
Indeed, I base that assumption in large part on the fact that there is no biological definition of race. As I have stated elsewhere, I conclude that when we refer to race we are reifying a social construction of race rather than a biologically defined construction. As a social construction, race has become a powerful factor in American society, but there is no scientific reason why one socially constructed group, i.e. whites, possess more of one biological attribute, say

latter, more visibly different categories and “ethnicity” to different groups within the broader Caucasian, Negroid, or Mongloid groupings.

Thomas Sowell, Race and Culture: A World View 6 (1994); see also Christopher A. Ford, Administering Identity: The Determination of “Race” in Race-Conscious Law, 82 Cal. L. Rev. 1231, 1239 (1994) (arguing that racial identity is largely a social rather than a biological construct).

46. See Masatoshi Nei and Arun K. Roychoudhury, Genetic Relationship and Evolution of Human Races, 14 Evolutionary Biology 1, 44 (1983) (discussing race and morphology).

47. Professor Anthony Appiah’s work both summarizes and buttresses this observation:

The evidence in the contemporary biological literature is, at first glance, misleading. For despite a widespread scientific consensus of the underlying genetics, contemporary biologists are not agreed on the question of whether there are any human races. Yet, for our purposes, we can reasonably regard this issue as terminological. What most people in most cultures ordinarily believe about the significance of “racial” differences is quite remote from what biologists are agreed on . . . . Every reputable biologist will agree that human genetic variability between the populations of Africa or Europe or Asia is not much greater than that within those populations, though how much greater depends in part, on the measure of genetic variability the biologist chooses. . . . Apart from the visible morphological characteristics of skin, hair, and bone, by which we are inclined to assign people to the broadest racial categories–black, white, yellow–there are few genetic characteristics to be found in the population of England that are not found in similar proportions in Zaire or in China, and few too (though more) that are found in Zaire but not in similar proportions in China or in England. All this, I repeat, is part of the consensus.

Kwame A. Appiah, In My Father’s House: Africa In The Philosophy of Culture at 35 (citations omitted) (emphasis in original). For a more thorough discussion of this issue, see Alex M. Johnson, Jr., Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law, 84 Cal. L. Rev. 887, 911 (1996) (author argues that racial classification is voluntary and self-referential).

48. See Johnson, supra note 1 at 336.
intelligence, than another socially constructed group like African-Americans. Consequently, and working from first order principles that all people are inherently, randomly equal when it comes to the distribution of an attribute like intelligence across racial and ethnic lines, the crucial question is why certain groups, like African-Americans or Hispanics, are not proportionally represented in certain groups or in certain categories. To be more direct, the precise question is why those historically discriminated against, that is, African-

\[49\] I would be remiss if I did not note a recent development in Biomedical Research pursuant to which drugs are being designed and marketed for members of certain racial groups. See, Maura Lerner, “Heart Drug for Blacks Gets OK,” *Star Tribune*, June 24, 2005, A1 (FDA approves BiDil, a heart drug developed and targeted for African-Americans) and Nicholas Wade, “Genetic Find Stirs Debate On Race-Based Medicine,” *NY Times*, Nov. 11, 2005 A14 (Drug company alleges that it has detected a gene in African-Americans that increases the risk of heart attacks by 250 percent when compared to whites). Moreover, a conference was held at the University of Minnesota Law School entitled, “Proposals for the Responsible Use of Racial and Ethnic Categories in Biomedical Research: Where Do We Go From Here?” on April 18, 2005 (cite to articles produced as a result) at which this issue was addressed. As a result of this incipient re-emergence of race as a biological category I have written, “The Re-Emergence of Race As A Biological Category: The Legal and Societal Implications,” (forthcoming).

\[50\] Under the current OMB guidelines Hispanics can be of any race. See, http://www.clhe.org/3el-1.htm. (“The revised standards will have five minimum categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. There will be two categories for data on ethnicity: ‘Hispanic or Latino’ and ‘Not Hispanic or Latino.’”) (emphasis in original). Hence, Hispanics more closely resemble an ethnic rather than a racial group bound by language and culture rather than grosser morphological traits. Elsewhere I have argued that Hispanics occupy a unique position in the racial hierarchy of the United States.

As currently constructed, the term Hispanic is an ethnic rubric under which people of all racial types can be classified. Unlike whites or blacks, Hispanic as a racial category is meaningless because an Hispanic can be of any race. Hence, being identified as Hispanic imparts no racial identification (and, relatedly, no racial stereotypes). To a large extent, the designation Hispanic represents a fluid and rather large ethnic group consisting of many subgroups or types. These subgroups or types are linked rather loosely to each other, and they are grouped not by reference to a racial division, but by a common language group or heritage.

Americans, Hispanics and Native Americans, those I have designated the underrepresented minorities, are underrepresented in certain prestigious positions but overrepresented in negative categories or positions. In the absence of racism and its effects, both past and present, our society would presumably produce a percentage of minority students matriculating at law schools and entering the legal profession proportional to the percentage of these groups in American society.

A close examination of the numbers—a look at what is flowing through the pipeline—reveals the impact and effect of racism, past and present, on those minorities attending law school and entering the legal profession. According to the 2000 U.S. Census the total population of the United States was at that time a little over 281,000,000. Of that number, 35,306,000 were identified as Hispanic/Latino or 12.5% of the population. African Americans total slightly less than 51. The noticeable omission in this group are Asian-Americans who are not underrepresented in either law school or the legal profession, see supra notes 00-00 and text accompanying. I am not claiming that Asian Americans are not discriminated against. Quite the contrary, Asian Americans suffer similar discrimination in American society. String cite Asian-American CRT articles. The puzzle, then, is to explain why certain discriminated groups are underrepresented in these two categories, law schools and the legal profession, and Asian-Americans are not. Although the ultimate answer to this question is yet the subject of another lengthy article, suffice it to say, I believe it has to do with the enduring legacy and effects of stereotypes and how they channel behavior and responses in this area. See Alex M. Johnson, Jr. “Hoop Dreams: Rational Behavior and the Manipulation of Meritocratic Standards,” (draft copy on file with Review).

52. I pursued this line of reasoning more thoroughly in Johnson, supra note 7 at 1044 to defend the use of quotas in law school admissions. Indeed, there I stated, and it bears repeating:

Almost any statistical study or examination that compares the plight of blacks and other minorities vis-a-vis whites demonstrates that with respect to any important index that blacks and other minorities are underrepresented in prestigious positions but overrepresented in negative categories. One excellent source of statistical and other material that proves this point appears in Richard Delgado, Rodrigo’s Chronicle, 101 Yale L. J. 1357, 1382 (1992) (appendix lists essays and books that brings statistical data to bear on problems of cities and underclass). See also Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 223-36 (1992) (includes statistical tables drawn from 1990 census data and the Current Population Survey that compare the positions of whites and blacks in various categories ranging from infant mortality to life expectancy to everything in between.).
at almost 34,000,000 or 12.1% of the United States population. Asians total a little over 10,000,000 at 3.6% of the population.\footnote{\textit{Asian}—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. It includes “Asian Indian,” “Chinese,” “Filipino,” “Korean,” “Japanese,” “Vietnamese,” and “Other Asian.”} Lastly, American Indian/Alaskan Natives total slightly over 2,000,000 and comprise .07% of the United States’ population as of 2000.\footnote{See U.S. Census Bureau, \textit{Profiles of General Demographic Characteristics 2000, 1 tbl. DP-1 (2001)}, available at http://www.census.gov/prod/cen2000/dp1/2kh00.pdf.} Addressing the end of the pipeline, the latest data that is available to me (which may slightly understate the numbers of minorities in the legal profession) documents that the total number of all minorities in the legal profession is 56,504 of 747,077 lawyers or 7.56% of all lawyers in 1990.\footnote{Id.} Of that number, 25,670 (3.44%) of all lawyers were African American; 18,612 (2.49) were Hispanic; 10,720 (1.43%) were Asian; and 1,502 (.20%) were Native American.\footnote{Id.}

The numbers, then, are quite telling. Although minorities, as a whole, comprise almost 30% of the U.S. population they total less than 10% of the lawyers practicing law today. Every single minority group (in this case, including Asian Americans) is severely underrepresented in the legal profession based on these numbers. Furthermore, given the attractiveness of law and a legal career for minorities, based on the percentage of graduating college students who choose to pursue law as their first professional degree,\footnote{Id.} there is no shortage of interest in law and the legal profession as a career option for all minority students, but especially African Americans. It is to that issue that I turn in the next part with a primary focus on the admission process by which applicants apply to law school, receive one of three responses—admit, reject or wait list— and if admitted to one or more law schools, make a decision to attend, not attend or defer.

\textbf{Part II}

\textit{The First Leak in the Pipeline: Admissions}

It goes without saying that although minorities comprise almost 30% of the United States population, the number of minorities eligible to matriculate at an ABA approved law school in any given year, including future years, will not be anywhere near 30% of the population. By and
large, those eligible to attend an ABA-approved law school must first possess a bachelor’s degree from a college or a university.\(^\text{58}\) Hence, the relevant pool for purpose of law school admission are those who have or who will shortly have a bachelor’s degree from an accredited university or college.\(^\text{59}\)

Using statistics provided by Dr. Wilder’s report and focusing on degrees that were awarded in 1999-2000, 22.5% of bachelor’s degrees were awarded to members of minority groups, including particularly 9.0% to African-Americans, 6.3% to Hispanics, 6.5% to Asians,\(^\text{60}\) and 0.7% to American Indians.\(^\text{61}\) Now examining these numbers as a whole we see the first significant leakage in the pipeline which is not addressed in this Part: the disproportionately low (with the exception of Asians and Native Americans) who attend college and receive a bachelor’s degree of some type.\(^\text{62}\) Given the assumptions made in this Article, one would assume that 30% of high school graduates who then choose and are able to attend college. Here the pipeline is also severely affected with substantial losses of minority students:

From high school graduation to college we lose considerably numbers of minority students—in higher proportions than their white counterparts. For example, 64% of white high school graduates in 2001 immediately enrolled in college. For that same year, 55% of black students attended college right after high school.

Pre-Conference Report, Embracing the Opportunities for Increasing Diversity in the Legal Profession: \textit{Collaborating to Expand the Pipeline (Let’s Get Real)} (copy on file with review) at 2 (citations omitted).

\(^{\text{58}}\) I state “By and large,” because there are a few ABA approved law schools who have very small specialized admission programs pursuant to which students from that school’s undergraduate program may apply during the third year of college and matriculate at the law school after completion of the third year of college and before the receipt of the bachelor’s degree from that institution. After the completion of three years of law school, the participant in this “accelerated” law degree program receives a juris doctor and a bachelor’s degree upon the completion of six, rather than seven years of education. Cite to a 3/3 program (I believe Columbia has one).

\(^{\text{59}}\) Of course that pool is determined by the number of High School graduates who then choose and are able to attend college. Here the pipeline is also severely affected with substantial losses of minority students:

\(^{\text{60}}\) Here, for the first time, we encounter the overrepresentation of Asian in the subject pool with Asian’s comprising slightly more than 3% of the U.S. population but garnering more than double that percentage of bachelor’s degree. As discussed further, \textit{infra}, I attribute this overrepresentation to a number of factors, including, most prominently, the effect of stereotypes on behavior of members of racial groups.

\(^{\text{61}}\) Which is exactly consistent with their percentage in U.S. population.

\(^{\text{62}}\) Even those minorities attending college are disproportionately represented in those who fail to complete college in a timely fashion.
of the bachelor degrees awarded would be awarded to members of minority groups as opposed to the 22.5% detailed above. This leakage is indeed quite serious and, if correct, could provide law schools with a significant number of applicants and matriculants.\footnote{The factors that caused this leakage and actions recommended to correct this leakage are beyond the scope of this Article. However, many of the presenters at the Pipeline Conference referenced above, see \textit{supra} note 00 and text accompanying, focused exactly on this issue and presented some very good ideas to remedy this problem. In the Pre-Conference Report prepared for the Pipeline Conference there was express recognition of the leakage that occurs before college and that ultimately impacts law school admissions and matriculation:}

In other words, it seems patently obvious that increasing the number of minorities

Another leaky portion of the pipeline is college matriculation through graduation. A 2005 report from the National Center for Education Statistics found that only 38.5% of black (non-Hispanic) students at 4-year colleges graduated “on time.” Hispanic students graduated at a higher rate, 43.5%, but Asian/Pacific Islander students had the highest college graduation rates at 63%, while white (non-Hispanic) had a 57.3 college graduation rate.

Pre-Conference Report, Embracing the Opportunities for Increasing Diversity in the Legal Profession: \textit{Collaborating to Expand the Pipeline (Let’s Get Real)} (copy on file with review) at 3 (citations omitted).

Children as young as three and four years of age already experience disparate problems as students in pre-kindergarten programs. One study reported that African-Americans attending state-funded pre-kindergarten were almost twice as likely to be expelled as Latino or white children, and boys of all colors and ethnicities were expelled at a rate more than 4.5 times that of girls.

High School is another point in the pipeline for which documentation of a differentiation exists for minorities. A 2004 report from The Civil Rights Project at Harvard University found that white high school students had a 74.9 graduation rate, compared to a 50.2% high school graduation rate for blacks. At 51.1%, graduation rates for American Indian High School students were slightly above blacks, while Hispanic students were at 53.2%. Asian/Pacific Islander students had the highest high school graduation rate, at 76.8%.

Pre-Conference Report, Embracing the Opportunities for Increasing Diversity in the Legal Profession: \textit{Collaborating to Expand the Pipeline (Let’s Get Real)} (copy on file with review) at 2 (citations omitted).
obtaining college degrees will inevitably lead to an increase in the number of minority applicants and matriculants to law schools. However, the issues presented by this underrepresentation which will worsen if recent reports of differential high school graduation rates holds true, are a result of complex societal forces having to do with issues of race and the societal investment in education that are beyond the scope of this article. My focus, herein, is on taking simple steps that can reduce the leakage in the pipeline for those minority students who have overcome all of the hurdles that exist prior to applying to law school and who have therefore graduated from high school, matriculated at a college or university and have or will shortly have at least a bachelor’s degree from a college or university. Just as importantly, my focus herein is predominantly on those minority students who have already indicated, at least by taking the LSAT, that they have some interest in pursuing a legal career.

What is interesting and positive for those who are interested in increasing the diversity of minority students in law school is that although only 22.5 percent of bachelor’s degrees are awarded to minorities, 32.5 of the LSAT test-takers during the 1999-2000 period were minorities (11.5% of the LSAT test takers were African Americans, 8.4% were Hispanic, 6.9% were Asians and 0.8% were American Indians/Alaska Native). So, if measured by those interested in taking the LSAT, law and the legal profession remain popular destinations for minority students, and disproportionately so. As a result, we start with a positive scenario—law attracts more minority

64. Education Week, a respected source of education statistics, released a report in June of 2006 that reported that of the relevant population only 51.6% of African Americans, 55.6% of Hispanics, and 47.4% of American Indian/Alaskan Native graduated from High School in 2002-2003 compared to 76.2% of whites and 77.0 of Asian/Pacific Islander (once again, an overrepresentation of Asian Americans).

65. Thus, I concur in the recommendations in the Pre-Conference Report that we as a society must: 1) start early in plugging the leaks in the pipeline by improving the skills of minority students on standardized tests to eliminate the score gap between whites and minorities which is addressed infra at notes 00-00 and text accompanying; 2) vastly increase our societal investment in educational infrastructure to eliminate racial disparities in education; 3) address unemployment rates and resulting child poverty: 4) address the perspective that law is the enemy to show students of color that law can be a tool of justice; and 5) focus on the loss of black males from the pipeline. Pre-Conference Report, Embracing the Opportunities for Increasing Diversity in the Legal Profession: Collaborating to Expand the Pipeline (Let’s Get Real) (copy on file with review) at 7-10.

66. See infra notes 00-00 and text accompanying.

67. Wilder, supra note 31 at 00.

68.

More recently, almost one third (32.5%) of the LSAT examinees in 1999-2000 were members of minority groups, compared with 22.5% of those who received bachelor’s degrees in that year. By way of contrast, non-Hispanic whites represented 70% of the LSAT-takers in 1994-1995
students to it than similarly-situated white students. Hence, there should be a disproportionate increase in the numbers of minority students attending and graduating from law schools.

It goes without saying that not all LSAT test takers choose to apply to a law school and that state of affairs is true for minority and non-minority test takers. A review of the data reveals that the 11.5% of all LSAT test-takers were African American in the 1999-2000 testing year which totals 9,473. Of that number, 7,305 or 77.1% chose to apply to at least one law school. As a result, it should be obvious that 22.9% or 2,168 African American test takers chose not to apply to any law school. At first glance, that seems to present a serious leak in the pipeline—the loss of over 2,000 potential students who evinced enough interest in law to plunk down good money and to spend a significant amount of time and energy to take the LSAT.

However, a close review of the data set reveals that for all groups the average rate of non-application (those who took the test and did not apply to any law school) is 21%. Although whites did not apply at a rate slightly higher than 20%, the 21% non-application rate for the entire groups masks a range of non-application of 18-25% among the minority groups. What is important to note is that the rate of non-application for all groups is roughly between 21% and 23% (with American Indians coming in at 25%—they, however, have such a small number of test takers that the loss of a few potential applicants can significantly affect the percentage). And, although I am not a psychometrician, I believe the differential rate of non-application among various sub-groups is statistically insignificant.

Hence, my take at this point in the pipeline is that the leakage is not unacceptable or related at all to the racial identity of the applicant. At this point in the pipeline the difference between underrepresented minority groups and others is not significant. So, there is leakage at this point, but that leakage is perhaps due to the test-takers receiving lower than expected test scores but received 81% of the bachelor’s degrees awarded in that year. With the exception of American Indians, larger proportions of members of each of the minority groups applied to law school than received bachelor’s degrees.

It appears, then, that college graduates who are members of minority groups are proportionately more likely than their white counterparts to consider attending law school. At the same time, the representation of minority group members among LSAT-takers in relation to their proportional representation in the larger U.S. population varies by group. Hispanics continue to be under represented, African Americans approach the proportions they represent of the total population, and Asians are over-represented.

Id. at 16 (citations omitted).

69. Wilder, supra note 31, at 17, Table 12.
scores, the availability of other opportunities (especially for those who scored well and more than likely do have other post graduate opportunities), or a decision made to defer application until a later year. The point here, and it is a small one, is that even though over 2,000 African Americans did not apply to law school after taking the LSAT (and 176 Native Americans, 462 Mexican Americans/Chicanos, 654 Hispanics, and 1361 Asian/Pacific Islander), along with 11,411 white test takers, it is unrealistic to assume or base decisions on a model that is based on every test taker applying to law school and to seek to correct a leakage based on that assumption.

The LSAT test is given and taken so that individuals can assess their interest and aptitude for law and a career in the legal profession. It stands to reason that a significant number of these test takers, at the portal to a legal career, will determine for one reason or another not to pursue that career option at that time. Given that the numbers who choose not to pursue their interest to make at least one application to a law school in the year in question are remarkably similar based on race-ethnicity, I draw no inference or conclusion that members of underrepresented minority groups are disproportionately affected at this point in the pipeline. Hence, no corrective or other steps need to be taken at this point to encourage members of underrepresented minority groups to apply.

On the other hand, where there is significant and disproportionate leakage in the pipeline is in the applicant pool; that is, those who apply to law school and fail to be admitted to a law school thereby precluding matriculation. Here the numbers are quite revealing and merit close inquiry.

