Knots In The Law School Pipeline For Students Of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer

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Abstract

This article identifies and addresses one of the most important issues in legal education today: the declining number of students of color (African-Americans, Native Americans, and Hispanics–designated “underrepresented”) admitted to and matriculating at American law schools. This decline in underrepresented students is worsening notwithstanding an increase in applications to law schools from these same students. Furthermore, although affirmative action remains lawful, I contend that it is being negated through actions taken by administrators, deans and bar examiners acting at various stages of the “Law School Pipeline.” Lastly, I note that the underrepresented students, by applying to the wrong law schools–law schools which they have no chance of being admitted– must share some of the blame for this sad state of affairs.

As a result, this article addresses those impediments (e.g., misapplication by students, misuse of the LSAT in admissions) to increasing the flow of underrepresented students of color into our law schools and then, the legal profession. To solve this critical issue of underrepresentation, I provide remedies which, if accepted, will result in the further diversification of law schools without resort to affirmative action (which, I predict, will ultimately be eliminated in higher education).
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KNOTS IN THE LAW SCHOOL PIPELINE FOR STUDENTS OF COLOR:
The LSAT Is Not the Problem and Affirmative Action Is Not the Answer

By

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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,

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 ethnic 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 further addressed in my reply to Professor Sander’s article, A Systematic Analysis of Affirmative Action In American Law Schools: A Reply in Favor of Context, (copy on file with the review).
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.\footnote{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 principles and violative of constitutional law. Further they allege that in the long run the continued use of affirmative action is harmful to minorities and race relations. The gist of the argument is that affirmative action establishes “race” as a viable factor in admissions and consequently, so the argument proceeds, “stigmatizes” minorities as well as treating whites unequally (reverse discrimination). 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. However, I take as a given that 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 the opinion in \textit{Grutter v. Bollinger}\footnote{539 U.S. 306 (2003). Of course, the companion case to \textit{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 \textit{Grutter}.}, the Supreme Court almost wistfully concludes with dicta that affirmative action should not be necessary twenty-five years after the opinion is issued.\footnote{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.} I have written articles in favor of the continued use of affirmative action,\footnote{Yet I, also,}
believe that an optimal state of affairs in legal education is a world in which affirmative action is not used because there is nevertheless a proportionate representation of currently underrepresented groups in our law schools and, subsequently, in the legal profession. In other words, in an optimal “aracial” 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.10

Quite the contrary, we do not live in an optimal “aracial” world but in a society still suffering from the effects of a 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 important issues 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, assuming Grutter, 539 U.S. at 342 (citations omitted).


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 important cultural fact; nothing turns on what eye color you have.”).

9. See supra note 2.

10. Often ignored in 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, which necessitates 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.
affirmative action in not available, 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?11

Indeed, many in the field of legal education, especially those of us intimately involved in the admission process,12 have noticed that although the number of minorities applying to law schools is 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.13 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 question:

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 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 the University of Minnesota Law School I was heavily involved in that school’s 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 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.
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. As a result, even fewer members of these underrepresented groups are passing any bar examination and achieving the goal of becoming a practicing attorney. Although many point to the Law School Aptitude Test (“LSAT”) as a bar to the admission of underrepresented minorities, I conclude that the LSAT is not the inhibiting factor it is alleged to be by many. Further, I will demonstrate that once members of these underrepresented groups sit for the LSAT, decisions made subsequent to the receipt of the LSAT score significantly impact whether that individual will matriculate at a law school and begin their sojourn to become a member of the legal profession. In other words, even though members of underrepresented minority groups do not score as well as whites on the LSAT\textsuperscript{14}, that score scale differential is not dispositive with respect to ultimate matriculation at a law school. Quite the contrary, it is choices made by the applicant, coupled with the misuse of the LSAT by the end users (the Law Schools), that determines whether matriculation will subsequently occur and at which school. Once, however, the decision is made to matriculate, I will document that members of these underrepresented minority groups graduate at the same rate as their white peers.\textsuperscript{15}

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.\textsuperscript{16}

As a result, this Article addresses issues that are, continuing the metaphor, restricting the flow of minorities into our law schools and ultimately the legal profession. These issues are

\textsuperscript{14} For further exposition of this statement, see infra notes 00-00 and text accompanying.

\textsuperscript{15} See infra Part III for an in-depth discussion of this thesis.

