KNOTS IN THE PIPELINE FOR PROSPECTIVE LAWYERS OF COLOR:

THE LSAT IS NOT THE PROBLEM AND AFFIRMATIVE ACTION IS NOT THE ANSWER

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INTRODUCTION

Putting aside momentarily the debate over the appropriate use of affirmative action in law school admissions,¹ almost all would agree that

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¹ See, e.g., 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 “merit” test like the Law School Admission Test (LSAT) is used to screen for
increasing the number of diverse or underrepresented individuals in law schools, and subsequently the legal profession, is a laudable goal and one that will have a salutary effect on the legal profession and, ultimately, society. The debate, to date, has centered on whether affirmative action can lawfully be used to achieve that increase and, if so, whether the use of affirmative action is beneficial for its recipients. Further, both opponents and supporters of affirmative action agree that the elimination of the need for the continuing use of affirmative action is also a laudable goal and one that should be embraced societally.

In Grutter v. Bollinger, the Supreme Court almost wistfully concluded with dicta that affirmative action should not be necessary twenty-five years after the opinion. I have written an article in favor of the continued use of affirmative admission, see Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 CALIF. L. REV. 953 (1996) (contending 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) (contending that it is the misuse of the LSAT by deans and others in admissions that is inimical to the interests of underrepresented minorities). 2. 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/as, 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.


4. 539 U.S. 306, 343 (2003) (citations omitted) ("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.")}. Of course, the companion case to Grutter, Gratz v. Bollinger, found the
action (actually going so far as to suggest that even quotas should be lawful), yet I also believe that an optimal state of affairs in legal education is a world in which affirmative action (including, of course, quotas) 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 society there would be no need for affirmative action and all would support the elimination of affirmative action in admissions because blacks, Hispanics, and Native Americans (the underrepresented minority groups) would be admitted to law schools at least in proportion to their percentage of the U.S. population without its use.

Quite the contrary, we do not live in an optimal "aracial" world, but in a society still suffering from the effects of a 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. I contend, however, that the debate over the efficacy of affirmative action is somewhat misplaced. Instead, I posit that the underrepresentation of minority lawyers is created by impediments in the educational and licensing pipelines that produces lawyers. Indeed, I demonstrate that there are other significant factors limiting the enrollment of these underrepresented individuals in law schools. Furthermore, I address what steps can and should be taken to increase the enrollment of these very valuable students—without using affirmative action—so that they are no longer underrepresented when measured by their representation in larger society.

I do so from the perspective of one who has been intimately involved in the admission process and the operation and effect of the LSAT on that process for the last quarter of a century. From 1989-2004 I was a volunteer for the Law School Admission Council (LSAC), the non-profit entity that produces the Law

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use of certain "affirmative action practices," for example, 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 the Court's opinion in Grutter. 539 U.S. 244, 270, 275-76 (2003).


6. See Johnson, supra note 1 (arguing that 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 below, 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 55-58 and accompanying text. As to the facile claim that the LSAT should be abolished to increase the flow, see Johnson, supra note 1 at 337-42, and Alex M. Johnson, Including Diversity in U.S. News' Rankings: One Small Step in the Right Direction, 27 ST. JOHN'S J. C.R. & ECON. DEV. (forthcoming 2013) [hereinafter Johnson, Including Diversity].
School Aptitude Test ("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." 7 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. 8

More precisely, many in the field of legal education, and especially those intimately involved in the admission process, have noticed that although the number of minorities applying to law schools is increasing slightly, the number of certain minority students (that is, African-Americans) admitted to and matriculating at our law schools is decreasing both as an absolute number and as a percentage of those students actually attending law school while the number of Asian-Americans is increasing. 9 This allows law schools to continue to claim that they are diverse when they are actually becoming less diverse, biracial (white and Asian-American) institutions. This has led to a renewed emphasis on the factors that have caused this decline in law school matriculants (among underrepresented minorities, especially African-Americans) and leads directly to this Article's primary question: What is limiting the number of minority matriculants, particularly African-Americans, 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 licensed attorney. Although many point to the

7. Johnson, supra note 1, at 309.
8. Id.
9. For further discussion of this disturbing trend, see infra note 55 and accompanying text.
LSAT as a serious impediment to the admission of underrepresented minorities to the legal profession, I conclude that the LSAT is not the inhibiting factor it is alleged to be. Further, I will demonstrate that once members of these underrepresented groups sit for the LSAT, decisions made after receiving their 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,\(^\text{10}\) that score scale differential is not dispositive with respect to ultimate matriculation at a law school. I demonstrate that the choices made by the applicant about where to apply to law school, coupled with the misuse of the LSAT by the end users (the law schools), determine whether matriculation will subsequently occur and at which school. Once the decision is made to matriculate, I document that members of these underrepresented minority groups graduate at the same rate as their white peers.