More than 74,500 individuals applied to ABA-approved law schools for admission in fall 2000. Roughly 69% of them were accepted. . . . . [H]owever, the overall acceptance rates were not the same for members of different racial-ethnic minority groups. Moreover, with the exception of Asians and those who identified themselves as of “other” race-ethnicity, all minority groups identified by the data were accepted at lower rates than were whites. Fewer than half (43.7%) of the black applicants were admitted to at least one of the law schools to which they had applied in 1999-2000, compared with 65.1% of the white applicants. Hispanic applicants were admitted at a rate of 54%, although the rates for the three individual groups ranged from 36% of Puerto Ricans to 65% of Chicanos.70

This clearly is statistically significant and represents a serious leakage in the pipeline. I believe the reasons for the disproportionate leakage are complex and multiple. As everyone in legal education is aware, there is a significant correlation between acceptance by a law school and the applicant’s academic credentials—the stronger or higher the applicant’s LSAT scores and undergraduate grades (UGPA), the better the chances of receiving a favorable admission decision. Simply put and all other things being equal, the higher the LSAT score, the

70. Id. At 17-18 (citations omitted).
better the chances of being accepted into a law school.\textsuperscript{71}

What is not as well known or understood is that certain minority groups, those that are underrepresented, score less well on the LSAT as groups than similarly situated whites.\textsuperscript{72} Focusing on African Americans, they score approximately one standard deviation below that of similarly situated whites.\textsuperscript{73} This score-scale differential between whites and members of underrepresented minority groups, especially African Americans, is well-known among psychometricians as an observable fact, but is largely unexplainable as to its cause given the assumption with which I started this Article—that is, there is no difference in intelligence or other important attributes between members of different races because there is no genetic or biologic difference between members of different races.\textsuperscript{74} Nevertheless the score-scale differential is real,
persistent, and significant. Just as clearly, the score scale differential has likely created differential acceptance rates among the various groups.\textsuperscript{75}

Nonetheless, the impact of differential rates of acceptance among different racial-ethnic groups on the composition of the admitted class may be seen in the comparison between the “% of applied” and “% of admitted” columns of Table 13. Whereas 65% of law school applicants in 2000 were white, whites comprised 72% of the admitted pool. Black and Latino applicants are most seriously affected by the differential rates of acceptance. Where 11.4% of the applicant group was black, blacks represented only 7.4% of the admitted pool. Hispanics made up 8.3% of the applicant pool and 6.7% of the admitted group. The proportional representation of Asians, on the other hand, was identical in the applicant pool and among admitted applicants. In short, there are substantial losses at the stage of admission to law school among certain racial-ethnic groups, a finding that merits further study.\textsuperscript{76}

The problem is complicated, however, by a second variable. Not all law schools are alike with respect to the quality of the students they attract, admit and matriculate to their law school. Without overstating the obvious, certain schools are more selective than other schools and that selectivity often correlates quite well to academic credentials of the matriculating students.

For example, (and although I hate to reference it) U.S. News and World Reports uses as one of its metrics in evaluating law schools that law school’s “Acceptance Rate” which is the percentage of applicants accepted that applied during that admission cycle. Yale University Law School, which is ranked number one by U.S. News in its 2006 Edition, had an 2005 acceptance rate of 6.2% and a 25-75 percentile LSAT score of 168-175 (giving the Yale Law School a median LSAT score of 172).\textsuperscript{77} The school ranked second by U.S. News in its 2006 Edition, Stanford Law School, has an acceptance rate of 7.8% for the same period and a median LSAT of

\begin{itemize}
\item The situation is more complicated, however, than the overall rates suggest. Acceptance into law school is highly correlated with applicant’s academic credentials; that is, their LSAT score and undergraduate grade-point averages (UGPA’s). Rates of acceptance for the various racial-ethnic subgroups are related to the respective distributions of their credentials; which are not identical . . . . When the groups are matched with respect to test scores and UGPA, the comparative acceptance rates look quite different. While the rates of acceptance rates for candidates with high test scores and UGPA are quite similar, more of the black and Hispanic candidates than white candidates are clustered in the low end of the score and grade distribution.
\end{itemize}

Wilder, \textbf{supra} note 31 at 18.

\textsuperscript{76} \textbf{Id.}

\textsuperscript{77} U.S. News and World Report, 2007 Edition America’s Best Graduate Schools, at 44.
170. Given the range of LSAT scores of accepted students, it is fair to surmise that applicants who score below a certain number on the LSAT have very little chance of gaining acceptance at these law schools.

What is interesting is that a few years ago some law schools produced grids which demonstrated, cell by cell, how many students had applied with certain LSAT and UGPA’s and how many had been accepted from that cell.\(^{78}\) That information was readily available as it was published in the ABA’s Official Guide to Law Schools.\(^{79}\) By examining that cell an interested potential applicant could roughly discern his or her chances of being admitted based on the previous year’s admission data. Indeed, the data may have been too revealing because it would also document the fact that applicants attaining an LSAT score below a certain number had no or little chance of being admitted.\(^{80}\) Today a potential applicant can go on-line and enter his or her LSAT and UGPA and select any or all ABA-approved law schools and receive data on the chances of being admitted to that law school with the expressed academic credentials.\(^{81}\) Hence,

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\(^{78}\) See if you can find an example of this. If not explain that 8 students with a UGPA of between 3.0 and 3.25 with an LSAT score between 150-155 may have applied and 3 of those students may have been admitted.

\(^{79}\) Cite to appropriate volume.

\(^{80}\) This is not to imply that law schools are using cut-off scores: that is, making an ex ante determination not to admit students who have not met a minimum score. Such a policy would violate the LSAC’s cautionary policies and would result in an inappropriate use of a test score. See, Johnson, supra note 1 at 344, n. 136. However, the reality is that given a school’s median LSAT (or its 25-75 percentile scores) it will not admit students typically who score one or more standard deviations below the 25\(^{th}\) percentile. They won’t admit that student for two reasons: First, they don’t have to given the volume of applications and the quality of their applicant pool. Second, although LSAT scores are not perfect predictors of first year grades (of which more anon, see infra notes 00-00 and text accompanying), students with such disparate entering credentials may be at risk of not competing successfully with students with much better credentials. To state the ridiculous, it would be difficult for a student with a 145 LSAT to successfully complete at Yale Law School with a median LSAT of 172 and a 25\(^{th}\) percentile of 170. Why would Yale subject that student to such an arduous task? At my own law school, the University of Minnesota, I noticed that the Law School had not admitted anyone with an LSAT below a 150 during my four years as Dean. That did not mean that these files were not reviewed and evaluated for admission. They were indeed. However, given the school’s then median LSAT of 164 and its 75-25th percentile of 167 and 162, respectively, it made no sense to accept an applicant with an LSAT that deviated so far from the median and the 25\(^{th}\) percentile unless there was something truly exceptional (what that would be, I don’t know) that elevated that applicant to a level that I haven’t seen in my 24 years in admissions.

\(^{81}\) See, [http://officialguide.lsac.org/docs/cgi-ginv/home.asp](http://officialguide.lsac.org/docs/cgi-ginv/home.asp) and select LSAC Data Search. I note in passing that the site has been “rigged” so that no matter what academic variables are input, the applicant has a 0-5% chance of being admitted to a certain law school which is obviously not true beyond 0% in certain cases. By that I mean, if you input your LSAT
applicants have access to information about their realistic chances of being admitted and should be reasonably aware of those chances.

The third and final variable in this equation is the applicant’s choice of where to apply given the information that is available and discussed above.\(^{82}\) Unfortunately, the data demonstrates that applicants choose which law school to apply to and in so doing do not necessarily apply to a law school at which they have a legitimate chance of admission. One of the advantages of the law school admission application process is that it is a highly decentralized process pursuant to which any applicant can choose to apply to any law school, irrespective of the applicant’s academic qualifications, as long as that individual takes the LSAT, completes the application process, and pays the application fee (indeed, through the fee waiver process an indigent applicant need not pay the application fee as long as the applicant can demonstrate his or her desert).\(^{83}\) As a result, applicants can choose to apply to as many or as few schools as they prefer and the only possible limiting factor for the applicant is cost and inconvenience.\(^{84}\)

score as 120 and your UGPA as 2.0 you will have a 0-5% chance of getting into Yale Law School. I would hazzard a guess that the true odds are indeed 0%. This current search engine has been modified and softened from the previous engine which gave the applicant an exact percentage of the chances of getting into a certain school with the requisite academic credentials. That engine, which would inform the applicant that she had hypothetically a 62% chance of being admitted to the University of Minnesota Law School with an LSAT of 165 and a 3.6 UGPA was modified because it was deemed to provide too much data or information to the applicant and was unduly influencing applicants’ decision making process regarding where to apply. I know this because I was involved in the work-group on Alternative Testing Scores of the LSAC that debated and recommended this change.

\(^{82}\) A radical departure from the current admission process or system could conceivably employ a centralized admission process pursuant to which the applicant would make one application to one centralized “admissions bureau” or entity and that entity would screen and evaluate the applicants and match them with appropriate law schools for entry—perhaps even making the admission decision for one or more of these law schools. Those familiar with the process by which medical residents are placed in pursuant to the National Resident Matching Program will recognize the similarity between my proposal and the Electronic Residency Application Service which is used by the Association of American Medical Colleges to place all medical residents among the AAMC member schools. See, [http://www.ecfmg.org.eras/](http://www.ecfmg.org.eras/) for further details regarding the medical schools’ procedure for admission.

\(^{83}\) Cite to LSAC website and fee waiver process.

\(^{84}\) When I was Chair of the LSAC, I was astounded to learn that every year several individuals apply to over 100 law school which, assuming an average application fee of $60.00, totals over $6,000. Indeed, one year I was chair I was informed that a single individual had applied to over 150 law school in that individuals quest to become a lawyer. According to the Law School Admission Council data, there were 95,800 applicants to law school in 2004-05 who made 544,900 applications to ABA approved schools for an average of 5.7 applications per applicant to an ABA approved school. See [http://lsacnet.org/data/lsac-volume-summary.htm](http://lsacnet.org/data/lsac-volume-summary.htm).
Using my experience at the Law Schools of the Universities of Minnesota and Virginia as examples, it is clear to me that members of underrepresented minority groups misapply to law schools creating much of the leakage at this stage of the pipeline. African-Americans, for example, with an average score that is one standard deviation below that of whites and Asian applicants, should apply to schools that they have a chance of being admitted to rather than applying solely to the best or most prestigious school nationally or in the region. At Virginia, for example, the Law School would receive over 200 applications from members of underrepresented groups with LSAT scores below 150 who had little or no chance of being admitted no matter what their other accomplishments. The same was true at Minnesota (although the number of applications from this class of applicants was about half that at Virginia). If these students applied only to schools of similar caliber or applied to no other law schools, that student, it is fair to surmise, would not be admitted to any law school. If that student, however, applied to the three other schools in Minneapolis with a 149 LSAT that student would have an excellent chance of being admitted at the following schools: Hamline, William Mitchell and the University of St. Thomas.

This unfortunate result of the applicant not receiving a favorable admission decision from any law school is, I believe, a function of two factors: 1) poor advice and choices regarding which law schools to make an application and 2) an over-emphasis by law schools in their admission process in using the LSAT score as part of the admissions process leading to the admit/deny decision. As to the former, I cannot statistically document that African-Americans are advised to apply to Law Schools that they have no chance of gaining admission to or that receiving correct advice from pre-law advisors, these applicants ignore that advice and choose to apply to law schools were their chance of gaining admission are nil. The only thing I can point to is documentation that African-Americans with similar credentials are admitted at the same rate as whites at the high end of LSAT attainment and it is those African-Americans and other underrepresented minorities with lower scores who are disproportionately not being admitted to law schools because they are applying to the wrong schools.

If the goal is to reduce the leakage in the pipeline the first step that should be taken is educational. By that I mean, applicants must be apprised of their realistic chances of gaining

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85. See Johnson, supra note 1 at 000.
86. The ABA’s 2007 Official Guide to U.S. Law School reports the following 75th percentile, median and 25th percentile for these three schools as:

- Hamline University School of Law--158, 155, 150;

- University of St. Thomas School of Law--158, 154, 151; and

- William Mitchell College of Law--157, 153, 149.
87. See supra note 75.
admission to a law school when being advised on which law schools to apply. In some respects, I believe affirmative action is both a benefit and a hurdle in this area. As discussed below, I believe affirmative action must continued to be used in law school admissions as part of the holistic approach or the evaluation of the whole person in admissions.88 Yet, given the misapplications that I have personally experienced as a member of two Law Schools’ Admissions Committee, I contend that certain applicants erroneously believe that affirmative action means that a member of an underrepresented group can or will be admitted to a law school irrespective of that applicant’s qualifications solely or predominantly because that applicant is a member of an underrepresented group.89 Hence, I believe members of underrepresented groups are applying to law schools which they have literally no chance of being admitted and not applying instead to schools where they have a reasonable prospect of gaining a favorable admission decision. That is what is creating leakage.

Instead, I believe in the appropriate use of affirmative action as called for by the Supreme Court in the Grutter opinion.90 Grutter allows the race or ethnicity of the applicant to be considered as a “soft variable”91 in what the Court termed a “highly individualized, holistic review of each applicant’s file”92 in order to achieve the goal of diversity. What the Court did

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88. See Johnson, supra note 1 at 000.
89. Which, as discussed immediately below, is not the definition of affirmative action or how affirmative action is lawfully deployed in the admission process.
90. Supra note 5 and text accompanying.
91. The Court in Grutter wrote:

   The [admission] policy [at the University of Michigan Law School] makes clear, however, that even the highest possible [LSAT] score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School’s educational objectives. So-called “soft’ variables” such as the “enthusiasm of the recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection” are all brought to bear in assessing an “applicant’s likely contributions to the intellectual and social life of the institution.”

Grutter, 539 U. S. at 315 (citations omitted).
92. Id. The Court in Grutter wrote:

   Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races.
not say (because the University of Michigan Law School did not state it in its brief or arguments) is that although “a low score [does not] automatically disqualify an applicant,” it is beyond peradventure that the odds of an applicant being admitted, irrespective of race, lessen as the LSAT score lowers to a point that an LSAT score attained below a certain number makes it increasingly difficult, if not impossible, to admit a student with that low score given the applicant pool and the other admissible applicants. The University of Michigan Law School would not state this because it could be construed as promulgating or advocating impermissible or unfavored “cut-off” scores. Moreover, no one can predict ex ante what that impermissibly low score will be—it is a function of the applicant pool and their quality which may change from year to year. However, that should not mask the face that a student with an LSAT score of a certain level, say 140, I hazzard a guess, has not been admitted to the University of Michigan Law School in its recent history.

Which is not to say that affirmative action is not at work in the University of Michigan Law School’s admission process. Quite the contrary, the University of Michigan Law School may (indeed, I would guess does) have an applicant pool that contains several members of underrepresented minority groups whose LSAT score is considerably below the median of 168 but well above 158. As to those students who score between 158 and 166 (the 25th percentile of the students matriculating at Michigan), race may be one of the variables used to determine whether the student should be admitted notwithstanding that student’s low score vis-a-vis the other admitted applicants. The reality, however, is that a student from an underrepresented minority group who scores a 140 (or in this case even a 150) will not be admitted given the difference between that student’s score and the median score of the admitted students at that school—the gap is simply too wide.

There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in Gratz v. Bollinger the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity.  

Id. at 337 (citations omitted).

93. See supra note 00 and text accompanying for a discussion of “cut-off” scores and how their use is contrary to the LSAC’s cautionary policy.

94. To put this claim in the appropriate context, according to the 2007 Searchable Edition of the ABA-LSAC Official Guide to ABA Approved Law Schools at http://officialguide.lsac.org/docs/cgi-bin/home.asp (hereinafter 2007 ABA Guide) the University of Michigan Law School has a median LSAT of 168 and a 25th percentile of 166.

95. Furthermore, there are justifiable reasons why a school may choose to admit someone with an LSAT that is, say, 10 points below their median, but not 20. Without going into too much detail, it is well known that LSAT and UGPA, when combined together, provide some predictive ability for correlating first year and ultimately cumulative Law School Grade Point Averages (LGPA). Although the correlations are strong from a psychometric perspective given the limited nature of the two variables and what they represent, the LSAC research has
concluded repeatedly that there is a variance in outcomes that does not correlate to these two variables—that there is a roughly .43 correlation between these two variables and first year law school grades (which in lay person’s terms means that these two variables—grades and LSAT—account for approximately 25% of what goes into achieving that first year grade point average)—it is beyond cavil that there is a strong correlation and the greater the difference between LSAT scores the more likely the disparity between first year grades. My point is that a student with an LSAT that is 20 points lower than the median LSAT of the class is more likely to do less well compared to the other students than one with a LSAT that is 10 points lower, etc. That, coupled with the fact, that the applicant pool at Michigan is deep enough to allow Michigan to admit a diverse class without admitting any underrepresented minorities with LSAT scores more than 10 points (in this hypothetical) lower than the median means those students who apply with LSAT scores lower than 10 points below the median will have their files cursorily reviewed and rejected.

See Linda Wightman, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School*, Law School Admission Council Research Report 99-05—Executive Summary: This study was designed to examine questions about
The data from the study demonstrate the utility of LSAT scores and UGPAs in the law school admission process beyond the prediction of first-year academic performance in law school, laying to rest a common criticism of their use. The study shows that the predictive power of these measures extends to law school performance as measured by cumulative law school grades. It does not, however, address the prediction of achievements beyond law school. Moreover, the modest size of the correlations suggests that a substantial amount of the variance in outcomes is left unexplained by the two measures. While law school grades are an important outcome in selecting law school students, they are not the only outcome of interest, although they were the only one examined in this study.
At first (and cursory) glance, the reader may conclude that I, like some other notable opponents of affirmative action, am arguing against affirmative action and instead encouraging members of underrepresented minority groups to apply to the “right” school—that is, the school that they can be admitted to without the benefit of affirmative action. Quite the contrary, elsewhere I have argued that affirmative action must be deployed in order to maintain and increase the diversity of law school student bodies and ultimately the legal profession.

My point is more subtle and realistic when an analysis of the pipeline is made to determine where and why there is significant leakage: members of underrepresented minority groups “waste” their time, effort, and money applying to schools that they have no chance of being admitted to because of their misguided or misinformed belief that the power of affirmative action will vault them into the admitted pool, notwithstanding their far inferior qualifications. That assessment is not a realistic one given the state of the admission pool and the manner in which affirmative action operates in the admission process. In this case, then, I am alleging that affirmative action has created unrealistic expectations in the applicant pool and perhaps with respect to certain pre-law advisors. Here, education is the key and appropriate remedial response. Consequently applicants to law school with a 165 may have a shot at being admitted to Yale Law School, especially members of underrepresented minority groups, but students—all students with a 150 LSAT score do not. And that is the way that affirmative action is supposed to operate—to use soft variables to provide impetus to admit students who are otherwise qualified to be admitted even if there numbers are not as objectively strong as other students who are not beneficiaries of affirmative action.

The reality is that in admissions, the admissions decision, although strongly influenced by the objective indices—UGPA and LSAT—creates a pool of admissible applicants who possess a range of scores and UGPAs. Just like admissions is not strictly or solely a numerical determination (never has been, never will) i.e., produce a certain number on the LSAT and

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96. See Sander supra note 3. My problem with the thesis presented by Sander is addressed infra at notes 00-00 and text accompanying.
97. See, Johnson, supra note 1 at 334 (citation omitted):

Indeed, Professor Wightman comes to the rather shocking conclusion that if schools did not employ affirmative action and admitted all students based solely on the numbers [the LSAT score and UGPA] only 20% (687 of the 3435) of the African-American applicants who were admitted to any law school for the fall of 1990 “would have been accepted if the LSAT/UGPA-combined model had been used as the sole means of making admissions decisions.” She buttresses this conclusion with her analysis of the admissions process as it affects white applicants.
UGPA and the applicant is automatically admitted irrespective of other variables, the admissions decision-maker does not ignore, in totality, the objective indices to admit a student based solely on the soft variables. That would negate the function of the objective variables which are the most uniform and probative evidence of the quality of the applicant.