\textsuperscript{16} 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”).
identified not because I 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 minorities in the legal profession is not the continued use of affirmative action or its lack of use. I contend that 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. Consequently, 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 underrepresented minority matriculants to the legal profession at law school and beyond, 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 underrepresented minority students to law schools in the United States. These steps may be as simple as educating and encouraging pre-law advisors and counselors to correctly and appropriately advise applicants to apply to the right law schools. The right law schools are those law schools that they have a realistic chance of gaining admission to in order to minimize the “leakage” in the application process that occurs with misapplication.

17. 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 variables employed in an holistic approach the need for the use of affirmative action lessens. For a discussion of the holistic approach in admissions, see Johnson, *supra* note 1.

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

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

20. See infra notes 00-00 and text accompanying.
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\textsuperscript{21}). In the near term, however, certain “neutral” actions such as the recent attempts to toughen state bar exams by raising passing scores (apparently advocated predominantly in order to make passing the Bar harder\textsuperscript{22}), 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 legal profession by lawyers of color\textsuperscript{23}.

By identifying those facts that are restricting the flow I hope to shed light on various 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 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 three parts, including one

\textsuperscript{21} 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 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.

\textsuperscript{22} 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 as 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.

\textsuperscript{23} See infra notes 00-00 and text accompanying.
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. 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 law school. These prospective students, 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 the concluding Part III 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 major 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 III 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.

Consequently, in Part III 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. I buttress my claim for a national bar exam by briefly tracing recent developments in international law that will inevitably lead to the creation of a national bar with a national bar examination.

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24. This part is relatively brief because I have addressed this issue comprehensively in a previous article. See Johnson supra note 1.

25. See notes 000-000 and text accompanying.
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 representatives 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 among the HCBU officials extolling the virtues of a legal education and the opportunities afforded thereby.26

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”.27 And, he was correct. The paucity of African-Americans receiving doctorates in these fields is indeed alarming.28 In addition, the number of African-Americans receiving advanced or terminal

26. 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.

27. 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.

28. As noted by Professor Sander in his Article:
degrees in the other professions (my non-exhaustive lists includes most prominently medicine, business, architecture and engineering) is also a matter of serious concern.\textsuperscript{29}

Thus, the point 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-Americans and African-American males in particular.\textsuperscript{30}

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 doctoral degrees and 6.8% of “first professional” degrees (including degrees in law, medicine, theology, and dentistry). Id. at 191 tbl.299. According to the American Bar Association’s website, blacks earned 7% of all law degrees in that year.


\textsuperscript{29} Again the data produced in Wilder, \textit{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, 2,771 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).

\textsuperscript{30} \textit{See, e.g.}, Ron Matus, \textit{“The Invisible Men,”} St. Petersburg Times, April 17, 2005:
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 proportionately populate all of the professions and

> 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 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.

31. 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 including the fact that 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 to a prospective student than pursuing a doctorate.
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.

However, I disagree with the President’s implicit conclusion that fewer Blacks attending law school means more Blacks attending other graduate or professional schools. More precisely, I contend 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

32. 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.

33. 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 not continue their tenure in higher education. As to these individuals, who I presume have viable alternative and therefore 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 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, would be a waste of time. With these latter individuals, dubbed non-qualifying test-takers, the choice is made not to apply to a law school for perhaps rational reasons (later 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, see infra text at 00-00 and notes accompanying). 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.
advanced degree when they apply to and ultimately do not matriculate at a law school.\textsuperscript{34} 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{35}

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 individuals fail to obtain admission at his or her law school of choice will inevitably be attributable to those individuals receiving LSAT scores well-below that of the other admitted students at the law school of his or her choice.\textsuperscript{36} If that is indeed the case, the odds of that individual doing well or significantly better on other standardized tests, which are prerequisites for admission into these other professional and graduate schools, is also very low.\textsuperscript{37}

Moreover, it follows, that since there are so many seats available in law schools for so

\textsuperscript{34} I choose matriculation or attendance at law school at this stage as opposed to acceptance to a law school because as discussed \textit{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{35} Of course, it is true that some, but not a majority, 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{36} 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 \textit{infra} at notes 00-00 and text accompanying.

many different individuals in every state except Alaska,\textsuperscript{38} in a discipline that essentially has no academic prerequisites except that the individual think logically, analytically and read comprehensively,\textsuperscript{39} that if 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. Therefore, I contend that other professions or programs do not benefit from the leakage.\textsuperscript{40}

Where does the leakage begin? To determine leakage, I accept as given 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, and athletic ability, for example.\textsuperscript{41} 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{42} Indeed, I base that assumption in large part on the fact

\textsuperscript{38} 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, \textit{see supra} note 00, and scores 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.