I make this point now to emphasize how important the *application decision* is for underrepresented students. It is that decision—which law school to apply to—not matriculation or performance in law school, that realistically determines how many law graduates will take the bar examination from these underrepresented groups, as whites and African-Americans accepted to any law school matriculate and graduate proportionately. And if potential law school students apply only to law schools that they have literally zero chance of being admitted to, those potential law students, as a result of their misapplication, will not be admitted to any law school.\(^\text{11}\) 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 given the differential cut or passing scores used by fifty-one licensing jurisdictions.\(^\text{12}\)

Given the various cut scores that exist in the fifty-one jurisdictions, an applicant with a passing score for one jurisdiction may fail the bar in the jurisdiction in which he or she sat for the exam given the higher cut or passing score. That potential attorney represents leakage in the pipeline producing

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10. *See infra* notes 55-58 and accompanying text.

11. As detailed below, a student with an LSAT score of 140 has literally no chance of being admitted to a selective school like Stanford or Virginia no matter what his or her other attributes. *See infra* notes 65-67 and accompanying text. If that student applies only to those two schools and no other, that student will not be a matriculant that fall. This misapplication results in the loss of a potential matriculant who may have been admitted to a less selective school.

12. This is also discussed below in Part III. The bottom line, however, is that bar passage rates are significantly different—lower—for members of underrepresented minority groups. As discussed below, 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 (the so-called "eventual bar outcome"). *See infra* notes 93-95 and accompanying text.
lawyers of color by ultimately reducing the number of attorneys of color eligible to practice.

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 steps are necessary 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 the applicant has a realistic chance of gaining admission to given their objective qualifications—LSAT score and undergraduate grade point average (UGPA). If minority applicants apply to the right law school, this will minimize the “leakage” in the application process that results from misapplication.

Conversely, some curative 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).\(^\text{13}\) 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 examination harder),\(^\text{14}\) 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.\(^\text{15}\) Moreover, efforts should be focused on the elimination of differential cut or

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13. *See Johnson, Including Diversity, supra note 6* (arguing for inclusion of Diversity Index in the law school rankings published by *U.S. News and World Report*. 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. I hope to force law schools to confront 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, Including Diversity, supra note 6*. Perhaps one day deans will direct their admission directors to value diversity more than the rankings.

14. 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 name of the state—usually California). In other words, there does not 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. *See infra* note 103 and accompanying text.

15. *See infra* notes 84–85 and accompanying text.
passing scores and the implementation of a national uniform cut or passing score at a reasonable level that ensures the competence of those admitted to the bar in all jurisdictions, but does not negatively impact exam takers of color who disproportionately take the exam in a handful of states.

In order to accomplish this objective, I divide this Article into three parts. In the brief Part I, 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 among underrepresented African-American students at the application stage of the process leading to matriculation at a law school, with a lesser focus on Hispanics and Native Americans given the relative paucity of studies focusing solely on these two different groups, albeit for different reasons.\footnote{16
Although the Wilder study that serves as the focal point of this Article, see \textit{Wilder}, infranote 19, documenting the application patterns of African-Americans and their subsequent matriculation at law schools does provide some data for Hispanic and Asian-American students, the study's principal contribution is the details it provides regarding African-American students and their application patterns and matriculation rates. See \textit{infra} notes 43-59. The same emphasis on African-Americans applies to Professor Wightman's study that analyzes bar passage data. See \textit{infra} notes 80 and 89-105 and accompanying text. One can speculate that the focus has been on African-Americans because of two distinct variables: First, Hispanics can be of any race and that may complicate accumulating distinct and verifiable data regarding this classification. See \textit{infra} notes 34-38 (discussing the different racial classifications). Second, being identified as Hispanic in American society does not necessarily equate with being discriminated against in American society given the fact that Hispanics were not enslaved as a group and given that they can be of any race, their morphological traits (how they look) may not identify them as a minority or a member of an underrepresented group. Native Americans present a different, albeit more complex issue. The issue is not one of identification, but of small numbers. Those small numbers may inhibit valid empirical analysis of data detailing their presence and position in the pipeline. As discussed above, Asian-Americans, the other major minority group in American society, are not currently underrepresented in either the pipeline or the legal profession relative to their percentage of the U.S. population and are therefore not included in my definition of underrepresented group for the purpose of this article.