The second factor that causes leakage in the pipeline at this stage is the overemphasis on the LSAT score of applicants which creates tremendous pressure on individuals making the admission decision to make distinctions between applicants based on insignificant differences in LSAT scores. This focus on the LSAT score, to maintain or improve the Law School’s rankings in the all important U.S. News and World Report annual rankings leads to the rejection of the holistic or whole person approach in admissions and gives impermissible weight to the LSAT. Above I argue that most schools should feel comfortable admitting students within say 10 points of that school’s median and should deploy affirmative action as a vehicle to diversify their student body with applicant/matriculants who fall within that 10 point spread. The pressure placed on schools to maintain or increase their median, seventy-fifth and twenty-fifth LSAT scores,\(^{98}\) creates intense pressure to admit those students with higher rather than lower LSAT scores even though the differences between the students with scores of, say, 165 and 162 may largely be indistinguishable from a psychometric perspective and ultimately from the perspective

\(^{98}\) All three scores are reported to the ABA Section on Legal Education and published in the ABA’s Official Guide to U.S. Law Schools. See supra note 94. U.S. News and World Report (hereinafter U.S. News) has in given years used the schools median LSAT, used the school’s 75th and 25th percentile LSAT scores in compiling the rankings and in the 2006 U.S. News rankings, U.S. News computed a median which it used in its rankings based on the individual school’s reported 75th and 25th percentile even though said median, as computed by U.S. News by averaging the 75th and 25th may not have been the true median. For example, a school with 100 matriculants may have 25 with LSAT scores above 165 making its 75th percentile score 165. The school may then have 25 students with LSAT scores below 155 making its 25th percentile 155. The other 50 students may have LSAT scores of 164. The median (half of the matriculants above this number and half below) is 164 and the average is 162 or very close to it depending on the scores above 165 and the actual scores below 155 (however, assuming all 25 students above 165 have a 165 and all students below 155 have a 155 the average is exactly 162 if the other 50 matriculants have scores of 164), yet U.S. news, by averaging the 75th and 25th percentile would, in its rankings compute the median at 160 for its purposes. See Johnson, supra note 1 at 185:

Although at one point the law schools have reported the median LSAT score to the ABA Section, in recent years the schools have reported the 25th and 75th percentiles. U.S. News has compiled the median by averaging those two numbers. . . . The data are from the most recent entering class. The medians used are the calculated midpoints of the 25th and 75th percentiles. 25+75/2=CALC midpoint. . . (citation omitted).
of the rankings.\textsuperscript{99}

I contend that it is the pressure created by the rankings and the use of the LSAT in their compilation that has caused a decline in the number of African-Americans admitted to law schools the last few years and an increase in the number of Asian-Americans over that same time period so that there are more Asian-Americans matriculating at law schools notwithstanding the increasing number of African-American applicants over the same time period. This has lead to the overrepresentation of Asian Americans in our law schools and the underrepresentation of the other minority groups identified above.

In effect, subjectivity is being slowly removed from the admission process created by the external pressure placed on law schools by the rankings produced by U.S. News. Elsewhere I have written extensively on the misuse of the LSAT in the admission process and its impact on members of members of underrepresented groups applying to law schools.\textsuperscript{100} Although I will not repeat those arguments in exhausting detail (and direct the reader to the article for an in-depth exegesis of my thesis), I will lay out, in cursory form, the major points made as part of that argument.

\begin{itemize}
  \item U.S. News rankings of Law Schools is dominant in influencing applicants’ and
\end{itemize}

\textsuperscript{99}. By the latter I mean simply that if U.S. News and World Report is using the 75\textsuperscript{th} and 25\textsuperscript{th} percentile LSAT scores in compiling their rankings, once a school has established its 75\textsuperscript{th} percentile what becomes key is not admitting more than 25\% of its students with numbers below that achieved 75\textsuperscript{th} percentile (in the hypothetical in the preceding footnote, 25 matriculants have to have LSAT scores of 165 or higher to maintain the 75\textsuperscript{th} percentile at 165 with 100 matriculants. 24 of the students may have LSAT scores of 170 or higher, but if the 25\textsuperscript{th} has a 164 LSAT the 75\textsuperscript{th} percentile drops to 164. Hence, it is the LSAT score of the matriculant who is 25\textsuperscript{th} ordinally that is key and Deans and admission directors will go to great lengths to insure that the “25\textsuperscript{th} matriculant” has an LSAT score at or above the previous year’s 75\textsuperscript{th} percentile. Similarly, with respect to the 25\textsuperscript{th} percentile in the hypothetical, it is the 75\textsuperscript{th} matriculant’s LSAT that establishes the 25\textsuperscript{th} percentile. Anyone who matriculates and scores below that (matriculants number 76-100) are irrelevant for the purposes of computation of 25\textsuperscript{th} percentile (but, of course, not the median or average). Once the 25\textsuperscript{th} percentile is established, the law school should feel free to admit, consistent with its mission and the correct application of affirmative action (here, I want to be quite clear that if only members of underrepresented minority groups are given special treatment below the 25\textsuperscript{th} percentile that may result in the use of an impermissible quota, \textsuperscript{see} Johnson, \textsuperscript{supra} note 00), students with any LSAT score with no impact on its ranking. Hence, one would expect to see a wider distribution of scores for matriculants at the bottom of the matriculant class when they are ranked by LSAT score. That is not observed in actual practice. Quite the contrary and because of the overemphasis on the LSAT the spread between the LSAT’s of one law school’s matriculants tends to be very narrow with ranges at the high end of the LSAT spectrum of five or fewer points (\textsuperscript{see}, for example, Yale and Stanford above).

\textsuperscript{100}. \textsuperscript{See}, Johnson, \textsuperscript{supra} note 1.
others’ views of Law Schools because law schools are largely homogenous (given
the ABA Section on Legal Education’s role in regulating same as the accrediting
body for U.S. law schools),¹⁰¹ and the fact that U.S. news has cornered the market
for the evaluation of law schools (essentially has a monopoly and exercises
monopoly power) as the “first-mover” for evaluating law schools.¹⁰²

- Rankings of law schools, especially the U.S. News ranking of Law Schools, has a
  serious positive (if ranked highly) and negative (if the law school ranking drops)
  impact on law schools affecting every facet of what they do including attracting
  resources,¹⁰³ faculty, students, alumni contributions, decanal tenure, etc.¹⁰⁴

- U.S. News uses the median LSAT as part of its methodology for evaluating and
  ranking the law schools (“[t]hat variable is weighted so that it comprises 0.125 of
the overall weight attributed to the ranking”).¹⁰⁵

- Law School Deans can realistically control only one variable in the methodology
  used by U.S. News to rank law schools in order to maintain or increase their
  standing or place in the ranking.¹⁰⁶ That variable is the median LSAT of the
  matriculating class.¹⁰⁷

- For reasons that are largely inexplicable certain minority groups, but not Asians,
score less well on standardized tests, including the LSAT, than whites.¹⁰⁸ In the
  case of the LSAT, African Americans, Hispanics and Native Americans score
  roughly one standard deviation below that of similarly situated whites (roughly
  143 for African-Americans and 153 for whites–and Asians).¹⁰⁹

- As a result of the score scale differential between members of underrepresented
  minority groups and whites on the LSAT, members of underrepresented minority
groups are less likely to be admitted to law schools (even with the active

¹⁰¹. Id. at 326, n. 17..
¹⁰². See Michael Sauder & Wendy Nelson Espeland, Strength in Numbers? The
¹⁰³. Johnson, supra note 1, at 000.
¹⁰⁴. Id. at 000.
¹⁰⁵. Id. at 343.
¹⁰⁶. Id. at 348-354.
¹⁰⁷. Id. at 000.
¹⁰⁸. The lack of a logical reason for this “score scale differential” on standardized tests
    including the LSAT is discussed in Johnson, supra note 1 at 335-37.
¹⁰⁹. See, e.g., Linda F. Wightman, The Consequences of Race-Blindness: Revisiting
    Prediction Models with Current Law School Data, 53 J. Legal Educ. 229 (2003), Table 8 at 245
    that is reproduced in Johnson, supra note 1, at 333.
operation of affirmative action) because of the impact such admission might have on the median LSAT and concomitantly that law school’s ranking by U.S. News.\footnote{Johnson, supra note 1 at 000.}

- Conclusion: Certain minority groups are underrepresented in law school, and subsequently the legal profession, because they score less well than whites on the standardized tests used law school admission: the LSAT. Asian-Americans are over-represented in law schools proportionate to their share of the general population, the LSAT test-taking population, and, lastly, the applicant population, because they score as well, if not better, than whites on the LSAT.\footnote{See Wilder, supra note 31, at 18, Table 14 that provides mean UGPA and LSAT scores by race-ethnicity for three testing years: 1998-1999, 1999-2000, and 2000-2001.} More importantly, (and cynically) these Asian-Americans count as minorities and are reported as such by law schools to the ABA Section on legal education and, thence, the world.\footnote{See, e.g., 2007 ABA Guide supra note 94.} Hence, law schools can both increase their diversity (at least at it pertains to ethnic diversity for all minorities) and maintain or increase their median LSAT by admitting Asian-Americans.\footnote{The increase in Asian-Americans in law school and the corresponding decrease in African-Americans so that there are no more Asian-Americans matriculating at law schools than Asian-Americans is thus explicable as a function of both the law school’s noble impulse to increase diversity and its selfish interest in maintaining and increasing that law school’s rankings.}

The major leakage in the pipeline that occurs at the stage that applicants apply to law school is a result of the confluence of two factors that taken together doom thousands of African-Americans to a process that effectively guarantees their lack of admission to any law school. First, given the impact and continued use of affirmative action, many applicants seeking to benefit from its use, misapply to the wrong law schools with the misguided belief that the power of affirmative action provides them with a realistic prospect of admission at schools for which they have little or no chance of being admitted. Concurrently, law schools minimize the use of affirmative action, not because it is illegal or inappropriate to use it, because of its impact on their rankings as produced by U.S. News. As a result, even though law schools have the power to use affirmative action, to take race into account into what should be a very subjective process that is admissions, that use is minimized or sacrificed for the goal of attaining educational superiority vis-a-vis one’s peer schools.

Given the tenor of my argument to this point, I am not arguing, however, that affirmative action should or will be deployed in a fashion that will result in the admission of underrepresented minority groups to schools that they are not qualified for or eligible to be admitted to in the absence of U.S. News ranking. Employing the holistic approach in admissions

\[\text{\footnote{Johnson, supra note 1 at 000.}}\]
in which the LSAT is viewed as one variable in a subjective process in which other variables matter, while recognizing that a class is being assembled with similar academic credentials in order to compete fairly within and without the classroom is a subtle process and leads me to contend and conclude that law schools should be willing to admit students, per affirmative action, whose LSAT score is within one standard deviation (roughly 10 points) of that school’s median LSAT (using a three year trailing average to compute the median LSAT score). Essentially a school with a median LSAT of 163 will not and perhaps should not admit anyone with a 143, but it should seriously consider admitting someone with a 153. Similarly, a school with a median LSAT of 153 might admit the applicant an applicant the 143 (will clearly admit the 153) and will gleefully accept the 163. However, an applicant with a 130 LSAT scores should apply to another, less selective law school.

Finally, given a close read of this of the Article, law school deans, and their admission professionals, should recognize, if they have not already, that the use of affirmative action in the way suggested immediately above, should have little or no impact on that school’s rankings in U.S. News. This is due largely to the immutable mathematical fact that these students admitted per affirmative action will not detrimentally impact the median or 25\textsuperscript{th} percentile of that schools LSAT score if the number of students are less than 20\% of that school’s entering class. This use of affirmative action will seriously decrease the leakage of underrepresented minorities at this stage of the pipeline and provide serious fodder for those of us in law schools seeking to matriculate diverse students in our law schools.

The last stage of the admissions pipeline that needs to be addressed in this part is the leakage that occurs with the admitted applicants who choose, for whatever reason, not to matriculate at any law school. Recall that we started with 9,473 African-American test takers or 11.5\% of all test takers. Of that number, 7,305 (77.1\% of the test-takers) made the decision to apply to at least one law school. Then, fewer than half those, 43.7\% of the applicant pool of 8,503 (this number differs from the 7,305 noted above because it includes test takers who had taken the LSAT in previous administrations and are applying to Law School at that time) applicants in the fall of 2000 were admitted. That equals 3,718 African-Americans who were admitted (comprising 7.4\% of the admitted pool although they were 11.4 percent of the applicant pool) compared to 65.1\% of the white applicants (they disproportionately comprise 72.2\% of the admitted pool), Asians who were 7.1\% of the applicant pool, were admitted at the rate of 69.7\% (the highest rate of any ethnic group) and comprised 7.1\% of the percent admitted. Those admitted African Americans who enrolled in a law school totaled 3,096 out of that 3,718 or 83.3\% of all admitted African Americans eventually enrolled in a law school in the fall. That compares quite favorably with the rates for whites and Asian (82.3\% and 80.1\%, respectively). Indeed, Chicano’s and Hispanics enrolled 83.9\% and 82.1\% of their admitted applicants and Native Americans weren’t far behind enrolling 80.9\% of their admitted applicants.

My take on this is that there is no disproportionate leakage for underrepresented minority

\textsuperscript{114} See supra notes 99-100 and text accompanying.
groups at this stage so that the decision to matriculate at a law school, after receiving a favorable admission decision, does not constitute a bottleneck in the pipeline. This lack of disproportionate impact at this stage only serves to emphasize the point made above that once members of underrepresented minority groups are admitted to a law school they will attend thereby increasing proportionately the number of possible minority attorneys in the pipeline.
At one time it was presumed that attrition was the leading obstruction in the pipeline for the production of minority lawyers from underrepresented groups. When I began my law school career at U.C.L.A. Law School in 1975, I was invited to a special “remedial” program for minority students admitted via affirmative action to ensure the maximum chance of our survival through the rigors of three years of law school. Having been admitted, my overriding fear, shared by the other students of color, was that I would not make it through to the end of law school and graduation. And that fear was not without cause. I matriculated at law school at the end of the “attrition era” in which deans welcomed law school classes at orientation by admonishing the entering first-year law school class seated in the auditorium “to look to your left, now look to your right, one of you will not be here next year.”

Hence, as I discuss the historical evolution of attrition and its impact on members of underrepresented groups, it should not be forgotten that at the time affirmative action began, attrition of one third or more of an entering law school class was an accepted part of American legal education. Consequently, it is not surprising that when affirmative action began, in the early and mid-60's, that attrition would take its toll not only white students, but those students admitted pursuant to affirmative action. And its toll was heavy. What I hope to demonstrate, however, is that as African-American students and members of other underrepresented groups began to enter law school more prepared (with better credentials) than their predecessors, attrition lessened and has now receded to the point that although it does inflict some losses in the pipeline, but nothing akin to the losses that occur at the application or matriculation stage (pre-law school) or later at the bar examination stage (post-law school). The intra-law school

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115. Apparently this program was not unique to U.C.L.A. Law School. See infra note 130 for a discussion of academic support programs.

116. I am happy to report that of the nine African-Americans in my Law School Section of 90 at U.C.L.A., seven graduated with their class on time. An additional member of that class graduated one year later after having being placed on academic probation. The ninth and last member of the class, who failed to graduate, did not make it through the first quarter of law school. Given that we were on the quarter system and no exams were given until the end of the second quarter, I can only assume that this individual left for “other,” non-academic reasons. See infra note 000-000 and text accompanying for the reasons given and tracked for attrition in law school matriculants.

117. Indeed, my Dean at U.C.L.A. Law School, William D. Warren, made reference to this state of affairs noting it might be true at other law schools, but not at U.C.L.A. and that he expected all of us to graduate with our class.

118. Cite to some historical analysis. Start with Stephens, A History of American Legal Education.

119. See supra note 5 (O’Connor quote in Grutter that the students are better prepared.)
obstruction to the pipeline still matters, but less so than even ten years ago and, although this is based on personal observation, hardly at all at the highly selective law schools which attract the best prepared underrepresented minority students.120

There is no doubt that if this Article had been written forty or even thirty years ago, attrition would be viewed as a primary impediment in the law school pipeline for the production of lawyers from members of underrepresented groups. It is no surprise that students admitted pursuant to affirmative action with lower objective indices (LSAT and UGPA) should have a higher attrition rate than whites at the time that affirmative action began.121 One quote aptly summarizes what I characterize as the early years of affirmative action and the differential attrition rates for members of underrepresented minority groups:

In this section, we will document that law school attrition . . . . is a significant barrier that also disproportionately screens Blacks and Hispanics out of the legal profession. The 1978-80 Study by the Law School Admissions Council found that almost eight out of every ten (79%) ethnic minorities admitted to A.B.A. accredited law schools in the period 1978-1980 graduated. Hence, the study reported an attrition rate for all ethnic minority students during the 1970's and early 1980's of 21%. The 1978-80 Study also reported that almost nine of every ten (86%) non-minority law school admittees graduated. The attrition rate for white students during 1978-80 therefore was 14%. Hence, the attrition rate difference for the 1978-1980 entering classes was at least 50% greater for Blacks and Hispanics than for non-minority law students . . . . Throughout the 1970's the minority attrition rate was at least 50% greater than, and at times twice, the non-minority attrition rate.122

Attrition data that is race specific is very difficult to come by given the way it is reported to the American Bar Association’s Section on Legal Education by law schools.123 Nevertheless

120. For a discussion of highly selective law schools, see supra note 00 and text accompanying.
121. Once again, my focus is on the differential rate between whites and members of underrepresented minority groups to determine if there is an impact on the pipeline. If whites and blacks left law school at the same rates, for example, I would draw the conclusion, no matter how high the rate, that attrition was not an impediment to the production of Black lawyers.
123. National Data about persistence in law school are difficulty to come by and must be inferred by juxtaposing information from different sources. Since attrition is the obverse of persistence, one approach is to examine enrollment figures–supplied by the ABA–for first-, second-, and third-year
recent data examined by the Law School Admission Council indicates that attrition rates for African-Americans during the 1998-2000 period equaled 20% in the 1978-80 Study.\textsuperscript{124} However, this number also includes those students who left a law school to attend another law school (transfer students) who therefore remain in the pipeline. When transferring is factored into the equation, the gap between white and black persistence lessen.

The ABA collects and aggregates but does not report attrition data for all law school students and for minority law school students; the latter category is a subset of the former. These data [from the \textit{2003 ABA-LSAC Official Guide to Law Schools}, which reflects attrition data collected in fall 2001] show that, over the 2000-2001 academic year, a total of 5,806 students of whom 1,625 were members of minority groups, left law school for one reason or another [Academic, Health, Financial and Other are the four allowable categories]. The overall attrition rate from all four years of law school during the 2000-2001 was 6.3\% of all minority group members and 4.6\% of all law school enrollees. These numbers included 1,531 students who transferred, 326 of whom were members of minority groups. Transfers thus accounted for 26.4\% of all students and 20.1\% of the minority students who left law school. The difference between minorities and whites would be slightly larger were the former not included in the category of “all students.”\textsuperscript{125}

\begin{table}[h]
\centering
\caption{Reasons for attrition, academic year 2000-2001, white and minority students}
\begin{tabular}{lccccc}
\hline
 & \multicolumn{2}{c}{White Students} & \multicolumn{2}{c}{Minority Students} \\
 & \textbf{N} & \textbf{\%} & \textbf{N} & \textbf{\%} \\
\hline
Academic & 1,051 & 35.3 & 755 & 58.1 \\
Health & 180 & 6.1 & 64 & 4.9 \\
Financial & 99 & 3.3 & 36 & 2.8 \\
Other & 1,646 & 55.3 & 444 & 34.2 \\
Total & 2,976 & 100 & 1,299 & 100 \\
\hline
\end{tabular}
\end{table}

students in three successive years. The difference between one year’s enrollment figures and those of the previous year can be considered attrition.

Wilder, \textit{supra} note 31 at 20.
\textsuperscript{124} \textit{Id.}\textsuperscript{125} \textit{Id.} at 21. Although it is very difficult to disentangle the data to determine who left law school for what reasons, Dr. Wilder’s data demonstrates that during 2000-01 a total of 2,976 whites left law school and did not transfer to another law school, while 1,299 minority students who did not transfer left law school.
Professor Sander analyzes Bar Passage Data to determine more recent attrition rates. Tracking the same classification scheme employed in the Bar Passage Study that divides the law schools participating in the study into six groups with similar characteristics, Professor Sander

Source: ABA, personal communication.

These figures represent recalculation of the original data, to omit transfers from the list of reasons for leaving and to separate “minorities” from “all students.”

Using data supplied by the ABA, 29,853 white students enrolled in law school in the fall of 2000 while 9,058 minorities enrolled. Although the numbers do not match up exactly, given that almost all attrition takes place in the second year of law school—actually between the first and second year [The information from the 2003 version of the Guide, which reflects attrition data collected in fall 2001, confirms that most attrition occurs in the first year of law school (and includes students who transfer to other law schools as well as those who drop out) and drops off after that; very few students leave law school in the third year and virtually none in the fourth. . . Wilder, Id.], assuming the white students who left law school in 2000-2001 enrolled in the fall of 2000, the 2,976 white students who left law school and did not transfer represent almost exactly 10% of all whites entering law school in the fall of 2000. The 1,299 minority students (who unfortunately cannot be separated by race) who left law school during 2000-2001 and did not transfer represents slightly over 14% of all minority students who enrolled in the fall of 2000.