\textsuperscript{39} 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.

\textsuperscript{40} If, as I contend, 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.

\textsuperscript{41} I have made this argument in several articles including most recently, Johnson, \textit{supra} note 1 at 335. \textit{See also}, Alex M. Johnson, Jr. \textit{How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods}, 143 U. Pa. L. Rev. 1595 (1995).

\textsuperscript{42} As Thomas Sowell has noted, the concept of race has a certain fluidity that has changed/evolved over time to fit the societal context.
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

The term “race” was once widely used to distinguish Irish from the English or the Germans from the Slavs, as well as to distinguish groups more sharply differing in skin color, hair texture, and the like. In the post-World War II era, the concept of “race” has more often applied to these latter, more visibly different categories and “ethnicity” to different groups within the broader Caucasian, Negroid, or Mongloid groupings.


44. 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 China, and few too (though more) that are found in Zaire but not in similar
society, but there is no scientific reason why one socially constructed group, i.e. whites, would possess more of one biological attribute, say 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 categories? To be more direct, the 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).

45. See Johnson, supra note 1 at 336.

46. 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) (copy on file with the review).

47. 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
precise question is why those historically discriminated against, that is, African-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 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.

Alex M. Johnson, Jr., Destabilizing Racial Classifications Based, 84 Cal. L. Rev. 887, at 892 (1996) (citations omitted).

48. 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).

49. 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:
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 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.50 Lastly, American Indian/Alaskan Natives total slightly

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.).

N. 5 at 1044.

50. “Asian” is defined in the 2000 Census as follows:

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.”
over 2,000,000 and comprise .07% of the United States’ population as of 2000.\textsuperscript{51} Addressing the end of the pipeline, the latest available data (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.\textsuperscript{52} 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.\textsuperscript{53}

The numbers, then, are quite telling. Although minorities, as a whole, comprise almost 30% of the U.S. population they total less than 8% of the lawyers practicing law today. Every single minority group (in this instance, 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, there is no shortage of interest in law and the legal profession as a career option for all minority students based on the percentage of graduating college students who choose to pursue law as their first professional degree.\textsuperscript{54} Hence, law and a legal career should attract a disproportionately high number of these students rather than a disproportionately lower number of them. That puzzle or conundrum is the issue that I turn to 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 matriculate, not matriculate or defer.

\textbf{Part II}

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

\textbf{See} \textit{U.S. Census Bureau, Profiles of General Demographic Characteristics 2000, 1 tbl. DP-1 (2001)}, available at \url{http://www.census.gov/prod/cen2000/dp1/2kh00.pdf}.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} Wilder, \textit{supra} note 31, at 4 citing the U.S. Census Bureau data from 1999.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textbf{See} \textit{supra} notes 00-00 and text accompanying. \textbf{See also infra} notes 00-00 and text accompanying.
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. Hence, the relevant pool for the purpose of law school admission are those who have or who will shortly have a bachelor’s degree from an accredited university or college.

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

55. 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).

56. 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:

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.
groups, including particularly 9.0% to African-Americans, 6.3% to Hispanics, 6.5% to Asians, 57 and 0.7% to American Indians 58. Examining these numbers as a whole we see the first significant leakage in the pipeline which is not addressed in this Part of the Article: the disproportionately low numbers of underrepresented minority students (with the exception of Asians and Native Americans) who attend college and receive a bachelor's degree of some type. 59 Given the assumptions made in this Article, one would assume that 30% of the bachelor’s degrees awarded would be awarded to members of minority groups as opposed to the 22.5% detailed above if the college age eligible population mirrors their respective percentages in larger society as reported in the Census data. 60 This leakage is indeed quite serious and, if corrected, could provide law schools with a significant number of applicants and matriculants 61.

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

58. Which is exactly consistent with their percentage in U.S. population.

59. Even those minorities attending college are disproportionately represented in those who fail to complete college in a timely fashion.

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: Collaborating to Expand the Pipeline (Let’s Get Real) (copy on file with review) at 3 (citations omitted).

60. See supra note 00.

61. 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
In other words, it seems patently obvious that increasing the number of minorities 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 hold true, are a result of complex societal forces having to do with issues of race and the societal investment in

Conference referenced above, see 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, which ultimately impacts law school admissions and matriculation:

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: Collaborating to Expand the Pipeline (Let’s Get Real) (copy on file with review) at 2 (citations omitted).

62. 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).
education that are beyond the scope of this article.\footnote{Thus, I concur in the recommendations in the Pre-Conference Report, \textsuperscript{supra} note 61, 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 \textit{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: \textit{Collaborating to Expand the Pipeline (Let’s Get Real)} (copy on file with review) at 7-10.}

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

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 these 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).\footnote{Wilder, \textsuperscript{supra} note 31 at 00.} So, if measured by those interested in taking the LSAT, law and the legal profession remain popular destinations for minority students, and disproportionately so.\footnote{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,} As a result, we start with a positive scenario–law
attracts more minority students to it than it does 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 as a possible career 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 of 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. And, although I am not a psychometrician, I believe the differential rate of non-application among various sub-groups is statistically insignificant.

non-Hispanic whites represented 70% of the LSAT-takers in 1994-1995 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 underrepresented, African Americans approach the proportions they represent of the total population, and Asians are over-represented.

Id. at 16 (citations omitted).

67. Wilder, supra note 31, at 17, Table 12.
Hence, my take at this point in the pipeline is that the leakage of underrepresented minority students 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, the availability of other opportunities (especially for those who scored well and more than likely have other post graduate opportunities), or decisions 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 in which every test taker will apply for admission to law school in the year that they take the LSAT.

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 make at least one application to a law school during 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 be taken at this point to encourage members of underrepresented minority groups to apply.

On the other hand, 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.68

This clearly is statistically significant and represents a serious leakage in the pipeline.

68. Id. At 17-18 (citations omitted).
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—that is, 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 better the chances of being accepted into a law school.69

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.70 African-Americans, for example, score approximately one standard deviation below that of similarly situated whites.71 This score-scale differential between whites and members of

69. This is perhaps too simplistic in that it ignores the impact of the applicant’s undergraduate grade point average (UGPA) in the process. Indeed, all things being equal, I posit that a law school faced with two candidates with identical LSAT score and otherwise similarly situated (e.g., caliber of undergraduate school, rigor of major, similar level of extracurricular activities, community involvement, etc.) will, if forced to make a choice on which applicant to admit, admit the applicant with the higher UGPA. Many schools, over 100 at last count, have an admissions index which “weights” the UGPA and the LSAT at various levels to produce a number for all applicants that can then be compared or ranked based on that number. For example, an index formula, which is a complex mathematical computation weighting the two variables may produce a number between 40 and 60 with a 60 representing an applicant with a 4.0 UGPA and a 180 LSAT (or perfect) score and a 40 may represent an applicant with a 2.0 UGPA and 120 LSAT (the lowest) score. An applicant can then be given a number between 40 and 60 based on their credentials and rank ordered based on the number. Presumptively a 56 is a better, i.e., stronger applicant, than a 55 and a 55 is a stronger applicant than a 54 and so on and so on. The index is selected and produced because it is believed to have a higher correlation in predicting first year law school grades. For a discussion of the use of an index in the admission process and the impact of correlation, see Johnson, supra note 1 at 344-45.

70. Asian-Americans score slightly and statistically insignificantly lower than whites on the LSAT which is one of the reasons they are not underrepresented in law schools but instead are overrepresented. See Wilder, supra note 31 at 18 (Table 14 demonstrates that African-Americans have a 142.8 average LSAT score, Asians score 152.7 compared to whites average score of 153.6. Hispanics average 147.4 and Native Americans average 148.6.)

71. By similarly situated, I am controlling for socio-economic status and undergraduate grade point average—although African-Americans, Native Americans and Hispanics do have UGPA that are less than that of whites on average.
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 Part—that 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. 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.

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.

72. For a discussion of the “mystery” of the score scale differential, see Johnson, supra note 1 at 00.

73. 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 UGPAs 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.

Wilder, supra note 31 at 18.
a finding that merits further study.\textsuperscript{74}

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 “Acceptance Rate” as one of its metrics in evaluating law schools (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 a 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{75} 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 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.\textsuperscript{76} That information was readily available as it was published in the ABA’s Official Guide to Law Schools.\textsuperscript{77} 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.\textsuperscript{78} Today a potential applicant can go on-line and enter his or her

\textsuperscript{74} Id.

\textsuperscript{75} U.S. News and World Report, 2007 Edition America’s Best Graduate Schools, at 44.

\textsuperscript{76} 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.

\textsuperscript{77} Cite to appropriate volume.

\textsuperscript{78} 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
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. 79 Hence,
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

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 25th 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 compete at Yale Law School with a median LSAT of 172 and a 25th 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 25th 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.