Grouping Law Schools. In order to evaluate a potential relationship between characteristics of the degree-granting law school and bar passage, law schools were grouped. The purpose of grouping law schools was to consider together those schools that were most like one another on some characteristic or set of characteristics. This option is particularly important when samples within individual schools are small, as was the case with ethnic group data in this study. For several analyses, participating schools were grouped in two ways. First, they were sorted into one of three strata, using entering-class median LSAT score as the only grouping variable. The other method of grouping law schools was based on the application of a statistical method known as cluster analysis. Law schools were assigned to clusters based on simultaneous consideration of seven variables. Four of the variables (size, cost, selectivity, and faculty/student ratio) focus on characteristics of the school, while the other three (percent minority, median LSAT score, and median UGPA) focus on characteristics of the student body. The cluster analysis identified six naturally occurring clusters of groups of law schools, numbered 1 to 6.

Linda F. Wightman, LSAC National Bar Passage Study (Law School Admission Council, 1998) at 8-9 (citation omitted). A Table provided in the omitted footnote provides a statistical breakdown of the six law school clusters:
demonstrates that although blacks have a slightly higher attrition rate than whites, that gap increases as the median LSAT and selectivity of the law school decreases (as is recognized in the six groups of law schools). Indeed, and as noted below, the attrition gap is negligible in Group 1.

As an illustration of the differences among clusters, the average scores on each of the clustering variables for schools in each cluster are shown in the following table:

<table>
<thead>
<tr>
<th>Variable</th>
<th>Cluster 1</th>
<th>Cluster 2</th>
<th>Cluster 3</th>
<th>Cluster 4</th>
<th>Cluster 5</th>
<th>Cluster 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tuition</td>
<td>11,428</td>
<td>11,153</td>
<td>13,659</td>
<td>3,136</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Enrollment</td>
<td>797</td>
<td>1,466</td>
<td>704</td>
<td>347</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Selectivity</td>
<td>0.34</td>
<td>0.26</td>
<td>0.17</td>
<td>0.33</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent minority</td>
<td>0.12</td>
<td>0.19</td>
<td>0.2</td>
<td>0.58</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Faculty/student ratio</td>
<td>24.73</td>
<td>28.14</td>
<td>22.04</td>
<td>17.77</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LSAT</td>
<td>39.53</td>
<td>42.06</td>
<td>49.50</td>
<td>39.53</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UCPIA</td>
<td>3.09</td>
<td>3.34</td>
<td>3.5</td>
<td>2.86</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent Private</td>
<td>98</td>
<td>60</td>
<td>88</td>
<td>29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Schools</td>
<td>53</td>
<td>21</td>
<td>52</td>
<td>8</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note that classification of schools by type of control (i.e., public or private) was considered as a potential clustering variable, but it was not included because it was so highly correlated with tuition. For a detailed discussion of the process for selecting clustering variables, see Wightman, cited at the beginning of this note.
schools between all students and blacks:

**TABLE 5.5: PROPORTION OF MATRICULATING STUDENTS NOT GRADUATING, BY LAW SCHOOL LAW SCHOOL GROUP**

<table>
<thead>
<tr>
<th>Law School Group</th>
<th>Proportion of Matriculants in Each Group Not Graduating from Law School Within Five Years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Whites</td>
</tr>
<tr>
<td>Group 1: Most Elite Schools</td>
<td>3.3%</td>
</tr>
<tr>
<td>Group 2: Other &quot;National&quot; Schools</td>
<td>5.4%</td>
</tr>
<tr>
<td>Group 3: Midrange Public Schools</td>
<td>8.6%</td>
</tr>
<tr>
<td>Group 4: Midrange Private Schools</td>
<td>9.1%</td>
</tr>
<tr>
<td>Group 5: Low-Range Private Schools</td>
<td>11.7%</td>
</tr>
<tr>
<td>Group 6: Historically Minority Schools</td>
<td>8.2%</td>
</tr>
<tr>
<td>Total for All Law Schools</td>
<td>8.2%</td>
</tr>
</tbody>
</table>

n of Students Matriculating in 1991: 27,300

Source: LSAC-BPS Data, supra note 133. Figures above are based on all reported cases in the LSAC-BPS study.¹²⁷

¹²⁷ Sander, supra note 3 at 437.
This leads Professor Sander to conclude: “Over the past fifteen years, overall law school attrition (at accredited schools) have bounced between 6% and 12%. Much of the attrition these days is voluntary. Consequently, the problem of minority attrition generally, and black attrition in particular, is now rarely discussed.”

I concur in Professor Sander’s assessment that much of the attrition that takes place today is voluntary (transfers, personal decisions not to pursue law as a career, etc.) and that what was once a major impediment in the pipeline no longer serves as same. Given the improvement in the caliber of students, the increased competition to matriculate at a given law school, and the academic support programs that exist at today’s law school, my educated guess is that very few Black students, especially at the most selective schools, leave law school today as a result of a poor or failing academic performance. However, even assuming I am wrong, given the rise of Academic Support and Academic Assistance Programs that exist at almost all law schools (except the most elite), the problem of attrition and its impact on the pipeline is being adequately addressed.

More importantly, the most recent debate over the use and efficacy of affirmative action was created by the publication of Professor Sander’s article, *A Systematic Analysis of Affirmative Action*. That article has also raised an issue that implicates the pipeline of students of color for law school. At the same time the policy of affirmative action was being upheld by the Supreme Court in Grutter, Professor Sander was making the claim that his study positively concluded that the costs to Blacks or African-Americans of affirmative action outweighs the benefit to them. The gist of his argument is that African-Americans, due to

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128. Id. at 436 (citations omitted).
129. Indeed, I was the Director of an Academic Support Program at the University of Virginia School of Law developed for in-coming minority students (an intensive one week immersion into law school culture and studies) specifically to insure that they could perform to the best of their ability and avoid the disaster of failing academically at the Law School during their first year.
131. Supra note 3.
132. See supra note 5.
133. The sole focus in Professor Sander’s article is on African-Americans as opposed to other underrepresented minorities who may also benefit from affirmative action.

My exposition and analysis in this Article focus on blacks and whites.
affirmative action, are admitted to law schools with lower LSAT scores than those who are admitted without the benefit of affirmative action.

I address the probity of this argument for two reasons related to this article. First, this article represents one of many articles in which the claim is made either expressly or implicitly that African-Americans are hurt by affirmative action and could, if correct, lead to two possible outcomes that could negatively impact the pipeline. The first outcome, which seems to be once again at issue with the Supreme Court,134 is the continuing use of affirmative action. Given the score scale differential between members of underrepresented groups and white and Asians, the elimination of affirmative action would seriously constrict the flow in the pipeline. A related claim by those opposed to affirmative action is that certain members of minority groups will choose not to apply to programs that employ affirmative action because of the so-called “stigma” of being a beneficiary of affirmative action. This claim, if accurate, means that there is leakage in the pipeline because of the operation of affirmative action and therefore needs to be addressed.

Another important reason this claim needs to be addressed is the view expressed by Professor Sander that those applicants who apply to law schools with lower LSAT scores are ultimately harmed in their careers if they are admitted to a law school based on affirmative action. That claim, if accurate, runs counter to my claim that members of underrepresented minority groups should, indeed, must apply to law schools when that applicant’s LSAT score is within one standard deviation (within 10 points) of the median score of those who have matriculated at the law school in the preceding year.135 If Professor Sander is correct in his

I do this principally for the sake of simplicity and concreteness. Many of the ideas that follow are complicated; to discuss them in the nuanced way necessary to take into account American Indians, Hispanics, and Asians would force me to make the narrative either hopelessly tangled or unacceptably long. And if one is going to choose a single group to highlight, blacks are the obvious choice: the case for affirmative action is most compelling for blacks; the data on blacks is the most extensive; and law school admissions officers treat “blacks” as a group quite uniformly—something that is not generally true for Hispanics or Asians.

Sander, supra note 3, at 370.

134. Cite to certiorari granted on the two cases involving public high schools and the use of race in preferential admissions.

135. Actually this may be something of an overstatement given that I find myself in rare agreement with Professor Sander when he notes, quite correctly that correlation improves when the correlation is applied to large groups and/or groups with large disparities in LSAT scores.

Just as the predictive power of correlation increases when it is applied to larger groups, so it increases when applied to large disparities [in LSAT
assertion, my advice if taken by applicants and law schools, will result in less leakage in the pipeline (at least in the short term), but attorneys who would have been better off going to law schools where their LSAT score approximates or comes close to the median LSAT score of all matriculants.136 More importantly, Professor Sander makes the claim that there are actually fewer African-American attorneys practicing law today than there would be if affirmative action is eliminated. Indeed, to be quite precise, Professor Sander makes the rather astonishing claim that one law school class (the class that matriculated in 1988 and began taking the bar exam in the Summer of 1991), for example, would have 169 more African-American lawyers (an increase of almost 8%) if affirmative action was not used to admit African-Americans into law schools for which they are otherwise unable to qualify for without affirmative action.

A. Sander’s Claim that Affirmative Action Creates a Bottleneck in the Pipeline

This truly is a remarkable claim and one that I need to lay out in some detail for the scores]. Predicting outcomes for persons in the middle of a distribution (where people are usually most thickly clustered) is hard; outcomes at high and low ends follow more regular patterns.

Sander, supra note 3 at 422. I take it then, that Professor Sander would agree with my modest proposal to limit the use of affirmative action to those applicants who score within a ten point range of the median LSAT of those admitted to the school without the benefit of affirmative action in order to minimize “outcomes at the low end.” By limiting affirmative action to those within this ten point range, I hope to minimize the lower grades that these affirmative action beneficiaries are likely to receive.

If you buy the logic of Rick Sander’s apparently well-researched, well-argued, and undoubtedly well-intentioned paper, the answer would have to be yes [to the question of would an affirmative action recipient be better off had he gon to Boston College Law School instead of to Harvard?] Notwithstanding a few qualifications along the way, even elite law school graduates . . . and all other benefits of affirmative action over the last forty years, would–on average–have been better off going to lower-ranked law schools, where their entering credentials would have fit better with the entering credentials of their white peers.

To be sure, it is easy to lose sight of the fact that this is Sander’s central claim.

reader unfamiliar with Professor Sander’s article. Hence, this portion of this section will be devoted to summarizing Professor Sander’s claim as it relates to the use of affirmative action and that affirmative action is a bottleneck in the production of (at least in his article) African-American lawyers.137

Professor Sander’s well-researched article begins with, for me, a rather pedestrian premise, that affirmative action is used in just about every law school to admit and enroll members of underrepresented minority groups in law schools. Instead of focusing on the factors that create the need for affirmative action and action that can be taken to improve the position of minorities vis-a-vis whites so that affirmative action is no longer needed, this self-professed supporter of minorities,138 details what he contends is the hidden secret of legal education and admission policies to law schools—that all law schools use affirmative action and not just those elite law schools at the top of the U.S. News rankings.139 Professor Sander claims this is the

137. Those familiar with Professor Sander’s article are encouraged to skip this part.

138.

No writer can come to the subject of affirmative action without any biases, so let me disclose my own peculiar mix. I am white and I grew up in the conservative rural Midwest. But much of my adult career has revolved around issues of racial justice. Immediately after college, I worked as a community organizer on Chicago's South Side. As a graduate student, I studied housing segregation and concluded that selective race-conscious strategies were critical, in most cities, to breaking up patterns of housing resegregation. In the 1990s, I cofounded a civil rights group that evolved into the principal enforcer (through litigation) of fair housing rights in Southern California. My son is biracial, part black and part white, and so the question of how nonwhites are treated and how they fare in higher education gives rise in me to all the doubts and worries of a parent. As a young member of the UCLA School of Law faculty, I was deeply impressed by the remarkable diversity and sense of community the school fostered, and one of my first research efforts was an extensive and sympathetic analysis of academic support as a method of helping the beneficiaries of affirmative action succeed in law school.

Sander, supra note 3 at 371 (citations omitted).

139.

The widespread assumption that racial preferences exist only at elite schools is based on faulty logic and poor empiricism. The logical argument runs something like this: The black-white gap in test scores and grades produces a shortage of blacks at the top of the distribution, so the most elite institutions must use racial preferences to recruit an adequate number of blacks. In the middle of the distribution, in contrast, there are plenty of blacks to go around. The logical misstep is not realizing that if
dirty secret of affirmative action—that not just elite schools use it, but essentially all ABA approved law schools.  

Although I do not think it is any great secret that almost all schools use affirmative action, nor do I think it incredulous as does Professor Sander, Professor Sander believes the use by elite schools creates what he calls a cascade effect with respect to the other African-American applicants pursuant to which schools that are not elite or selective must also employ

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enough midrange blacks are snapped up by elite schools, the midrange schools will face their own shortage of blacks admissible through race-blind criteria. The lack of good empiricism on this issue results from the tendency of researchers, public intellectuals, and the media to focus on the glamorous schools, and to give only passing attention to those in the trenches.

In fact, the evidence within the law school world shows conclusively that a very large majority of American law schools not only engage in affirmative action, but engage in the types of segregated admissions/racial boosting that I illustrated in Part II. I will also argue that the dynamics of affirmative action in law schools make these practices largely unavoidable. In other words, few American law schools feel that they have any meaningful choice but to engage in covert practices that, if made explicit, would probably not survive judicial scrutiny.

Id. at 411.

140. Given the process by which members of sub-groups are admitted to law school (which I detail infra notes 141-142 and text accompanying), I am unclear about why it is surprising that almost schools employ affirmative action when it is a given, as Professor Sander, that there is a benefit to having a diverse law school class and ultimately a diverse practicing bar. (The rub for Professor Sander is the alleged cost imposed on the members of the benefitted group which he claims exceeds the benefits and therefore cannot “be pragmatically justified.” Sander, supra note 3 at 371). If that benefit (putting aside its alleged cost) is sought after by elite or selective law schools, why would it not be sought after by those not as elite or selective. If there is one truism in legal education is that if the so-called elite or selective schools are employing a practice, the rest of the ABA-approved law schools will shortly be employing the same practice. It the uniformity of the delivery of legal education that is both its strength and weakness and its uniformity in admissions that creates many of the problems generated by the rankings. See Johnson, supra note 1.

141. Instead of elite, I use the term selective and define schools as selective when they receive at least ten times as many applications from applicants as they have seats available in the class they are attempting to enroll. For further discussion of this point, see Johnson, supra note 1, at 322 n. 46. Selectivity is the key to what Sander and others ascribe to elite schools and may resolve (at least what for Sander) is the mystery why essentially all law schools employ
affirmative action in order to satisfy its need or desire to have a diverse student body sufficiently populated with African-Americans. If diversity is prized by elite or selective schools for the benefits it bestows upon them, it stands to reason that the other schools would also seek this benefit (if only to ultimately attain elite status) by matriculating diverse student bodies. That desire, coupled with the reality that African-Americans (as well as Hispanics and Native Americans) score significantly lower than whites, means that there are less higher scoring African-Americans available to all law schools—elite or non-elite.

Since the elite or selective law schools, by definition, attract the best and the brightest applicants of all sub-groups, these elite or selective law schools would attract the best African-American applicants and enroll these students. The next tier of schools would similarly attract the next best group of African-American students and so on and so on. Consequently, if there is (as there is) a gap between the best African-American students and white students at the top of the applicant pool as it pertains to their LSAT score, that gap will persist throughout all levels of affirmative action to diversify their law school classes. Selectivity of the type employed by Yale and Stanford Law Schools in making their admission decisions, see supra note 77, allows them to admit only the best of their applicant pool with the knowledge that the applicants admitted will more than likely matriculate at the school in question. When the applicant pool is divided into sub-groups, like women versus men, or in the case of a public university like the University of Michigan, resident versus non-resident, the school, once again due to its selectivity is able to choose the best among the sub-group. When there are no or little differences between members of sub-groups—say white men versus white women—the need for a sub-grouping collapses and the best students are admitted irrespective of the classification scheme. If, however, there is a statistically significant difference between members of the sub-groups—the classic example is resident versus non-resident for public schools, the subgroups are segregated and the best are taken from each sub-group in order to achieve a requisite resident/non-resident ratio for the entering class. By definition, if the resident pool is weaker statistically than the non-resident pool (which it most often is), weaker students, at least when judged by objective indices will be admitted from this pool and non-resident students with the same exact and even stronger qualifications than the admitted resident student will be denied. And this is exactly how admission works at selective public law schools like Michigan, Virginia, Berkeley, UCLA and Minnesota. There is no hue and cry over this state of affairs because residency is not a protected or suspect classification like race or ethnicity. For a discussion of all the qualifications that can be used lawfully to discriminate (differentiate) applicants, see Hopwood v. Texas, 78 F. 3d 932 (5th Cir. 1996). Of course, the same sort of selection process occurs when the law applicants are, in effect, divided by race. That is, the best members of the sub-group, when judged by objective indices, are admitted by the most selective schools even if those objective indices do not match those of members of other sub-groups. Furthermore, since African-Americans score, on average, one standard deviation below that of their comparable white peers, it stands to reason that their scores on the LSAT would approximately be one standard deviation below that of the white admitted applicants. For a discussion of the score-scale differential, see supra notes 00-00 and text accompanying.
applicants applying to law schools. As African-American students scoring between 165-170 are admitted to highly-selective law schools where the mean is 172, so will students scoring between 155-164 be admitted to schools where the median is 168 and so on down the chain. This is the cascade effect that results in affirmative action being used at every law school today.\(^{142}\)

Anyway, after detailing the prevalent use of affirmative action by all law schools, Professor Sander turns to the effect (or cost in his cost/benefit analysis) of the use of affirmative action. To determine that cost or effect, Professor Sander turns to the grades achieved by the recipients of affirmative action. Using (more like manipulating) data produced by the LSAC in its fascinating and informative Bar Passage Study which normalized grades and provided generic grade information that can be disaggregated by race (but not by school),\(^{143}\) to document that African-American law students in almost every category of law schools,\(^{144}\) performed significantly less well than their white peers. He convincingly documents that African-Americans, as a result, are disproportionately represented in the bottom two quartiles of their respective class based on grades.\(^{145}\)

To sum up to this point, African-Americans score less well than whites on the LSAT. As

\(^{142}\) As we will see shortly, Sander’s solution to this cascade problem is to eliminate affirmative action resulting in African-Americans with 165 LSAT scores admitted to schools like Minnesota (which has a median of 164) instead of Stanford or Harvard Law School. In addition to eliminating the cascade effect, Sander’s proposal would essentially eliminate African-Americans from what he characterizes as elite schools and cause African-Americans to go to Boston College instead of Harvard. See supra note 00.

\(^{143}\) For further discussion of the methodologies employed by the Bar Passage Study, see supra note 000. As to the grades achieved by African-American law students, see Sander, supra note 00 at 425-437.

\(^{144}\) The Bar Passage Study divided the Law Schools that were the subject of the study into six clusters, grouping schools with similar characteristics. Id.

\(^{145}\) Although the African-Americans are disproportionately represented in the bottom of the class, that result is clearly not inconsistent with the correlation prediction established by the LSAT. In fact, the LSAT slightly over predicts for African-Americans. See Sander, supra note 3 at 424 (citations omitted):

There is a more fundamental problem with the fairness critique. If it were true that academic indices generally understated the potential of black applicants, then admitted black students would tend to outperform their academic members. But this is not the case. A number of careful studies, stretching back into the 1970s, have demonstrated that average black performance in the first year of law school does not exceed levels predicted by academic indicators. If anything, blacks tend to underperform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges.
a result, there are fewer higher scoring African-Americans to compete with whites to obtain admission to the so-called selective or elite law schools. These schools, however, driven by their desire to have a diverse class, employ affirmative action to admit African-Americans with lesser scores than their white peers. Given their elite status, however, these schools take the best African-American students for these schools, leaving lesser (when measured by LSAT score) African-American applicants for less selective schools and so on. As a result in disparities in LSAT score, these African-Americans, as predicted by their relatively low LSAT score, receive worse (that is, lower) grades than their white peers and finish at or near the bottom of their class.146

The next big step occurs when these African-American law graduates sit for a state bar examination. Once again, the news, although sobering, is not good for our African-American sub-group. Using data that has been available for over a decade (and which at the time of initial dissemination was regarded as good news147), Professor Sander demonstrates that African-Americans do not pass the state bar examination at the same rates as whites; a fact that was first proven by the LSAC’s Bar Passage Study.148 That previously known fact is not particularly startling or newsworthy. Professor Sander, however, in an attempt to ferret out why African-Americans do not do as well as whites on state bar examinations, focuses his attention on the law school grades of African-American students.