79. See, 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
score as 120 and your UGPA as 2.0 you will have a 0-5% chance of getting into Yale Law
School. I would hazard 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.
given the information that is available and discussed above.\textsuperscript{80} 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 need).\textsuperscript{81} 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.\textsuperscript{82} Unfortunately, the data demonstrates that applicants do not necessarily apply to a law school at which they have a legitimate chance of admission.

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,\textsuperscript{83} 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

\textsuperscript{80} 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, \textsuperscript{81} \url{http://www.ecfmg.org.eras/} for further details regarding the medical schools’ procedure for admission.

\textsuperscript{81} Cite to LSAC website and fee waiver process.

\textsuperscript{82} 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 individual’s 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 \url{http://lsacnet.org/data/lsac-volume-summary.htm}.

\textsuperscript{83} See Johnson, \textit{supra} note 1 at 000.
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.84

Failing to receive a favorable result from any law school is an unfortunate end which 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 chances 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.85

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 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

84. 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.

85. See supra note 75.
holistic approach or the evaluation of the whole person in admissions. Yet, given the misaplications 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. Hence, I believe members of underrepresented groups are applying to law schools to 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.

Consequently, I believe in the appropriate use of affirmative action as called for by the Supreme Court in the Grutter opinion. Grutter allows the race or ethnicity of the applicant to be considered as a “soft variable” in what the Court termed a “highly individualized, holistic

86. See Johnson, supra note 1 at 000.

87. Which, as discussed immediately below, is not the definition of affirmative action or how affirmative action is lawfully deployed in the admission process.

88. Supra note 5 and text accompanying.

89. The Court in Grutter wrote:

Grutter, 539 U. S. at 315 (citations omitted).
review of each applicant’s file in order to achieve the goal of diversity. What the Court did 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. At some point 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 an impermissible or unfavored “cut-off” score. Moreover, no one can predict ex ante what that impermissibly low score will be—it is a function of the applicant pool and its 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 hazard 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

90. 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. 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).

91. 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 regarding the appropriate use of the LSAT in the admission process.

92. 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.
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.93

93. 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 variable—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 variable—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 validity and utility of two commonly used predictors of academic success in law school, LSAT score and UGPA, when the criterion measure is grade point average at the completion of law school (cumulative LGPA). The study also examines the multiple correlation of LSAT scores and undergraduate grade-point average (UGPA) with cumulative LGPA. The question of interest in these analyses...
is whether there are differences in the strength of the relationship between the two predictors and cumulative LGPA, on the one hand, and between them and first-year LGPA, on the other. The data are examined for individual schools as well as within six clusters of law schools that are similar to one another on a variety of school and student body characteristics.

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. Conversely, elsewhere I have argued that affirmative action must be employed 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. The policy of affirmative action has created unrealistic expectations in the applicant pool and perhaps in certain pre-law advisors as well. That expectation is not a realistic one given the state of the admission pool and the manner in which affirmative action operates in the admission process. Here, education is the key and appropriate remedial response. Consequently, African-American and other underrepresented minority applicants to law school with a LSAT score of

94. See Sander supra note 3. My problem with the thesis presented by Sander is addressed in Johnson, supra note 3 at 00-00 and text accompanying.

95. 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.

96. Here I agree with Professor Sander and the primary thesis of his article, see supra note I, that affirmative action is employed in almost every law school as a result of the “cascade effect” created by affirmative action’s use by selective or elite schools.
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 their numbers are not as objectively strong as other (read identical) 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 as admissions is not strictly or solely a numerical determination (never has been, never will be) i.e., produce a certain number on the LSAT and 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 their 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,97

97. 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 alternated between using the school’s median LSAT and the school’s 75th and 25th percentile LSAT scores in compiling the rankings. In the 2006 U.S. News rankings, U.S. News computed a median based on the school’s reported 75th and 25th percentiles even though said median, as computed by U.S. News, 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:
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 of the rankings.\footnote{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 ensure 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, \textit{see} \textit{Johnson, supra} note 00), students with any LSAT score without fear of the impact on rankings. 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. 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 \textit{see, for example, Yale and Stanford above).}}

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. Furthermore, it is also responsible for the 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

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 25\textsuperscript{th} and 75\textsuperscript{th} percentiles. \textit{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 25\textsuperscript{th} and 75\textsuperscript{th} percentiles. 25+75/2=CALC midpoint. . . (citation omitted).
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. 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.

$\begin{align*}
\text{U.S. News rankings of Law Schools is dominant in influencing applicants’ and others’ views of Law Schools because law schools are largely homogenous (given the ABA Section on Legal Education’s role in regulating same as the accrediting body for U.S. law schools),} & \text{ and the fact that U.S. News has cornered the market for the evaluation of law schools (essentially has a monopoly and exercises monopoly power) as the “first-mover” for evaluating law schools.} \\
\text{Rankings of law schools, especially the U.S. News ranking of Law Schools, has a serious positive (if ranked highly) and negative (if the law school ranking drops) impact on law schools affecting every facet of what they do including attracting resources, faculty, students, alumni contributions, decanal tenure, etc.} \\
\text{U.S. News uses the median LSAT as part of its methodology for evaluating and ranking the law schools (“[t]hat variable is weighted so that it comprises 0.125 of} & \\
\end{align*}$

\end{document}

99. See, Johnson, \textbf{supra} note 1.

100. Id. at 326, n. 17..


102, Johnson, \textbf{supra} note 1, at 000.

103. Id. at 000.
the overall weight attributed to the ranking”).

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. That variable is the median LSAT of the matriculating class.

For reasons that are largely inexplicable, certain minority groups, but not Asians, score less well on standardized tests, including the LSAT, than whites. 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).

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 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.

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104. Id. at 343.

105. Id. at 348-354.

106. Id. at 000.

107. 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.

108. 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.

109. 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 in 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. 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. 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.

The major leakage in the pipeline that occurs at the stage when 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, but rather 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 consider race in the theoretically subjective process of admission--that use is minimized or sacrificed for the goal of attaining educational superiority vis-a-vis one’s peer schools.

Despite the tenor of my argument to this point, I am not suggesting, 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 admission, whereby 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


111. See, e.g., 2007 ABA Guide supra note 94.

112. The increase in Asian-Americans in law school and the corresponding decrease in African-Americans so that there are now more Asian-Americans matriculating at law schools than African-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.
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 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 their 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 75th or 25th percentile of that schools LSAT score if the number of students admitted as a result is 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 groups at this stage such that the decision to matriculate at a law school after receiving a

\[113\text{ See supra notes 99-100 and text accompanying.}\]
favorable admission decision, does not constitute a bottleneck in the pipeline. The 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 proportionately increasing the number of possible minority attorneys in the pipeline.
PART III

THE BAR EXAM: A SERIOUS KINK IN THE PIPELINE

Almost all would agree that the bar exam is a severe impediment to certain members of underrepresented minority groups becoming practicing attorneys.114 The LSAC’s path-breaking Bar Passage Study,115 as well as later studies done by Dr. Steven Klein,116 have conclusively demonstrated that African-Americans and members of other underrepresented groups do not pass the bar exam at the same rate 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.117

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.118 Instead 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

114. As noted supra, perhaps focusing solely on those law students who become practicing attorneys is too narrow a measure 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.

115. See supra note 000 and text accompanying.

116. See supra note 000 and text accompanying.

117. See Appendix 1 which is Table 10 from the Bar Passage Study that summarizes eventual bar examination outcome for different ethnic groups.

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), however, I would like to take this opportunity to focus on two factors that unduly restrict bar passage that have heretofore gone relatively unnoticed.

First, the recent efforts by many state bars to raise their cutoff scores 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, 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 Data, if patiently worked through, reveals that the disparities in pass rates among states creates the equivalent of misapplication by underrepresented minority test-takers. By that I mean, it is clear that some underrepresented minorities are taking bar exams in certain states and failing 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, 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.

professions,\textsuperscript{121} 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.\textsuperscript{122} I then conclude this part by strengthening my argument for a national bar examination with a critique of efforts, lead by Dr. Steven Klein,\textsuperscript{123} 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, perhaps relatedly, to exclude underrepresented minorities from the practice of law.

1. Misapplication on the Bar Examination

First, a caveat: very few jurisdictions (California, with various studies by Dr. Klein as the exception),\textsuperscript{124} 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 law graduates 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.\textsuperscript{125} There obviously would be more minority lawyers if these

\textsuperscript{121} Cite to Medicine, Architecture, Engineering and others.

\textsuperscript{122} See infra notes 000-000 and text accompanying.

\textsuperscript{123} See infra notes 000-000 and text accompanying.