What is added to that, and integral to Professor Sander’s thesis regarding the “cost” of affirmative action, is Professor Sander’s thesis that the crucial factor in predicting (correlating) success on the bar exam the grades one received while in law school. To simplify, the higher one’s law school grade point average (LGPA), the better the chances of success on a bar examination.149 Professor Sander makes the all-inclusive claim that: “At a given index level,

146. Along the way the attrition rates of these African-American students is addressed. However, as discussed supra notes 00-00 and text accompanying, attrition does not significantly impact African-Americans at selective law schools.
147. I was a member of the Workgroup that implemented the Bar Passage Study. Superbly lead by then Judge Henry Ramsey (now Dean Ramsey) the Workgroup believed that the Study or BPS as we referred to it would demonstrate that blacks were not passing bar exams at the same rate as whites. However, the lack of information and misinformation that was prevalent at that time about minority passage rates was so negative (popular and other press reports detailed pass rates as low as 10% in some states, typically California), that we as a group felt that any accurate data would be helpful in addressing the problem. Imagine our pleasant surprise when we discovered that over 70% of all minority test takers ultimately passed a bar examination. Cite to the data. Although this pales by comparison to the 98% passage rate for whites, this was still good news. Professor Sander, of course, focuses on the differential. See Sander, supra note 3, at 000.
148. Id.
149. Sander, supra note 3 at 442-454. Although Sander spends several pages detailing the correlation between law school grades and bar passage, he spends little time detailing why
blacks have a much higher chance of failing the bar than do whites--apparently, entirely as a result of attending higher-ranked school and performing poorly at those schools.\footnote{150} To connect the dots more directly, Professor Sander is making the claim that the poor grade performance that he documents for African-Americans is attributable to the fact that their objective credentials, LSAT and undergraduate grade point average, is not as strong as their white counterparts because they were admitted as a result of affirmative action. This poor performance, which is caused because the student is attending a school that she should not otherwise be attending (due to the operation of affirmative action), then correlates to higher bar exam failure.

The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school (say Vanderbilt, ranked between fifteenth and twentieth in most surveys) will have a significantly lower chance of passing the bar than the same student would have had she attended a school that admitted her on the basis of academic credentials alone (say, University of Tennessee, ranked between fortieth and sixtieth in most surveys). As we have seen, the evidence shows that a student’s race has nothing to do with her chances on the bar; her law school grades have everything to do with it.\footnote{151}

higher law school grades translate into better bar passage chances. Common sense leads me to conclude initially that higher grades mean more knowledge and understanding of the law which translates into better and more thorough answers to bar examination questions as well as less cramming for the bar exam. I do agree with Sander’s base premise that the better you do in law school, the more likely you are to pass a bar examination. It seems intuitively obvious that better students, as evidenced by their grades, will do better on an examination which essentially tests the same subject matter and the same skills—logical analysis, reading comprehension, analytical ability and the ability to write cogently and clearly.

\footnote{150} Id. at 444.  
\footnote{151} Id. at 448-49 (citations omitted). Here is where things seriously start to go off the tracks for Professor Sander and his theory. He then begins to hypothesize why a student achieving C’s at Vanderbilt, yet B’s at Tennessee will presumptively do better on the bar based on the better grades she is receiving at Tennessee. Here he spins out two ridiculous theories that simply are not credible. First, he addresses one theory that he has “heard” that “less elite law schools” do a better job teaching black letter law and preparing their students for the bar exam. This assertion ignores so much data that an entire article can be written critical of it. Suffice it to say, if this were true, students at “less elite schools” would pass the bar at a higher rate than their counterparts at the elite schools. Focusing on the two schools that Professor Sander employs as his exemplar, Vanderbilt and Tulane, the latest data from the Official Guide to Law Schools, indicates that Vanderbilt’s bar passage rate for 2005 in Tennessee was 90.5% while Tennessee’s was a very good 86.8%. There are countless other examples, but time precludes debunking this ridiculous assertion. The second hypothesis given as to why the B student at Tennessee would do better than the C student at Vanderbilt is because “students simply learn less when they are academically mismatched with peers.” \textit{Id.} This allegedly leads to disengagement with the
However, I still have not documented how this thesis, even if correct (which it isn’t) creates a knot in the pipeline restricting the flow of minority (in this case, African-American) lawyers. Working through the numbers and focusing on the Law School matriculants who enrolled in 2001, Professor Sander claims that although 14% fewer students would be admitted without affirmative action (3182 versus 3706) and 14% fewer students would enroll in a law school (2983 versus 3474), there would only be 8.1% fewer African-Americans graduating from law school in 2004 (presumably because there would be less attrition due to the lack of an academic mismatch). But here is the real kicker, even though fewer African-Americans would take the bar exam, Professor Sander predicts that there would be 169 more (or a 7.1% increase) in African-American lawyers if preferences (affirmative action) were not used to admit these students to schools that they would not otherwise be eligible to attend.

academic enterprise resulting in poorer grades, etc. I don’t know where to start. First, this theory has no statistical or scientific basis. It is intuitive at best. Second, even if true, what does it have to do with passing another standardized test given in a totally different environment when the exam taker is not only competing with those from his or her school with higher scores, but also competing with those from the less elite schools with equivalent scores, and competing with those with even lower LSAT scores from even less than less elite schools. Finally, and as addressed infra, see notes 00-00 and text accompanying, of what predictive or correlative ability of the LSAT? Taking Professor Sander’s thesis to its logical conclusion one can make the claim that a student attending Stanford (I would use Yale but Yale doesn’t give grades) with a 165 LSAT who achieves a B+ average (with Stanford’s mean grade of essentially A) putting that student in the bottom of her class has a worse chance of passing the California bar than an African American student with a 150 LSAT who attended and graduated from Southwestern University School of Law in the middle of her class. This notwithstanding the fact that Stanford has a 92% pass rate on the California Bar and Southwestern has a 58% pass rate on the same exam.

For a discussion of attrition, see supra notes 00-00 and text accompanying.

I reproduce the infamous Table 8.2 so that the reader can review it in its entirety:

<table>
<thead>
<tr>
<th>Stage of the System</th>
<th>Number of Blacks in the System Under Current Policies</th>
<th>Number of Blacks in the System with No Racial Preferences</th>
<th>% Change Caused by Moving to No Preferences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicants</td>
<td>7404</td>
<td>7404</td>
<td>--</td>
</tr>
<tr>
<td>Admittees</td>
<td>3706</td>
<td>3182</td>
<td>-14.1%</td>
</tr>
</tbody>
</table>
To conclude this part, Professor Sander is making the assertion that if preferences in admissions are eliminated, blacks will be admitted to law schools where their grades will be consistently better (and presumably correlate better with their LSAT score) which will translate into a better performance on the bar exam and produce a net gain of 169 lawyers.\textsuperscript{154} Quite the

<table>
<thead>
<tr>
<th>Matriculants</th>
<th>3474</th>
<th>2983</th>
<th>-14.1%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Graduates (2004 or Later)</td>
<td>2802</td>
<td>2580</td>
<td>-8.1%</td>
</tr>
<tr>
<td>Graduates Taking the Bar</td>
<td>2552</td>
<td>2384</td>
<td>-6.8%</td>
</tr>
<tr>
<td>Passing the Bar, First Time</td>
<td>1567</td>
<td>1896</td>
<td>+20.1%</td>
</tr>
<tr>
<td>Passing the Bar, Eventual</td>
<td>1981</td>
<td>2150</td>
<td>+7.9%</td>
</tr>
</tbody>
</table>

Sources: Wightman, Race-Blindness, supra note 278, at 243 tbl. 7 (first two rows in above table); statistics compiled by the author from the LSAC-BPS data (last four rows in above table).

Sander, supra note 3 at 473 (citations omitted). The claim that 169 additional African American lawyers are produced is disputed by Professor Wilkins in his article critical of Professor Sander’s thesis. He claims that Sander’s theory, even if accurate—which he disputes—will produce only 17 additional lawyers and note 169. See, Wilkins, supra note 136 at1942-43:

Let's begin at the bottom. Sander concedes that, under his plan, 14% of all the black students currently admitted to law school would no longer be eligible for admission to any school. This amounts to 524 blacks who currently have the chance of becoming lawyers but who would no longer have this possibility under Sander's proposal. Sander dismisses this cost on the ground that these students "have such weak academic credentials that they add only a comparative handful of attorneys to total national production." Sander's own calculations, however, suggest that this dismissal is far too quick. Notwithstanding their comparatively weak entering credentials, 65% of matriculants in this category graduate from law school. Twenty-nine percent eventually pass the bar and become lawyers. This translates into 152 practicing lawyers who will never have an opportunity to be lawyers under Sander's plan.

This is not a trivial loss. For starters, it is only seventeen short of the number of new lawyers that Sander claims his plan will produce. Thus,
contrary, I contend that affirmative action is not restricting the flow of African-American (and, relatedly, other underrepresented minorities) into the practicing bar and that we must continue its use in the way it was intended until African-Americans, as well as other underrepresented minorities, score equally as well on the LSAT as their white and Asian counterparts.

B. Sander’s Argument: Flaws Compounding the Problem.

Professor Sander’s argument regarding the failure of African-Americans is premised even if one credits all of Sander's admittedly optimistic assumptions, his plan loses almost as many black lawyers out of the bottom of the distribution as it gains from increasing bar passage rates for those in the middle. Moreover, even if one were to believe that it was a net gain to society, or even to the black community, to replace the 152 black lawyers excluded by Sander's plan with the 169 blacks gained by eliminating affirmative action—a question I address below—there can be no question that with respect to those blacks who will no longer have a chance to become lawyers, the question of their exclusion is not trivial to them. Once again, in a proposal that claims to value blacks “as individuals,” this cost certainly cannot be overlooked.

Sander, in his riposte, A Reply to Critics, 57 Stan. L. Rev. 1963, 2005 n. 102 (2005) claims that Wilkins is in error and that 169 new lawyers would be produced:

In Part VIII of Systemic Analysis, I point out that ending preferences would have reduced the number of entering black law students by an estimated 491 blacks (Wilkins gives the number 524, but it’s unclear how he derives this). Wilkins points out that 29% of this cohort graduates and passes the bar, producing 142 (my number) or 152 (Wilkin’s number) new lawyers. Wilkins, supra note 5, at 1942. He then compares this number with the number of net new black attorneys I estimate might be produced by a race-blind system (169), suggesting that ending preferences only produces a net increase of 17 attorneys (169 minus 152). Id. This is incorrect. The whole point of my analysis is to net the black lawyers lost in the admissions process against those gained through lower attrition. The total gain in new lawyers is 311, which becomes a net gain of 169 after accounting for the 142 would-be lawyers not admitted to law school.

I will assume arguendo that Sander is correct with respect to the number of African-Americans produced per his thesis regarding the elimination of affirmative action. Nevertheless I contend that Professor Sanders’ underlying assumptions are erroneous and I conclude infra at notes 000-000 and text accompanying that no new lawyers will be produced if preferences (read affirmative action) are eliminated from law school admissions.
almost entirely on his supposition that the grades received by law students are highly correlated with successful bar passage—that is, the higher or better grades received, the better the odds or chances of passing a bar examination. Given the low grades that Blacks achieve as a result of the preference they receive in admissions vaulting them to compete with those with better credentials who attain higher grades, Blacks are therefore doomed to fail the bar exam at higher rates. His argument is seriously flawed for two demonstrable reasons and, I believe, one hypothesis that is more credible than Sander’s assertion in this regard.

The two demonstrable fallacies in Sander’s thesis has to do with the nature and predictive ability of standardized tests which Sander alternately lauds and ignores to focus on grades. There is no question that the LSAT is as valid a predictor for success on the bar examination as are law schools grades (which are themselves correlated with the LSAT score). This piece of the puzzle must be explored and explained by Sander and, as I detail below, refutes his thesis. Second, the bar examination is a high-stakes standardized test. Further, there is a considerable amount of data that proves that African-Americans, and other underrepresented minorities do not do as well on standardized tests, for whatever reason. Couple this with the “cascade effect” created by so-called “preferential admission” and there is a plausible and better explanation for the differential (lower) passage rate on bar examinations by African-Americans. Finally, Sander’s entire thesis is predicated on the heretofore untested assumption that African-Americans will continue to attend law schools even if there is no preferential admissions (they will matriculate at Boston College instead of Harvard Law School). I test that assumption below and offer an alternative hypothesis.

1. The LSAT and the Bar Exam

There is little doubt that there is a strong correlation between one’s LSAT score and the first year grades one attains in law school. Furthermore, recent LSAT studies document that there similarly a strong correlation between the LSAT and final or third year law school grade point averages. Both correlations are improved if the student’s undergraduate grade point average is also known and used as a variable. It is also becoming apparent that there is a similar correlation between the LSAT and undergraduate grades and bar passage—a fact that Professor Sander acknowledges and demonstrates in his article (worthy of a long quote):

Another way to avoid the weaknesses of conventional validation studies is to use academic indices to predict performance on bar exams. Bar exams are

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155. See supra note 000-000 and text accompanying.
156. See supra note 000-000 and text accompanying for a discussion of possible causes for this differential/discrepancy.
157. Cite LSAC studies and Sander’s article.
158. See infra notes 161-162 and text accompanying.
159. Id.
taking by a broad cross-section of law graduates from 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 the raw scores on the California bar exam. The studies find the predictive power of the LSAT is quite good. LSAT scores have a .61 correlation with multistate exam scores (even though the tests are usually taken four years apart), and a correlation of .59 with overall exam result (including the eight-hour essay exam and the eight-hour practice exam.) Adding undergraduate grades as a predictor produces a further, modest increase in correlations. The R2 of these academic indices with bar results is, therefore, well over 35%.

Explaining 35% of individual variance may sound mediocre, but I find it impressive for a number of reasons. No other predictor tested for admissions purposes (e.g., interviews) has been able to explain more than 5% of individual variance in school performance.160

Although there is no consensus that the LSAT is a better predictor of bar exam success than law school grades,161 there does appear to be a consensus162 that there is a significant

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160. Sander, supra note 3 at 420-21 (citations omitted) (emphasis added).
161. In the Bar Passage Study, the author concluded that there was a lower correlation between LSAT scores and bar performance and LGPA and bar outcome:

Figure 3 shows mean LSAT scores for passing and failing examinees by jurisdiction, again presented in descending order for passing candidates. . .
The LSAT data appear to be more variable than the LPGA data, but that is partly a reflection of scale differences. Even so, for the majority of jurisdictions, there is a large and statistically significant difference between LSAT means for passing and failing examinees. The variability and lack of consistency in LSAT data are likely related, at least in part, to the lower correlation between LSAT score and bar examination outcome that between LGPA and bar outcome. The variability in means of failing examinees also may be related to the small number of failing examinees in some jurisdictions.


162. See, for example, Stephen Klein and Roger Bolus, Analysis of July 2004 Texas Bar
correlation between performance on the LSAT and bar outcomes even if there is some debate regarding whether law school grades are a better predictor (have a higher correlation) for bar outcomes.\footnote{163}

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Exam Results by Gender and Racial/Ethnic Group, @
http://www.ble.state.tx.us/one/analysis_0704tbe.htm (last visited 7/26/06):

As a group, do the students at some law schools generally score higher or lower or lower on the bar exam that what would be expected on the basis of their mean LSAT scores?

Generally No. As noted on the Texas Board of Law Examiners’ Website (WWW.ble.state.tx.us), there are large differences in bar exam passing rates among schools. We found that almost all of these differences can be explained by differences in the admissions scores of the students they graduate. For example, there is nearly perfect relationship between a law school’s mean total bar exam scale score and its mean LSAT score (the correlation is .98 out of a possible 1.00).

Black and Hispanic candidates are not spread evenly among the nine Texas law schools. They are much more likely to attend some schools than others. There are also large differences in passing rates among schools. However, the large differences in passing rates among racial/ethnic groups are not related to which law schools they attend because almost all the schools do about as well on the bar exam as would be expected on the basis of the mean LSAT scores of their graduates. That is what is driving the differences in bar scores among groups.

\footnote{163} Although Table 13, which appears below, from the LSAC Bar Passage Study, \textit{supra} note 126, shows that a the cumulative LGPA (adjusted and standardized within school) show slightly better correlation with bar examination outcome, the LSAT score, with a correlation of .30 is an excellent predictor of bar outcomes.
What is therefore surprising is the claim that the lower law school grades achieved by Blacks, allegedly as a result of affirmative action or preferences in admission, is the primary (one could conclude from Sander’s article perhaps the sole) cause of the failure of these same students to pass the bar exam. The focus on the grades attained by African-American students failing the bar exam ignores then, three important facts that are important to Sander’s thesis. First, it should be self-evident that the LSAT produces a strong correlation for bar outcomes. Second, law school students at elite schools (which I characterize as selective) score among the best of all African-American test-takers. These African-American students attending these elite schools on average score above the LSAT median or they would not have been admitted to the elite law

<table>
<thead>
<tr>
<th>Factor</th>
<th>Correlation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cumulative GPA of undergraduate college</td>
<td>r = 0.41</td>
</tr>
<tr>
<td>Cumulative undergraduate GPA of all students</td>
<td>r = 0.28</td>
</tr>
<tr>
<td>LSAT score</td>
<td>r = 0.98</td>
</tr>
<tr>
<td>Undergraduate grade point average</td>
<td>r = 0.45</td>
</tr>
<tr>
<td>Asian American</td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td></td>
</tr>
<tr>
<td>Student attended law school</td>
<td>r = 0.47</td>
</tr>
<tr>
<td>Sex (1 = male; 0 = female)</td>
<td>r = 0.41</td>
</tr>
</tbody>
</table>

Although I am not a psychometrician, I find it quite plausible that grades would have a slightly higher correlation to bar outcome than the LSAT. It stands to reason that the LSAT, which has a good and strong correlation to LPGA, would not be a better predictor (correlative) than grades due to the fact that the grades reflect three years immersion into the study of law and the bar exam is not an aptitude test but a high stakes power test designed to test the study of law. If one assumes that the LSAT, which tests reading comprehension, logical and analytical reasoning (see supra note 00), tests general intelligence and knowledge and the ability to take a standardized, high-stakes power test, then adding to that Law School grades, which both builds upon the skills test by the LSAT and adds to it the specialized knowledge of the law, will result in a better correlation to bar outcomes than LSAT alone which simply tests for three skills noted above. As noted infra, see note 000 and text accompanying, a stronger correlation to bar outcome is performing above the median LSAT score. This supports my thesis because scoring above the median indicates superior intelligence and test taking ability. Those scoring below the mean (by definition half of the test takers, but not matriculants) who do attend law school have the opportunity to in effect make up the difference by acquiring the substantive knowledge of the law to afford them a better opportunity to pass the bar exam—in effect, to overcome their deficiency as expressed in a low or lower LSAT score.
school, even with preferences in effect.\textsuperscript{164} Third and finally, the data from the Bar Passage Study documents that those who score at or above the LSAT median have essentially the same passage rate for eventual bar examination outcome.\textsuperscript{165} This is one of the most telling statistics

\begin{table}[h]
\centering
\caption{Number and percentage of study participants by LSAT score group, ethnic group, and eventual bar examination outcome}
\begin{tabular}{|c|c|c|c|c|c|}
\hline
\textbf{Ethnic Group} & \multicolumn{2}{c|}{\textbf{Score Above LSAT Mean}} & \multicolumn{2}{c|}{\textbf{Score Below LSAT Mean}} \\ 
& \textbf{Pass} & \textbf{Fail} & \textbf{Pass} & \textbf{Fail} \\ \hline
American Indian & 35 & 1 & 55 & 13 \\ 
& 67.56 & 5.60 & 73.34 & \textbf{3.66} \\ \hline
Asian American & 43 & 14 & 68 & 24 \\ 
& 72.04 & 25.66 & 88.89 & \textbf{15.11} \\ \hline
Black & 162 & 7 & 98 & 369 \\ 
& 93.91 & 4.11 & 95.76 & \textbf{31.91} \\ \hline
Mexican American & 105 & 1 & 227 & 42 \\ 
& 98.89 & 3.82 & 98.47 & \textbf{14.02} \\ \hline
North Idaho & 36 & 2 & 66 & 24 \\ 
& 91.74 & 5.56 & 93.33 & \textbf{24.27} \\ \hline
Hispanic & 171 & 7 & 902 & 31 \\ 
& 95.07 & 3.95 & 95.80 & \textbf{14.21} \\ \hline
White & 1,149 & 196 & 7\& 112 \\ 
& 99.59 & 17.30 & 94.46 & \textbf{5.01} \\ \hline
Other & 115 & 1 & 156 & 23 \\ 
& 97.29 & 2.67 & 86.90 & \textbf{15.81} \\ \hline
Total & 12,241 & 238 & 9,262 & 362 \\ 
& 98.51 & 1.49 & 90.38 & \textbf{9.71} \\ \hline
\end{tabular}
\end{table}

The focus, then, should not be on Law School Grades, but on those students achieving an LSAT at or above the median. Among these students, one could safely predict an eventual successful outcome on a bar examination. Further, even if the focus is on the percentage of applicants who pass their first bar examination with LSAT scores at or above the median LSAT, the data reveals that there is only a slight difference among ethnic groups:

\textsuperscript{164} See supra note 126 for the statistical characteristics of Cluster 1 Schools.