\textsuperscript{125} I am not naive enough to believe that individuals choose to take a bar exam
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.126 For the cohort studied in the Bar Passage Study, over 40% of the African-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).127 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).128 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).129 This is hardly surprising or earth shattering data.  

principally based on their chance of passing that bar exam–although I do recall in the late 80's and early 90's it was quite common for many of my former students to take the D.C or Pennsylvania Bar Exam because D.C. had a relatively easy bar exam and Pennsylvania only graded the Multi-State Bar portion of the exam if the taker achieved above a certain score, and passing on either or both exams allowed the taker to “waive” into much tougher testing jurisdictions like New York. Obviously there are many important variables that make up the calculus determining which bar exam to take. However, with reciprocity, waive-in rules, attorney exams, etc. if the goal is to produce more minority lawyers, who with their license may readily and freely move throughout jurisdictions practicing law, there clearly would be a benefit from having more minority lawyers who gain their first admission to the bar in a state where the score they achieve provides them with their license–even if that state is not their first choice in which to practice law.

126. The LSAC’s Bar Passage Study, supra note 126, which served as the principal data source and reference for Professor Sander’s article, followed and surveyed the students entering law school in 1991 and graduating in 1994 and tracked that group’s bar result for five years to 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.

127. Wightman, supra note 126 at 17.

128. Id.

129. Id.
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 which 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 score 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 case 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) taking the bar exam disproportionately in those states.

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.

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).
with lower pass rates. This particular question has been addressed in the Bar Passage Study.\textsuperscript{132}

\textsuperscript{132} 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:

\begin{tabular}{|l|}
\hline
**New England** & Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont \\
\hline
**Northeast** & New Jersey, New York, Pennsylvania \\
\hline
**Midsouth** & Delaware, District of Columbia, Kentucky, Maryland, North Carolina, Tennessee, Virginia, West Virginia \\
\hline
**Southeast** & Alabama, Florida, Georgia, Mississippi, South Carolina \\
\hline
**Great Lakes** & Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin \\
\hline
**Midwest** & Iowa, Kansas, Missouri, Nebraska, North Dakota, South Dakota \\
\hline
**South Central** & Arkansas, Louisiana, Oklahoma, Texas \\
\hline
\end{tabular}
Among questions related to the variability in bar passage rates among jurisdictions were several about how bar applicants from different ethnic groups 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...
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, 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 significantly different 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.

Assuming my thesis is credible, that members of underrepresented minority groups take the bar exam disproportionately in states that have higher passing scores resulting in lower pass rates and as a result disproportionately fail the exam at higher rates than whites, it still begs

133. 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, supra note 126 that is attached hereto as Appendix 2.

134. Id. at 48 (emphasis added) (citations omitted).

135. 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
the question of what realistically can be done to improve the flow in the pipeline. It is not realistic to suggest, as it is 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 test-takers pass the bar exams in those states. The reason why African-Americans and other underrepresented minorities take bar exams in the states they choose is primarily because these areas are where minority populations are largely concentrated. If the goal of increasing the number of minority lawyers is in part for them to service minority populations, it makes no sense, even if it were 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 move 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.

Midwest. The Midwest is the region that tested the largest percentage of white examinees.

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.
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 briefly detour into International Law. Recent International agreements such as the General Agreement on Trade and Services (“GATS”)\(^{136}\) will have a profound impact on bar admission of foreign lawyers. Given that the practice of law is a service, the GATS treaty 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*

\(^{136}\) As one author describes it:

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.”

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. 137

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. 138

The bottom line is that rules will inevitably 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. 139 What is important to note is that


138. Id. at 4.

139. 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 national standards models in existence in most countries today. As this paper demonstrates, higher education recognition policies and practices, the rules and regulations pertaining to the recognition of professional
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.\textsuperscript{140}

\begin{quote}
qualifications, and the rules and regulations regarding the ability of foreign holders of qualifications to establish themselves under an equivalent professional title must be changed to comply with the GATS and other international obligations. Like other services covered under the GATS, the regulation of the legal profession must be reformed to address the issues of higher education and trade in higher education present. International frameworks must be established and promoted to improve transparency and promote mobility.
\end{quote}

\textit{Id. at 55.}

\begin{quote}
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
\end{quote}
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.  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 than their counterparts who graduate from an English Department of Law and are licensed to practice in Cambridge, England. Indeed, although it perhaps 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.

accreditation mechanisms and standards, and the ability of foreign lawyers to practice in host countries will not exist, or at best be limited.

Id. at 56.

I am making the assumption, which is a reasonable one, 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.
Although the reason for the differential outcome rates can be debated, the differential pass rate is documented for law students graduating in 1994 and 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 diversification of the legal profession. 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

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142. See supra notes 000-000 and text accompanying.

143.

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.

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).144

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:

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.145

Others have alleged that the increase in scores is due to a decline in the competency of the test takers.146 One would assume, although, that if the exam takers were worse (less


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

146.
competent) than prior exam takers, a higher failure rate would occur without an increase in the standard needed for passing. Indeed, the obverse would appear to be true—when competency is increasing, a higher passing standard is needed to maintain the same failure rate on an exam 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).

147. I am not the first to notice the illogic of this particular argument.

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).
which has not been manipulated or changed to make it harder. ¹⁴⁸

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 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.”¹⁴⁹

¹⁴⁸ 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.

¹⁴⁹ Kidder, supra note 217 at 555.
Although each of these three theories\textsuperscript{150} 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 supporters and critics,\textsuperscript{151} there is unanimity of support for the view that efforts to raise bar standards have and will continue to have a disproportionately negative

\textsuperscript{150} A fourth theory, mentioned in passing in several articles, is that by raising their passing scores, states are simply “keeping up with the Joneses”, 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.
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 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.

One reasonable supposition to be derived from these continuing efforts to raise bar exam passing scores in the face of overwhelming evidence regarding the effect such efforts have on minority bar passage is that such actions represent a continuing effort by 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

152. See supra note 196 and text accompanying.

are like themselves.\textsuperscript{154}

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.\textsuperscript{155} 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.\textsuperscript{156} 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,\textsuperscript{157} the

\begin{itemize}
\item \textsuperscript{154} Wilkins, \textsuperscript{supra} note 136 at 924 (citations omitted).
\item \textsuperscript{155} See \textsuperscript{supra} notes 000-000 and text accompanying.
\item \textsuperscript{156} See \textsuperscript{supra} notes 000-000 and text accompanying.
\item \textsuperscript{157} 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, 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
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.\textsuperscript{158}

\textbf{CONCLUSION}

Kidder, \textit{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.

\textsuperscript{158} \textit{See supra} notes 000-000 and text accompanying.
There does appear to be unanimity of agreement that members of underrepresented minorities, especially African-Americans, do not perform as well as whites and Asians on standardized tests, including importantly, the LSAT. They enter law schools with lower LSAT scores than their peers and perform according to the LSAT score—that is, lower than their white peers. As a result, the differential outcomes persists in bar examination outcomes. Putting aside for the moment the claim that these negative outcomes call for the elimination of affirmative action,\textsuperscript{159} 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 contend, beyond debate.\textsuperscript{160}

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. It is verifiable, however that the score-scale differential between whites and African-American on the LSAT is less than other standardized tests and is shrinking. Currently that differential is one standard deviation of difference versus the one-and-one-half standard deviation between whites and blacks that was the norm fifteen years ago\textsuperscript{161} (thereby proving J. O’Connor’s assertion that minority scores and credentials are improving\textsuperscript{162}). However, 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.\textsuperscript{163} In the interim, steps can and should be taken to stem the losses that occur in the

\textsuperscript{159} See supra notes 000-000 and text accompanying.

\textsuperscript{160} 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.

\textsuperscript{161} 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).

\textsuperscript{162} See supra note 5.

\textsuperscript{163} See supra notes 000-000 and text accompanying. Perhaps someone reading this
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 differential 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 National Conference of Bar Examiner (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.

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.

Finally, there is little dispute that the bar exam is a serious impediment to the production of societally-needed underrepresented minority lawyers. The loss of these lawyers at the end of the “lawyer pipeline” due to the bar examination is especially distressing. These prospective lawyers who 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

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.

164. Cite to the NCBE and its role in regulating bar examinations nationwide.

165. For no reason 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 it is the internalization of minority status and poor performance that may create the score-scale differential. Once the minority status and stigma disappear . . . .

166. Forty years ago the most serious impediment to the production of minority lawyers from underrepresented groups was the attrition that occurred during law school. That obstruction has been eliminated. Further, the largely historical issue of “attrition” and its impact on members of underrepresented minority groups is addressed in my essay, A Systematic Analysis of the Impact of Affirmative Action on Law Students of Color: A Reply in Favor of Context, supra note 3.
examinations apparently are content to continue, if not exacerbate, differences in career opportunities even if those differences are unrelated to lawyer competency and have the effect of maintaining 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.
### TABLE 10

*Number and percentage of study participants by ethnic group and eventual bar examination outcome*

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*Percent shows the percentage within each ethnic group who passed and failed.

**APPENDIX 1**
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<th>American Indian % of Group</th>
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<th>Asian American % of Group</th>
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*June administration.