\textsuperscript{165} Table 12 of the Bar Passage Study, supra note 126 documents a rather startling fact: there is essentially no difference among racial/ethnic groups on eventual bar examination outcome for those who score at or above the LSAT mean.
documented by the Bar Passage Study, but is ignored by Sander and ignored in a way that is seriously misleading since it is the very group of students at the elite law schools (whom Sander claims are hurt by preferential admission) that are at or above the median and who, according to the data, will pass the bar exam at or near the same rates as whites.¹⁶⁶

### TABLE 8

<table>
<thead>
<tr>
<th>Ethnic Group</th>
<th>After LSAT Mean</th>
<th>Before LSAT Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pass</td>
<td>Fail</td>
</tr>
<tr>
<td>American Indian</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number</td>
<td>20</td>
<td>5</td>
</tr>
<tr>
<td>Percent</td>
<td>98.7%</td>
<td>11.3%</td>
</tr>
<tr>
<td>Asian American</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number</td>
<td>42</td>
<td>44</td>
</tr>
<tr>
<td>Percent</td>
<td>96.6%</td>
<td>11.4%</td>
</tr>
<tr>
<td>Black</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number</td>
<td>124</td>
<td>231</td>
</tr>
<tr>
<td>Percent</td>
<td>84%</td>
<td>16%</td>
</tr>
<tr>
<td>Mexican American</td>
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<td></td>
</tr>
<tr>
<td>Number</td>
<td>38</td>
<td>31</td>
</tr>
<tr>
<td>Percent</td>
<td>91%</td>
<td>11%</td>
</tr>
<tr>
<td>Puerto Rican</td>
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<td></td>
</tr>
<tr>
<td>Number</td>
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</tr>
<tr>
<td>Percent</td>
<td>85.7%</td>
<td>14.3%</td>
</tr>
<tr>
<td>Hispanic</td>
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<td></td>
</tr>
<tr>
<td>Number</td>
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<td>19</td>
</tr>
<tr>
<td>Percent</td>
<td>88.3%</td>
<td>11.7%</td>
</tr>
<tr>
<td>White</td>
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<td></td>
</tr>
<tr>
<td>Number</td>
<td>884</td>
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</tr>
<tr>
<td>Percent</td>
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<td>4.7%</td>
</tr>
<tr>
<td>Other</td>
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</tr>
<tr>
<td>Number</td>
<td>113</td>
<td>7</td>
</tr>
<tr>
<td>Percent</td>
<td>93.3%</td>
<td>6.7%</td>
</tr>
</tbody>
</table>

¹⁶⁶. As one of Sander’s critics, Professor David Wilkins, points out, Sander plays fast and loose with the data when it comes to claims of differential bar passage rates of those from the so-called elite law schools:

Sander is more equivocal with respect to bar passage rates among this group [those attending top or elite law schools]. Thus, he concedes that controlling for all other variables, students at more highly ranked schools have higher bar passage rates. He also asserts, however, that blacks who
As discussed by Professor Sander, there is a cascade effect created by the so-called preferences given to Blacks in admissions. I take it to mean that the Blacks achieving the highest LSAT scores attend the more selective (elite) law schools that make up the Group I law schools in the LSAC’s Bar Passage Study. African-American students with lesser LSAT score attend less selective schools (Cluster 2, 3, 4, and 5 in the Bar Passage Study). With respect to those students who score below the median LSAT score, there is a higher rate of failure on the bar exam, both with respect to the first bar examination and eventual bar outcomes. At the end of the day, and following Sander’s analysis, which I take to be accurate with respect to the cascade effect that preferential admission creates, those Blacks admitted at the least selective schools will have lower LSAT scores than their white counterparts attending the same law school. Moreover, it stands to reason that the weakest students, at least when measured by LSAT score, would achieve both weaker or the lowest grades (given the correlation between the LSAT and LGPA) and would perform the poorest on the bar exam (given the correlation between the LSAT and bar exam outcomes).

Given this, and the fact that no data is presented regarding which African-Americans fail the bar exam, that is, those with high or lower LSAT or those attending certain schools and not others, a reasonable prediction is that those African-American at the bottom of the “cascade” are failing the bar exam and creating the differential pass rates that disproportionately affect African-Americans as a group. If that hypothesis is correct, which I believe is plausible, it is that group of African-American students at the bottom of the cascade who perhaps would not be admitted to any law school without “preferences” who are disproportionately failing the bar examination and not those attending more selective or elite law schools.

Wilkins, supra note 136, at 1927, n. 43 (citation omitted) (emphasis added). He never tests this proposition directly, however, with respect to black graduates of top schools nor reports black passage rate by school tier.
Is that, therefore, a knot in the pipeline restricting the flow which should be eliminated? Quite the contrary, as others have capably pointed out, bar passage is not the sine qua non of attending law school. The fact that one does not pass a bar exam does not mean one does not make a societal contribution.\textsuperscript{170} However, since the focus in this article is on the pipeline and its production of lawyers, it is also important to note that not all of these students admitted at the bottom of the cascade, as a result of preference, do indeed fail the bar. Quite the contrary, a significant percentage do pass the bar and become lawyers.\textsuperscript{171} That is the gain produced by affirmative action and if it is not offset by a loss, which I believe I have refuted above with respect to those attending elite law schools and is further addressed below,\textsuperscript{172} the pipeline is Americans from these schools are failing the bar exams. In some cases there are considerably more Blacks graduating than the total number of students graduating who did not pass a bar exam. For other schools, to make the case that Blacks are failing the bar exam one would have to accept that it is only the African-Americans who are failing the bar exam. If that were the case at any of these schools, I speculate that fact would be highly publicized and well-known given the hot button issues that affirmative action and race are in our society.\textsuperscript{170} As Professor Wilkins notes, the fact that one does not pass a bar exam should not negate the fact that those benefitting from preferences overwhelmingly receive a law degree (for further discussion, see infra notes 000-000 and text accompanying) which in and of itself has some value so that the metric employed by Sander and by me, becoming a practicing attorney, may be too narrow to capture all of the benefits provided by affirmative action or be the ultimate arbiter of the size and flow in the pipeline.

Although less than one-third of those excluded by Sander’s plan currently become lawyers, almost two-thirds become law school graduates. This is a credential that we should not assume to be worthless.

One way to remember this is to notice that, according to Sander’s estimate, approximately seven percent of law school graduates never even bother to take the bar. For some of these students, this was undoubtedly their plan from the start. For others, the decision to forego the potential benefits, but certain costs of taking the bar exam is the result of a complex mix of events that transpire during law school, including changes in family status, evolving interests [as an aside, most law professors, including perhaps Professor Sander choose not to take a bar exam since it is not important to their career path–academia], and perceptions about the job market. In either case, the education–and the credential–can still be quite valuable. As we in the academy continually assert, legal education is good preparation for a wide range of activities that go far beyond the practice of law.

Wilkins, supra note 136, at 1943-44 (emphasis in original) (citations omitted).

\textsuperscript{171} See Sander supra note 3 at 000 (footnote that contains table 8.2).

\textsuperscript{172} See infra notes 000-000 and text accompanying. X-ref to section on Blacks choosing
enhanced rather than restricted by affirmative action as it pertains to bar outcomes.173

2. The Impact of Standardized Tests

Although affirmative action is the focal point of Professor Sander’s article, the premise of the article is that there are fewer Black lawyers as a result of their relatively poor performance on the bar exam. Professor Sander, however, pays scant attention to the bar exam and possible reasons for this poor outcome rather than his focus on the low grades attained by these beneficiaries of affirmative action. By focusing almost exclusively on low grades as the cause for differential bar outcomes for African-Americans, Professor Sander ignores a wealth of data that documents that members of minority groups, especially African-Americans, perform poorly on essentially all standardized tests for inexplicable reasons. Professor Sander’s total lack of analysis of this issue is puzzling given his knowledge and familiarity with what he characterizes as “several principle criticisms” of the LSAT.174

not to go to lesser schools because of other viable career options.173 More important to bar outcomes than low grades or the correlative effect of the LSAT is the trend by bar examiners to raise the standard for passage which, of course, will have a disproportionate impact on those whose predictors are the lowest. That is addressed infra notes 000-000 and text accompanying. It is important to note, however, at this point, that if African-Americans were not disproportionately failing the bar, others would since the bar has never been and will never be an exam in which 100% of the takers pass irrespective of their ability. Given that the pass rates of most state bars remain within a narrow range, a certain subset of test-takers on the bottom will fail irrespective of their ability level. As Professor Wilkins notes, “After all, in the days before affirmative action, all of the bottom places on the law school grade ladder were occupied by whites.” Wilkins, supra note 136 at 1917 (citation omitted). If I had time, I could construct an argument that whites attending law schools and taking bar exams should be happy about the existence of affirmative action since it may increase their odds of success. Those whites who are excluded from attending law school due to affirmative action (although the data indicates that when affirmative action is employed class size increases to absorb those beneficiaries of affirmative action rather than acting as a zero-sum game displacing whites on the bottom), are those who would be the most ineffective and least productive. Hence, the real cost of affirmative action may be a trade off between diversifying the profession (the benefit) and losing, at most, mediocre white lawyers (the cost).174

Defenders of affirmative action say that the credentials gap has little substantive significance. They are supported by an eclectic band of critics that have attacked the reliance on academic numbers in general, and standardized tests in particular, as misguided and unfair. Let us consider several of their principal criticisms. . .

American standardized tests are unfair to non-Anglos in general and blacks in particular. It is intrinsically unreasonable to weigh a test taken in
Nevertheless, it is beyond cavil that African-Americans perform less well than whites on standardized tests for whatever reason. My purpose here is not to provide a reason for this differential performance (such a feat is beyond the scope of the article and the ken of the author) or to point to (what Sander dismissively calls) the “fairness” critique to allege that these tests are biased, etc. My point is simply to note that there may be other reasons for the differential performance of African-Americans on these tests that have nothing to do with grades and, hence, nothing to do with affirmative action. This should not be viewed as a digression in the thesis of this piece because it proves that affirmative action is not an impediment in the pipeline, but perhaps performance on standardized tests.\footnote{175}

What is apparent and conceded by almost all is that there is a significant gap (differential) between scores attained by whites and blacks on every standardized test.

Unfortunately the evidence does not demonstrate that the score-scale differential between whites and members of subgroups is unique to the LSAT. Quite the contrary, on every high-stakes test [those tests upon which something important turns—like admission to the bar through a licensure test] used to determine admission to college or graduate school, there is a score-scale differential between white test-takers and members of underrepresented subgroups. It is fairly common knowledge that the score-scale differential that afflicts the LSAT test when subgroups are compared is also present in every large-scale standardized test given in the United States today. Although this “score gap” is the subject of numerous articles and discussions, the score-scale differential between whites and

\footnote{175. This is not a screed or attack on standardized tests. In an earlier article, see Johnson, supra note 1 at 335-40, I support my assertion that the LSAT is not a discriminatory test and debunk many of the arguments made by those critical of the LSAT and the use of standardized tests in admissions. Indeed, I believe it fair to say that in that article I am supportive of the use of the test and critical of what Sander, \textit{id.}, characterizes as the fairness critique. I do, however, come to the conclusion that there is a gap (differential) between the scores of whites and similarly situated minorities, especially African-Americans, and thus far no one has come up with a rational or suitable explanation as to the creation and persistence of this gap.}
African-Americans is not unique to the LSAT, and any claim of discrimination leveled against the LSAT must, by necessity, be leveled against almost every standardized test used in America.  

176. Johnson, supra note 1 at 340-41 (citations omitted).

Here are some of the facts that give us great concern—facts that we have been devoting much of our lives to addressing. According to Nettles and Perna (1998), in their statement of facts about racial inequality in educational testing, one of the most visible and pronounced areas of difference between African Americans and Whites is their standardized educational testing scores. These differences represent one of the nation’s greatest educational challenges to equality of access and achievement. Differences in the test scores of African Americans and Whites are revealed at the earliest grade levels and they persist throughout the subsequent years of formal education. The following are just a few illustrations of the gaps that can be observed in some of the nation’s most prominent assessments.

- African American and White preschoolers achieve similar scores on tests of motor and social development (100.0 versus 102.6) and verbal memory (96.2 versus 97.7), but African-American preschoolers score much lower than Whites on tests of vocabulary (74.6 versus 98.2).
- Only 9% of African American 4th graders achieve scores at or above the proficient level on the NAEP reading test, compared with 37% of Whites.
- One-half (48%) of African Americans score below the basic level on the NAEP 12th reading test, compared with 19% of Whites.
- Only 4% of African American, but 17% of White, 8th graders achieve scores at or above proficient on the NAEP history test.
- Two-thirds (66%) of African Americans, but only 19% of Whites, score below basic on the 4th grade NAEP geography assessment.
- Only 24% of African American 4th graders score at or above the basic level on the NAEP mathematics assessment, compared with 72% of Whites.
- Two-thirds (66%) of African American 12th graders score below basic on the NAEP mathematics assessment, compared with only 28% of Whites.
- Only one-third of African Americans who take an Advanced Placement examination receive a passing score, compared with about two-thirds of Whites.
- Average scores on the SAT are about 100 points lower for African Americans than for Whites on both the verbal (434 for African Americans versus 526 for Whites) and quantitative components (423 versus 625).
- African Americans average 17.1 on the ACT, whereas Whites average 21.5.
- African Americans score about 100 points lower than Whites on the verbal,
One fact, of course, needs to be addressed, the bar exam, albeit a high-stakes test since something–licensure–turns on it, is not a test used for admissions. Nevertheless, I deem it highly plausible that the same fact or factors that creates the score-scale gap on the LSAT and other standardized tests also affects the bar exam. Proof to support that assertion rests with the correlation between the LSAT and the performance on the bar exam.¹⁷⁷ It stands to reason that if Blacks suffer from a score gap on the LSAT, that gap will be prevalent on the bar exam as well.

Does this mean that the bar exam or the LSAT are impediments created knots in the pipeline that calls for their elimination to increase the flow in the pipeline? The LSAT and the bar exam are clearly impediments. However, as to the LSAT, I am not sure what would be gained by its elimination. Quite the contrary, I have asserted that the LSAT is a tool of inclusion as opposed to exclusion and its elimination from the admission process could have a more severely negative effect on the pipeline because African-Americans and other minorities from less prestigious schools will be penalized and have no vehicle to demonstrate their ability to perform and compete with their white peers.¹⁷⁸ Suffice it to say, the elimination of the score-scale differential between whites and African Americans and members of other underrepresented minority groups would have the effect of eliminating the need for affirmative action, presumably result in higher grade attainment for African-Americans, and, lastly, given the correlation between the LSAT score and bar outcomes, result in better bar outcomes for African-American and other minority test-takers thereby increasing the flow in the pipeline. The million dollar question, for which no one has a satisfactory answer, is how to eliminate that differential?

The bar exam poses a slightly different issue. Although it would be nice to advocate that each state have a diploma privilege, a la Wisconsin, that allows any member graduating from that state’s accredited law school to be admitted directly to the bar, such advocacy, in my humble opinion, would be a waste of time because it is politically infeasible given the power that state bars wield. What is important to note for the passage through the pipeline is that although the bar exam is a high-stakes test,¹⁷⁹ there are actually 39 such tests explored in the bar passage study and fifty one different exams administered in total semi-annually usually. These tests, which have some commonality, like the multi-state, have different passing scores since the purpose is licensure rather than admission. Hence, these tests, unlike the LSAT and other tests

quantitative, and analytic components of the Graduate Record Examination (GRE).

- Average scores are also lower for African Americans than for Whites on the [LSAT] (142.6 for African Americans, versus 153.7 for Whites in 1995).


¹⁷⁷ See supra notes 000-000 and text accompanying.
¹⁷⁸ Johnson, supra note 1 at 323.
¹⁷⁹ See supra note 000.
used in admissions, employ a cut-off score; that is, a score below which takers fail and above which takers pass. This creates perverse situations in which a failing score in one jurisdiction can be a passing score in a jurisdiction across the border. It also creates incentives for state bar examiners to increase the cut-score needed to pass a bar exam in order to be competitive with peer states. Both of these factors create incentives that have a differential negative impact on minority exam takers and should be eliminated. Instead a national bar exam should be instituted which would increase the flow in the pipeline. I discuss this argument more fully in the next part.

3. A Hypothesis that is Impossible to Test.

One of the assumption implicit in Professor Sander’s article and thesis is the notion that without affirmative action or preferences in admission, African-Americans, now properly admitted to the law schools for which their credentials qualify them, will continue to attend law schools at the same rate as they do with affirmative action. That assumption is implicit in Professor Sander’s calculation that the elimination of affirmative action will produce a net gain of African-Americans because more of them will pass the bar exam and become practicing lawyers. That assumption has always greatly troubled me and causes me to posit, instead, my hypothetical in response.

As noted at the beginning of this Article, not all individuals who sit for the LSAT ultimately apply to any law school. In fact, thousands of students who pay good money and sit for the LSAT choose to apply to no law schools. Similarly, and as also discussed, several test-takers who apply to a law school and gain admission choose not to attend any law school. Both of these situations create leakage in the pipeline. Indeed, one of the central premises of this Article is that many African-Americans misapply to law schools by applying to more selective law school that they have little or no chance of gaining a favorable admission outcome.

Several of the test-takers who choose not to apply to any law school do so because their test scores are so low they have little or no chance of gaining admittance at a law school they are willing to attend. (This, too, I think is borne out by the misapplication of several hundred African-American applicants who apply to schools that they have no chance of gaining admittance.) These students on the bottom of the LSAT “pile” have little chance of being added to the pipeline unless they improve their scores. Elsewhere I have addressed my recommendation for admissible students who misapply to the wrong schools (obtain better counseling and be more realistic about the admission decision). What I have yet to fully explore are those students, especially African-American students, at the high end or top of the LSAT pile who choose not to apply to any law school. These potential students make their

180. See supra notes 00-00 and text accompanying.
181. See supra notes 00-00 and text accompanying.
182. See supra notes 00-00 and text accompanying.
183. See supra notes 00-00 and text accompanying.
choice not to apply for one of three reasons. First, the timing may not be optimal and instead of applying in the current cycle, these test-takers apply later. For this group, at least, there is no leakage in the pipeline, only deferral of entry.

With respect to the other test-takers, the choice not to attend law school is presumably due to one of two factors. First, some students may simply decide that the law is not for them, notwithstanding their relatively high scores and without consideration of other opportunities. I am not sure what can be done, however, to induce these potential students to become part of the pipeline. The third group of potential students presumably choose not to attend law school because they have other opportunities which they value more highly than law school. Indeed, I would expand this group to include many of the students who are admitted to one or more law schools but choose not to attend now or ever. For these students the fact that there are other opportunities which they value more highly, be it employment prospects, other academic pursuits, etc., precludes their matriculation at a law school.

Further, these high-scoring African-American students are bound to have many choices because by definition, they have scored well on a standardized test and it is only logical to assume that to that point in their academic or career they have done well and if they have taken other standardized tests (like the MRE, GMAT, or MCAT) they will likely have done well on those tests as well. No doubt a factor in any choice regarding whether to apply to a law school or matriculate at a law school which has admitted the applicant is the quality and prestige of the school that admitted the student when compared to other opportunities that are available. By that I mean, a student admitted to the Wharton School of Business and the Kennedy School for Government Affairs will more than likely choose one of those schools to pursue graduate work if she is not admitted to any law school ranked in the top 100 by U.S. News. Conversely, the choice of which school (and which career) to pursue becomes much tougher if that student is admitted to the Yale Law School. I concur, then, with my friend Professor David Wilkins, that students attending an elite law school gain much more than the educational and placement advantages conceded by Professor Sander in his article but instead, “[o]ver time, the socialization, networking, and credentialing benefits of a degree from an elite law school dominate the educational and placement advantages discussed by Sander. This is particularly true for black lawyers.”

Imagine what would happen if affirmative action is eliminated and the high-scoring black applicant who would have been admitted to Harvard Law School is instead admitted to Boston College as hypothesized by Professor Wilkins. Will that student choose to attend the Boston College of Law or instead seek an MBA at Wharton? Professor Sander’s entire argument regarding the production of more African-American lawyers is premised on the assumption that they will continue to do so. I think not.

184. Wilkins, supra note 136, at 1931.
185. See supra notes 00-00 and text accompanying.
My hypothesis is that these, the most highly sought after minority students in higher education, professional schools, and by employers, facing a myriad of career choices impacted by the prestige and eliteness of the school making the admit decision, will choose to pursue some other career or educational path. In other words, these are students who are not lacking in choice and the choice made by these prospective students will internalize the prestige of the school from which they will receive their professional or other degree.

An assumption that these beneficiaries of preferences in admissions will uniformly choose to continue to attend law schools, albeit lesser law schools in terms of prestige, is seriously flawed when the prospective students are those who would have been admitted to elite law schools per affirmative action. After all, these are the best students at the top of the pile of cascading students who benefit from affirmative action. These are the students who have attended the most elite colleges and who have excelled at these schools attaining the best grades and performing exceptionally well on standardized tests. Professor Sander, in his article, is a proponent of straight talk and honesty in dealing with the issues he addresses. Straight talk requires me to note that an African-American with a 165 LSAT, which is good enough to get her into every law school in America, but 5-7 points below the median LSAT at the most selective law schools, will be highly sought after by business schools, graduate programs, employers and other professional schools. Sander’s proposals acts as though these students are fully and inexorably committed to law as a career and that within law schools, these applicants present the proverbial zero-sum game in which one (the elite) law school’s loss, is another (the less selective) law school’s gain. My hypothesis, which I believe is a reasonable one, is that the applicable universe is not composed solely or law schools, but other career options as well.

To be blunt, these students do not lack choices—every profession, every occupation, and of course, academia, is interested in improving its diversity by attracting the best and the brightest individual students of color. I contend that these prospective students, who have excelled on the LSAT, are highly sought after by the other professional schools, graduate programs and employers. To date, the law schools have been receiving more than their fair share of these students because of the attractiveness of law as a path of study and as a career. Also, the allure of these elite law schools has to play a role in the decision-making process. Law schools are not simply competing against other law schools, they are also competing against other possible career options. Hence, any proposal that results in prospective students matriculating at Boston College instead of Harvard Law School must factor into the equation the leakage that will inevitably occur when these students choose alternative career paths given the lesser attractiveness of the law school to which they have been admitted.

Hence, my conclusion to this hypothetical is that, at the very least, the leakage that will occur as a result of these less attractive law school options will equal if not exceed the alleged “gain” of black lawyers that will be produced by higher/better bar passage allegedly produced by the elimination of affirmative action that is suggested by Professor Sander’s proposal. Since this

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186. See supra notes 00-00 and text accompanying.
hypothetical cannot be verified in the real world, I prefer to continue the status quo in which law is very as a very attractive career enrolling more than its fair share of minority college graduates to its various programs.

PART IV

THE BAR EXAM: A SERIOUS KINK IN THE PIPELINE

As the preceding Part makes obvious, the bar exam is a severe impediment to certain members of underrepresented minority groups becoming practicing attorneys.\textsuperscript{187} The LSAC’s path-breaking Bar Passage Study,\textsuperscript{188} as well as later studies done by Dr. Steven Klein,\textsuperscript{189} have conclusively demonstrated that African-Americans and members of other underrepresented groups do not pass the bar exam at the same rates as whites. Although the gap is not as wide as once thought, and appears to be narrowing, there is still a significant differential success rate for whites and members of underrepresented minority groups with respect to both first time and eventual bar outcomes.\textsuperscript{190}

Consequently, there is little doubt that the bar exam, as the last hurdle underrepresented minorities face in their quest to become attorneys, represents a serious impediment to that goal. There are several articles that attempt to both explain the differential passage rates and provide remedies for same.\textsuperscript{191} Instead, however, of summarizing those articles and their remedies (which include, but are not limited to exhorting law schools to provide better bar preparation as part of their curriculum, providing bar review courses free of charge, and providing financial assistance to those preparing for bar exams so that they can concentrate on their preparation as opposed to working),\textsuperscript{192} I would like to take this opportunity to focus on two factors that unduly restrict bar

\textsuperscript{187} Although as noted supra, perhaps focusing solely on those law students who become practicing attorneys is too narrow to capture all of the benefits that flow from being a law school graduate. Nevertheless, the initial inquiry and focus of this Article was and is on those who make it all the way through the pipeline to become practicing attorneys.

\textsuperscript{188} See supra note 000 and text accompanying.

\textsuperscript{189} See supra note 000 and text accompanying.

\textsuperscript{190} See Appendix 1 which is Table 10 from the Bar Passage Study that summarizes eventual bar examination outcome for different ethnic groups.


\textsuperscript{192} Id.
passage that have heretofore gone relatively unnoticed.

First, the recent efforts by many state bars to raise their cutoff score for passage clearly have had a detrimental impact on minorities—those at the bottom. Although these efforts have been criticized elsewhere for their impact on minority exam takers,193 I take a slightly different approach and argue for a national bar exam that equalizes the playing field for all exam takers, minority or not. I do so because the Bar Passage Date, if patiently worked through, reveals that the disparities in pass rates among states creates the equivalent of misapplication by minority test-takers. By that I mean, it is clear that some minorities are taking bar exam and not passing with scores that would be passing scores in other states. If the goal is to produce minority lawyers for the bar, the geographic location where one takes the bar should not be dispositive with respect to the number of minority lawyers. It is to this misapplication issue that I turn first.

Following that, I make the case that a National Bar exam, like licensure exams for other professions,194 should be implemented for the legal profession. I buttress my case with a brief foray into international law to address the impact that recent international treaties may have on the legal profession and state bar examinations.195 I then conclude this part by strengthening my argument for a national bar examination with a critique of efforts, lead by Dr. Steven Klein,196 to increase scores for passing the bar exams of various states. I assert that unless it can be demonstrated that those currently passing the bar are not performing adequately as practitioners, there is no good faith reason to increase passing bar exam grades except to protect the existing monopoly that the bar has on the delivery of legal services and to exclude underrepresented minorities from the practice of law.

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193. Increased passing scores may also threaten the diversity of the legal profession. Although law school graduates today are more demographically diverse than at any time in our nation’s history, minority test takers fail the bar exam at a higher rate than do white examinees. Under these circumstances, raising the bar’s passing score—especially without sound evidence that former standards failed to weed out incompetent practitioners—undermines the profession’s goal of increasing diversity. The implications are particularly troubling when the hurdle set for today’s demographically diverse graduates is higher than the one set for less diverse examinees ten or twenty years ago.


194. Cite to Medicine, Architecture, Engineering and others.
195. See infra notes 000-000 and text accompanying.
196. See infra notes 000-000 and text accompanying.
1. Misapplication on the Bar Examination

First, a caveat: very few jurisdictions (California, with various studies by Dr. Klein as the exception),\(^{197}\) publish data that provides information on the passage rate of various ethnic groups on the bar exam (presumably because the data would prove that whites and Asians pass at a much higher rate than underrepresented minority groups). Hence, any claim that African-Americans, for example, do better on one bar exam than another must rely on inference and supposition and to some extent, common sense understanding of what is happening with respect to bar passage rates based on anecdotal and other evidence. Nevertheless, I am confident in my assertion that African-Americans, and to a lesser extent Hispanics, disproportionately take bar exams in some of the toughest (in terms of passage rate—meaning they have the lowest percentage of test-takers passing the bar in any administration of the bar exam) “bar jurisdictions” and, as a result, “misapply” in taking the bar exam. By misapply I simply mean that certain test takers take the test in a jurisdiction, like California and achieve a failing score that would be a passing score in another jurisdiction, say Minnesota. In other words, these students who have yet to pass a bar exam have chosen to take the wrong bar exam (at least when measured by a positive outcome) and are precluded from achieving their goal of becoming a lawyer as a result.\(^{198}\) There obviously would be more minority lawyers if these putative lawyers took the exam in states with lower passing scores.

Here are the facts gleaned from the LSAC’s Bar Passage Study, the only national study to date that addresses potential differential passage rates on state bar exams among various racial and ethnic groups.\(^{199}\) For the cohort studied in the Bar Passage Study, over 40% of the African-Am...
American test takers took the bar exam in five jurisdictions out of the 39 that participated in the study (in descending order): New York, New Jersey, California, Georgia and Maryland (that number is 568 out of 1368 exam-takers). Over 70% took the bar exam in ten states (the five noted above and in descending order: Texas, Illinois, Florida and Pennsylvania, and Louisiana (952 out of 1368). Finally, over 90% of the African-American test takers took the test in fifteen jurisdictions: the ten noted above, plus North Carolina, Michigan, Ohio, Virginia, and Missouri (1144 out of 1368). This is hardly surprising or earth shattering data. A simple review of a map would reveal urban populations with high percentages of minorities, and especially African-Americans, in these fifteen states with the percentage of African-Americans (from ascending to descending) almost tracking perfectly with the fifteen states noted above. (The outlier would be New Jersey, but given its proximity to New York, it should be combined with New York in any analysis.)

But what if New York, California, and Maryland have some of the toughest bar exams in the country and result in a disproportionate number of African-Americans not passing the bar exam? As should be clear by now, there is a correlation between LSAT score and LGPA. There is also a strong correlation between LSAT and Bar Passage. There is even a stronger correlation between LSAT and LGPA and bar passage. African-Americans, scoring one standard deviation below whites and Asians, do less well in law school (as measured by grades) and do less well on bar exams (eventual passage rates for African-Americans is 77.6%, whereas for whites it is 96.7%, a difference of almost 20%). As a result, one can make a plausible cause

determine first time pass rates for the various sub-groups and “eventual pass rates” for the various groups. See Executive Summary, LSAC National Longitudinal Bar Passage Study (copy on file with the review). As such the data, although voluminous is now a decade old and may be less accurate for today’s exam takers. Notwithstanding its age, the data set is the best data set for analysis of the issues herein.

200. Wightman, supra note 126 at 17.
201. Id.
202. Id.
203. These first-time bar examination data demonstrate that members of the fall 1991 entering class distributed themselves very unevenly across states when they applied for admission to the bar. It is somewhat difficult to formulate trends for ethnic groups and understand their impact when dealing with such a large number of individual jurisdictions. Additionally, many jurisdictions participated in this study only on the condition that they would not be individually identified in reported data analysis. For both of these reasons, jurisdictions were combined into geographic groups as a way to summarize and analyze state data.

Id. at 16.
that the lower passage rate is attributable in part to African-Americans (and perhaps other underrepresented minorities, especially Mexican-Americans, two thirds of whom take the bar in California and Texas\textsuperscript{204}) taking the bar exam disproportionately in those states with lower pass rates. This particular question has been addressed in the Bar Passage Study.\textsuperscript{205}

Among questions related to the variability in bar passage rates among jurisdictions were several about how bar applicants from different ethnic groups

\textsuperscript{204} See Table 2, Bar Passage Study, supra note 126 at 17-18 (32.9% or 131 Mexican-Americans took the California Bar Exam in 1994 and 142 or 35.7% of Mexican-Americans took the Texas Bar Exam in 1994).

\textsuperscript{205} The jurisdictions were divided into ten regions designated Northwest, Far West, Mountain West, Midwest, Great Lakes, South Central, Midsouth, Southeast, Northeast, and New England. The distribution of first-time bar-examination takers by ethnic group is summarized for each of the ten regions in Table 3. This geographic breakdown shows that the Northeast was the region selected by the largest number of study participants for their first bar examination, and it represents the largest or second largest proportion of study participants from each identified ethnic group except American Indians and Mexican Americans. The smallest number of study participants took their first bar exam in the Northwest, consistent with the distribution of July 1994 first-time national data shown in Table 1. The smallest proportion of minority study participants was in the Midwest; 93 percent of the first-time test takers in this region were white.

The regions are defined as follows:

- **New England**: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
- **Northeast**: New Jersey, New York, Pennsylvania
- **Midsouth**: Delaware, District of Columbia, Kentucky, Maryland, North Carolina, Tennessee, Virginia, West Virginia
- **Southeast**: Alabama, Florida, Georgia, Mississippi, South Carolina
- **Great Lakes**: Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin
- **Midwest**: Iowa, Kansas, Missouri, Nebraska, North Dakota, South Dakota
- **South Central**: Arkansas, Louisiana, Oklahoma, Texas
- **Mountain West**: Arizona, Colorado, Idaho, Montana, New Mexico, Utah, Wyoming
- **Northwest**: Alaska, Oregon, Washington
- **Far West**: California, Hawaii, Nevada
were distributed across jurisdictions. One such question is whether applicants from some ethnic groups disproportionately tended to take the bar in jurisdictions where pass rates were more stringent. Members of the largest nonwhite ethnic group, both in the 1991 entering class and in the subset for whom bar examination data were available, were black, and that group was substantially larger than the second largest group—Asian Americans. Figure 1 shows the distribution of black and white study participants across the 22 jurisdictions in which the largest numbers of black applicants took their first bar examination. The jurisdictions are sorted by the number of black test takers. Sorting jurisdictions in this way produced a smooth decline in number of black test takers, but resulted in a fairly jagged distribution for white test takers. Thus, black test takers were not simply represented across jurisdictions by numbers that were proportional to white test takers. Figure 1 also demonstrates how very small the number of black first-time examinees was relative to the number of white examinees in every jurisdiction. Table 2 presents the data from which Figure 1 was constructed and also shows the counts and percentages by jurisdiction for members of the other ethnic groups included in this study. This table illustrates that the number and percentage of examinees from different ethnic groups were not proportionally parallel across jurisdictions. For example, a third of Asian Americans tested in California, as did a third of Mexican Americans. Another 35.7 percent of Mexican Americans tested in Texas. Thus only two jurisdictions account for 68 percent of the total number of Mexican American test takers among these study participants. More than a quarter of those test takers who categorized themselves as “other Hispanic” tested in Florida and 20 percent of American Indians tested in California.
Although the Bar Passage Study is unable to provide bar passage date for each jurisdiction per agreements with the participating jurisdictions that individual jurisdictions would not be identified or reported,\textsuperscript{206} some tentative conclusions were drawn that support my thesis of “misapplication.”

The analysis showed that the test statistic for the model with all of the explanatory variables was statistically significant, as was the improvement resulting from adding region to adjusted LPGA and LSAT score. The difference also showed that the odds of passing, given the same LPGA and LSAT score, were not

\textsuperscript{206} The Bar Passage Study was, however, allowed to present data regarding the number of test-takers for each jurisdiction by race-ethnicity. See Table #2 of the Bar Passage Study, \textit{supra} note 126 that is attached hereto as \textbf{Appendix 2}. 

significantly different (\(\#=.05\)) for the Northeast and three geographic regions, South Central, Mountain West, and New England. The odds of passing were about two times greater in the Great Lakes, the Midwest, and the Southeast that they were in the Northeast, given the same values on the other variables in the model. In contrast, they were the lowest in the Northwest and the Far West. . . . The difference in odds between the Northeast and the Far West is particularly relevant because of the large proportion of participants of color who sat for the bar in those regions. The data show that for an examinee with the same LPGA and LSAT score, the odds of passing the bar examination in the Far West were less than half (.40) when compared to the Northeast.\(^{207}\)

Assuming my thesis is credible, that members of underrepresented minority groups take the bar exam disproportionately in states that have higher passage rates and as a result disproportionately fail the exam at higher rates than whites,\(^{208}\) it still begs the question of what

\(^{207}\) Id. at 48 (citations omitted).

\(^{208}\) The regions also were examined with respect to differences in first-time pass rates. Table 4 shows the number and percentage of examinees passing their first bar attempt for each of the ten regions. Pass rates were significantly different among regions, but the differences were not as large as those found among individual jurisdictions. The lowest pass rates were found in the Northwest and the Midsouth, the highest in the Midwest. The Midwest is the region that tested the largest percentage of white examinees.
realistically can be done to improve the flow in the pipeline. It is not realistic to suggest, as it

| TABLE 1 |
|------------------|------------------|------------------|
|                | Total            | Total            |
|                | Pass             | Fail             |
|                | Total**          |                  |
|                | Number           | Number           |
| West           | 91.11            | 93.85            |
| Pacific        | 91.11            | 93.85            |
| Great Lakes    | 91.11            | 93.85            |
| Midwest        | 91.11            | 93.85            |
| Mountain West  | 91.11            | 93.85            |
| Northern       | 91.11            | 93.85            |
| New England    | 91.11            | 93.85            |
| Southeast      | 91.11            | 93.85            |
| South Central  | 91.11            | 93.85            |
| Southeast      | 91.11            | 93.85            |

**Percent shows the percentage within each region who passed or failed.**

**Percent shows the percentage of total participants who passed or failed in each region.**

Analysis of Relative Differences in Difficulty of Passing the Bar Among Jurisdictions. Data presented in Table 1 suggest that it may be easier to pass the bar in some jurisdictions than in others. The data also show that bar examinees of color tend to be concentrated in limited numbers of jurisdictions. Additionally, the national summary of pass/fail data to be presented in subsequent sections collapses data across jurisdictions with no regard for the relative difficulty with which a pass could be obtained. The combination of these facts leads to questions about how great the differences in difficulty of passing among jurisdictions might be.

Id. at 21. For First-Time Test-Takers see, Table 1 that is attached as Appendix 3.
with Law School admissions, the equivalent of forum shopping; that is, advising minority graduates to move to a Midwestern jurisdiction to take a bar exam there given the ease at which the test-takers pass the bar exams in those states. The reason why African-Americans and other underrepresented minorities take the bar exam in the states they choose is primarily because this is where minority populations are largely concentrated. If the goal is to increase the number of minority lawyers, in part, to service minority populations, it makes no sense, even if it was plausible, to convince or otherwise cajole these prospective lawyers to take the bar exam and practice in jurisdictions with little or no minority population.

The solution, I contend, is a national bar exam that equalizes the playing field for all prospective attorneys and eliminates the arbitrariness of pass/fail outcomes dependent upon where the examinee sits for the bar exam. This movement to a fairer, less arbitrary, national exam is, to some extent, inevitable given recent developments in international law. It is to that development that I now turn.

2. A National Bar Exam: A Pipe Dream or Impending Reality Driven by International Law

Recent developments in International Law will inevitably have an impact on admission to the practice of the bar leading ultimately, I predict, to a national bar examination. To understand this contention, I brief detour into International Law is warranted. Recent International agreements such as the General Agreement on Trade and Services (“GATS”)\footnote{As one author describes it:}

\begin{quote}
Overall, though, the GATS can be described as follows:

“GATS” stands for General Agreement on Trade in Services. The GATS is part of the agreements that were signed in April 1994 when the Agreement Establishing the WTO was signed.

The GATS was the first multilateral trade agreement that applied to services, rather than goods. Accordingly, the GATS raises new issues that Member Bars may not have previously faced. As the WTO web page explains: “This wide definition of trade in services makes the GATS directly relevant to many areas of regulation which traditionally have not been touched upon by multilateral trade rules. The domestic regulation of professional activities is the most pertinent example.”
\end{quote}

and that service is governed by the GATS treaty and will have an impact on who can practice law within a given country, as opposed to within subunits like states within that country.

In an increasingly global world the recognition of foreign qualifications and mobility of workers, including legal professionals, has become an area of intense debate. In particular, the introduction of international agreements to facilitate global trade in goods and services, such as the General Agreement on Trade in Services . . . and international agreements on the recognition of qualifications, such as the United Nations Educational, Scientific, and Cultural Organization [. . .UNESCO] Conventions have made the traditional national based rules and procedures regarding the recognition of foreign qualifications and, therefore, the mobility of foreign workers inadequate or in some cases obsolete.\(^{210}\)

Due to GATS, reforms will have to take place to determine how foreign lawyers can provide their services (which are covered by GATS) in countries that are signatories to the treaty and covered by its provisions.

Only by harmonizing legal education regimes and implementing reforms can the challenges facing legal education and the legal profession be addressed. Necessary reforms include establishing more cohesive mechanisms and practices regarding the requirements for degree granting institutions, updating the requirements for law graduates or others to join the organized Bar and practice law, and implementing mechanisms to oversee and ensure quality assurance and accreditation policies and standards for degree awarding higher education institutions.\(^{211}\)

The bottom line is that inevitably rules will have to change regarding standards for admission to practice law in jurisdictions covered by GATS to allow foreign lawyers to provide their services consistent with the provisions of GATS.\(^{212}\) What is important to note, is that


\(^{211}\) Id. at 4.

\(^{212}\) As noted above, international agreements, such as GATS and Council of Europe and UNESCO Convention; regional agreements, such as the UNESCO Regional Conventions and EU Directives; and federal state system rules, such as those of the ABA, and rules of the Russian Federation, are applicable to recognition of qualifications and competencies in higher education. However, to come into compliance with international obligations changes must be made in the prevailing
GATS, governs countries, not individual or separate jurisdictions (e.g., states or other political subdivisions) within the country covered by the treaty. Hence, it is inevitable that foreign lawyers will gain admission to the bars of the various jurisdictions in the United States in order to provide services consistent with the GATS treaty and the framework established thereby. These reciprocal agreements between countries will allow members of the Bar of, say, France, to practice in the United States and vice versa.213

Essentially, national higher education systems and regulatory frameworks have hindered the mobility of legal professionals and often the quality of legal education. As a result, reforms must be made to improve and harmonize higher education standards, recognition standards and rules, and accreditation standards and mechanisms in order to enable the free movement of professionals, such as lawyers, between countries. Only by harmonizing legal education regimes, establishing more cohesive mechanisms and practices regarding the requirements for degree granting institutions, increasing the requirements for law graduates or others to join the organized Bar and practice law, and establishing mechanisms to oversee and ensure quality assurance and accreditation policies and standards for degree awarding higher education institutions can legal education face the challenges of globalization. As this paper shows, accomplishing this goal will require the adoption of international, or at least regional, standards contained in the aforementioned international and regional agreements and rules; and other multi-national agreements and organizing principles. Until such standards are implemented reciprocity among countries regarding the recognition of degrees and other qualifications, harmonization of quality assurance and accreditation mechanisms and standards, and the ability of foreign lawyers to practice in host countries will not exist, or at best be limited.
Although it is impossible to predict when agreements allowing foreign lawyers to practice in the United States will be finalized and become effective, such agreements appear to be inevitable. Moreover, once these agreements are reached, the French lawyer licensed to practice in Paris, France, will have the ability to practice in any jurisdiction in the United States.\textsuperscript{214} It would not make much sense under GATS to grant foreign lawyers the right to practice law in a foreign country only if they pass the bar exam of that country’s political subdivision, such as the state of New York or California.

If I am correct in my prediction regarding the impact of GATS and its provisions that will usher in an era during which any foreign lawyer can practice law in any jurisdiction in the United States, imagine the impact that would have on the standards for admission to the practice of law for United States citizens attending United States–ABA Approved Law Schools. Those lawyers graduating from my alma mater, U.C.L.A. School of Law, would have less rights and mobility that their counterparts who graduate from a Mexican College of Law and are licensed to practice in Chihuahua, Mexico. Indeed, although it sounds far-fetched now, it would be more efficient for a United States citizen to attend a Canadian law school and become a Canadian barrister if the goal is practice in the United States. This projected future state of affairs leads me to conclude that once GATS is fully implemented and operational, state bar exams will become obsolete and replaced by a national bar examination that will allow any lawyer passing same to practice anywhere in the United States and avail themselves of the reciprocal practice privileges in foreign countries provided by GATS.

3. Raising the Bar–Strengthening the Obstruction in the Pipeline for No Good Reason

As discussed above, the Bar Passage Study documents that African-Americans and other underrepresented minorities do not pass the bar at the same rates as whites and Asians. Although the reason for the differential outcome rates can be debated,\textsuperscript{215} the differential pass rate documented in for law students graduating in 1994 is beyond cavil. One would think, of course, that bar examiners and those responsible for the various bar examinations would view this disparity with alarm and address the issue with alacrity. After all, one would assume that these bar officials, charged with serving as the last gatekeepers, would be very interested in the

\textsuperscript{Id.} at 56.

\textsuperscript{214} I am making the assumption, which I assume to be reasonable, that GATS agreement will allow the foreign lawyer to practice law in any U.S. jurisdiction if the treaty entered into by the Federal Government grants that privilege. It is elemental constitutional law that treaty rights granted to such lawyers would trump local bar rules requiring exam testing, etc. under the Supremacy Clause. Cite.

\textsuperscript{215} See supra notes 000-000 and text accompanying.
One can predict studies, programs and changes designed to help increase the passage rate for underrepresented minorities or, at the very least, the identification and examination of factors causing the differential outcomes.

Instead, however, over the last decade the most prominent (and somewhat uniform) development for bar examiners has been to increase the bar exam passing standard resulting in even more individuals failing to pass the bar exam.

During the 1990s more than a dozen states raised bar exam passing scores, including states such as Texas, Illinois, Pennsylvania, and Ohio that have relatively large number of lawyers . . . In 2003, the Florida Supreme Court narrowly adopted a higher passing standard (Amendments to Rules of the Supreme Court 2003), and Minnesota’s Board of Bar Examiners withdrew a proposal to raise the bar amidst heavy criticism. In September 2002 the bar examiners in New York [the state with the highest number of African-American test takers in the BPS] formally proposed that the court of appeals approve a tougher passing standard (New York State Board of Law Examiners 2002).

The reasons given for supporting an increase in bar exam passing standards are numerous. One primary factor leading to increased bar passage scores is the effort of Dr. Stephen Klein to convince bar examiners that their passing score is too low given his scientific methodology:

216. In the 1980s and 1990s, many states and federal circuits established commissions on racial and gender equality. After extensive study, many of the commissions concluded that people of color were under-represented in the legal profession on both a state and national level, there is a perception of ethnic bias in the court system, and that there is evidence that the perception is based upon reality. To begin to achieve a more racially and ethnically balanced justice system, many commissions recommended that states take affirmative steps to increase minority representation in the bench and bar. . . The failure of the current bench and bar to be as diverse as it could be is partly attributable to the existing bar examination. The current examination disproportionately delays entry of people of color into, or excludes them from, the practice of law.


Klein’s method of setting a passing score appears unique, both among bar processes and in the general literature on setting educational or testing standards. Klein first described his process in 1986, as one he had used to recommend a new passing score the Puerto Rico bar exam. More recently, Klein has used this process to recommend passing scores for the Ohio, Florida, Minnesota and Pennsylvania bar exams.

In brief, Klein collects expert judgments from regular bar graders, practicing attorneys, judges, and law professors about the quality of essays written on a recent bar exam. He then uses those judgments to estimate the percentage of examinees on that bar who would have failed the exam if the expert judgments had been applied. Once he has estimated that percentage, Klein determines the scaled score that would have produced the percentage of failed exams. For example, if Klein estimates from the expert judgments that thirty percent of the examinees on a July 1998 exam should have failed that exam, and thirty percent of those examinees earned scaled scores below 135, then he will recommend 135 as the state’s passing score.218

Others have alleged that the increase in scores is due to a decline in the competency of the test takers.219 Although one would assume that if the exam takers are worse (less competent) than prior exam takers, a higher failure rate would occur without an increase in the standard needed for passing.220 Indeed, the obverse would appear to be true—when competency is

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218. Merritt, et. al., supra note 193 at 941-42 (citations omitted).
219.

One frequent argument for making bar passing standards more stringent is that today’s law school graduates are of inferior quality compared to earlier cohorts. For example, Erica Moeser, president of NCBE, recently voiced support for the pending proposal in Minnesota to raise the bar in light of declining competition to law schools during the 1990’s. In June 2000, Moeser argued, “We now have people spilling out of law schools who may not have made the bottom rung several years ago . . . The hard work of the board of law examiners is drawing the line on what a candidate should know before you given them this powerful tool of a law license.” Likewise, after it was disclosed that the passing score on the Illinois bar exam was raised in 1995, Stuart Duhl of the Illinois Supreme Court’s Board of Admissions (and a previous NCBE chair) defended the court’s action: “People are getting into law schools who aren’t qualified, and law schools are graduating people who aren’t qualified to be lawyers.”

Kidder, supra note 217 at 550-51 (citations omitted).
220. I am not the first to notice the illogic of this particular argument.
increasing, a higher passing standard is needed to maintain the same failure rate on an exam which has not been manipulated or changed to make it harder.221

Still others have contended that higher bar passing scores represent an attempt by the bar to maintain its monopoly on the practice of law by controlling (in this case, by restricting) the flow of new practitioners into the profession. “Social closure theory posits that the bar exam

Comparing figures 1 and 2 establishes that at least a portion of the decline in bar passage rates since 1994 is attributable to lower absolute performance on the MBE during the late-1990s rather than the imposition of more stringent bar passing standards. Thus, Erica Moeser’s recent statement about lower law student quality (assuming arguendo that the MBE measures quality) is at least partially borne out by 1994-2002 MBE scores. However, there is simply no logical connection between this fact and her argument that bar exam passing standards should be made more stringent, since . . . MBE scores are based on an absolute performance standard. In other words, lower MBE scores already result in lower bar passage rates even without a change in passing standards.

Id. at 552-53 (citations omitted).

221. In fact, I agree with Justice O’Connor’s assessment, see supra note 5, that the qualifications of all law school students, including members of underrepresented groups, are getting better, not declining.
standards are raised as an anticompetitive response to a perception that there was an excess supply of lawyers or an insufficient demand for legal services (or both). . . The recent proposals to raise bar passing standards also reflect this concern with too many lawyers.”

222. Kidder, supra note 217 at 555.
Although each of these three theories supporting raising bar exam standards (the pseudo-scientific Klein theory, the allegation that lawyers are less competent and therefore standards need to be raised, and standards need to be raised to restrict the flow of lawyers to provide legal services) has supporter and critics, there is unanimity of support for the view that efforts to raise bar standards have and will continue to have a disproportionately negative impact on those underrepresented in the legal profession—African-Americans, Native Americans and Hispanics.

Artificially high bar passage standards are of special concern because those standards can have a disproportionate impact on minority applicants to the bar. Several studies have documented lower bar passage rates among minority applicants than white ones. Examinations like the bar, therefore, seem to impose special obstacles for members of minority groups.

Under these circumstances, increasing the score needed to pass the bar raises three related concerns. First, even if the change itself does not have a disproportionate impact (i.e., even if the percentage of minority members among

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223. A fourth theory, mentioned in passing in several articles, is that by raising their passing scores, states are simply “keeping up with the Jones”, that is other states who have raised their passing scores:

Perhaps the most common justification for raising passing scores has been simply to keep up with standards in other states. Ohio, for example, announced that it raised its passing score in part because “Ohio’s standard was one of the lowest in the country, placing Ohio 43rd out of 47 jurisdictions.” To keep pace with that trend, Ohio decided to examine its passing score and ultimately to raise that score.

Merritt, et. al., supra note 193 at 939 (citations omitted).


In sum, all of the justifications offered to support higher bar passage standards lack empirical support, overlook controls already in place, prescribe the wrong remedy for an ill-defined disease, or restrict competition. And the simple desire to match passing scores in other states, without real evidence of attorney incompetence, risks reducing the supply of able attorneys available to serve the public without any countervailing benefit.

Merritt, et. al., supra note 193 at 940-41.

225. See supra note 196 and text accompanying.
those who fail the bar remains constant after the change), it increases a known discrepancy. . . Second, raising passing scores will raise the percentage of minority applicants failing the bar to disturbing levels. . . Finally, there is substantial reason to fear that raising bar passing scores will, in fact, have a disproportionate impact on minority members. In general, increased passing scores on the bar exam affect minority applicants more than white ones. In other words, the gap in passing rates between minority and white applicants is likely to grow as passing scores go up and passing rates fall. 226

One reasonable supposition to these continuing efforts to raise bar passage passing scores in face of the overwhelming evidence that such efforts have on minority bar passage is that such actions represent continuing efforts of those in control of the bar and entry into the profession to exclude members of underrepresented minority groups:

At the same time, there is ample evidence that the profession’s long history of exclusion continues to affect black lawyers adversely even if we concede, as the evidence also indicates, that overt discrimination against blacks has decreased markedly over the last three decades . . . Notwithstanding the important progress documented above, a mounting array of evidence confirms that most whites continue to hold a broad range of negative stereotypes about blacks even as they consciously profess to believe in racial equality. At the same time, an equally long line of research confirms what any observer of human nature takes for granted: that people instinctively prefer to work with others who are like themselves. 227

This Article’s analysis of affirmative action, the correlation between LSAT scores, LGPA and ultimately bar outcomes (passage) lends further evidence to the conclusion that those on the bottom for grades and bar passage will continue to be members of underrepresented minority groups. 228 This outcome, for some period of time, is inevitable due to differential outcomes on standardized tests that begin at the elementary school level and persist up to and through the bar examination. 229 However, instead of using these discrepant outcomes as a continuing reason or excuse to justify differential bar exam outcomes or even to increase bar passing scores, 230 the

227. Wilkins, supra note 136 at 924 (citations omitted).
228. See supra notes 000-000 and text accompanying.
229. See supra notes 000-000 and text accompanying.
230. It is not surprising that with respect to race and ethnicity, the NCBE and state bar examiners continue to champion the fairness of the bar exam procedures and results. Thus, the NCBE’s chief psychometric chief consultant, Stephen Klein of the Rand Corporation and GANSK & Associates, argues: “Differences among racial groups on the bar exam also parallel differences among them at key points in the educational pipeline,
correct response is the implementation of a national bar examination in which the field is leveled for all applicants and individual jurisdictions are not allowed to discriminate against minority test-takers for whatever reason, including those specious reasons that have been given to date to justify raising bar examination passing scores.  

**CONCLUSION**

There does appear to be unanimity, however, about one important fact that has a tremendous and detrimental effect on the pipeline: members of underrepresented minorities, especially African-Americans, do not perform as well as whites and Asians on standardized tests, including importantly, the LSAT. This so-called score-scale differential results in African-Americans receiving lower law school grades. As a result, the differential persists in bar examination outcomes. Putting aside for the moment the claim that these negative outcomes call for the elimination of affirmative action, it is crystal clear that substantial losses in the lawyer pipeline are attributable to the differential scores achieved on the LSAT by members of the various ethnic and racial groups. The negative ripple effect created by these differential scores is, I

such as graduation from high school and college. The bar exam simply reflects an accumulated educational deficit. It does not create or exacerbate it.” He also contends that the bar exam “does not discourage qualified students from entering law school nor does it pose an unfair challenge to their becoming practicing attorneys. In short, the exam is not the reason minority group members constitute such a small percentage of the bar. It is primarily an educational pipeline problem.” In addition, the NCBE argues, “Research indicates that differences in mean scores among racial and ethnic groups correspond to differences in those groups’ mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores or performance test scores.” Likewise, bar examiners in New York recently argued, “Differences in minority and non-minority pass rates mirror differences which exist on graduation from law school.” In summary, NCBE and state bar examiners argue that racial and ethnic differences in bar exam performance reflect rather than exacerbate prior differences in educational opportunity.

Kidder, supra note 217 at 565-66 (citations omitted). This rationale begs the question of why the NCBE and bar examiners sought repeatedly to raise the passing scores knowing full well that such actions would indeed exacerbate prior differences in educational opportunity for no justifiable reason.

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231. See supra notes 000-000 and text accompanying.
232. See supra notes 000-000 and text accompanying.
content, beyond debate.233

Hence, the ultimate solution to increasing the flow in the lawyer pipeline is in raising LSAT scores among members of underrepresented minority groups to eliminate the score scale differential which continues to persist. If Professor Sander really cares about diversity, I encourage him to devote his considerable intelligence and skills to addressing and remediating this persistent, albeit diminishing, score-scale differential. That would essentially eliminate all of the obstructions in the pipeline restricting the flow of minority lawyers. Although the score-scale differential between whites and blacks on the LSAT is less than other standardized tests and is shrinking so that it now represents one standard deviation of difference versus the one-and-one-half standard deviation between whites and blacks that was the norm fifteen years ago234 (thereby proving J. O’Connor’s assertion that minority scores and credentials are improving235), its persistence, probably more than any other factor, contributes to the restriction in the flow of potential minority lawyers in the pipeline.

Unfortunately the elimination of the score-scale differential will take time; perhaps decades given the reality that no one, to date, has been able to adequately explain the cause for the differential.236 In the interim steps can and should be taken to stem the losses that occur in the pipeline. Affirmative action should continue to be used until it is no longer needed (which I define rather logically as the elimination of the score-scale definition which hinders members of underrepresented minority group members from competing equally with whites and Asians). Further, prospective law students must be encouraged to apply to schools that they have a realistic chance of gaining admission to given that school’s selectivity. Law schools, in turn, must correctly use the LSAT score in the admission process in order to diversify their student body and graduate sufficient numbers of underrepresented minorities to diversify the profession. The bar examiners and the NCBE must cease and desist in their misguided efforts to raise passing scores on their bar exams unless they can clearly document the fact that those currently passing the bar lack competence and pose a threat to society as a result.

233. The reason for this score-scale differential is of course subject to continuing debate and discussion. Indeed, it should be the subject of concentrated research efforts that will hopefully ultimately lead to its elimination.

234. Johnson, supra note 1, a 340 citing the 1990 LSAT Research Report that indicated that the score gap between African-Americans and whites was then 1.1. See also, Jencks and Phillips, The Black-White Test Score Gap (1998) (asserts that the gap between whites and blacks on standardized test narrowed significantly during the 1970s and 1980s).

235. See supra note 5.

236. See supra notes 000-000 and text accompanying. Perhaps someone reading this Article fifty or one hundred years from now will find it hard to believe that a gap existed and was incapable of resolution. Although much progress has been made in race relations and issues of race, at the beginning of the 21st Century we still live and deal with some of the legacy created by this society’s embrace of legalized racism which began at the founding of this country.
When these interim steps are taken, more members of underrepresented groups will achieve their goal of becoming practicing attorneys. The pipeline will be open and fully flowing and the legal profession will reap the benefits. My prediction is that when this occurs, the elimination of the score-scale differential will not be far behind.237

Finally, there is little dispute that the bar exam is a serious impediment to the production of societally needed underrepresented minority lawyers. Forty years ago the most serious impediment to the production of minority lawyers from underrepresented groups was the attrition that occurred during law school. Although that obstruction has been largely dissol ‌ved, the loss of these lawyers at the end of the “lawyer pipeline” due to the bar examination is especially distressing. These prospective lawyers who fail to make it through the pipeline have successfully navigated their passage through a labyrinth that starts with the LSAT (that produces differential outcomes), includes the application process (that often results in misapplication), through three years of law school (often at considerable cost), and concludes with the last hurdle, the bar examination. The various leaders of bar examinations apparently are content to continue, if not exacerbate, differences in educational opportunities even if those differences are unrelated to lawyer competency and have the affect of continuing a legal profession that lacks diversity as a result of its history of discrimination and exclusion. That view can no longer be accepted or tolerated.

237. For no reasons other than intuition, I believe the score-scale differential will cease when members of minority groups are no longer underrepresented. Hence, I believe in Professor Steele’s thesis that the internalization of minority status and poor performance that may create the score-scale differential. Once the minority status and stigma disappear . . . .
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*June administration.*