17. This part is relatively brief because I have addressed this issue comprehensively in a previous article. See \textit{Johnson}, supra note 1.}
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 focus directly on the last major obstruction in the pipeline created by the various state bar examinations. Instead of focusing on grades attained by minority students and their impact on bar passage, Part III examines directly bar passage rates in thirty-seven different jurisdictions to determine what impact differential cut or passing scores in those bar examination jurisdictions have on potential minority attorneys in the pipeline. By examining the cut score or pass rates in states in which African-Americans and Hispanics sit for the bar exam, I demonstrate that the state in which the bar exam is taken is as important as the law school to which these applicants applied.

Consequently, in Part III my focus is on yet another version of "misapplication"—the selection of bar exams taken by underrepresented minorities. The solution proposed herein is a national uniform cut or passing score for standardized bar examination tests (in lieu of a national bar examination) that equalizes the playing field for all prospective attorneys and removes incentives, addressed below, to create artificial barriers to the practice of law that have a disproportionate impact on law graduates of color. I conclude, therefore, with a brief exegesis of the debate over the efficacy of a uniform, reasonable cut passing score for individual state bar examinations. Such a uniform cut score will ensure that competent attorneys are licensed to practice law at the state, rather than national level, but without the disproportionately negative impact that the current mishmash of cut scores has on the number of African-American examinees.

I. THE SIZE OF THE PIPELINE

Almost fifteen years ago, I attended a conference in Atlanta, Georgia sponsored by the LSAC. The invitees to the conference were Presidents and pre-law advisors from Historically Black Colleges and Universities (HBCUs) and representatives and officials from the LSAC. The goal of the conference was to increase the dialogue between the HBCUs 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.18

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18. LSAC member law schools are all law schools that are accredited by the American Bar Association's Section on Legal Education. Currently there are 202 ABA approved law schools, and therefore over 202 member law schools of the LSAC. See ABA-Approved Law Schools, AM. BAR ASS’N, http://www.americanbar.org/groups/ legal_education/resources/aba_approved_law_schools.html (last visited Nov. 1, 2012).
At one point, I recall speaking to an HCBU president and exhorting him to encourage his graduates to apply to the University of Virginia Law School. That president pointed out a fact which needs to be acknowledged as part of this discussion: he 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.”

And he was correct. 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% to Native Americans or American Indians—notwithstanding the fact that 15.8% of African-Americans between the ages of 25-29 in 1998 had graduated from college. Examining other statistical data, African Americans, for example, were awarded 8.3% of all bachelor degrees received in 1998.19

The paucity of African-Americans receiving doctorates in all fields is indeed alarming. Per the 2002 Statistical Abstract of the United States, African-Americans received only 8.2% of master’s degrees awarded in 2001, only 4.9% of doctoral degrees awarded, and 6.8% of “first professional degrees”: law, medicine, theology, and dentistry in 2001.20 In addition, the number of African-Americans receiving advanced or terminal degrees in the other professions (my non-exhaustive list includes most prominently medicine, business, architecture and engineering) is also a matter of serious concern.21

Although I disagreed with that president’s view that law schools received their fair or adequate share of African-American college graduates,22 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 admission 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 generally infra notes 60-61 and accompanying text. 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

21. See WILDER, supra note 19 (presenting data amply supporting this assertion). In examining the first professional degrees awarded in 1999-2000, African-Americans were awarded a total of 5553 first professional degrees. Of that number, 2771 were awarded in law, dwarfing and doubling the number of first professional degrees awarded in the next most popular field, medicine (with 1106 medical degrees awarded). Id. at 16.
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agree with his larger point that there are not enough graduates of color to proportionately populate all of the professions and academia. My point herein is not that law and the legal profession fail to attract their 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 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 school24 choose not to pursue another advanced degree when they apply to and ultimately do not matriculate at a law school.25

starting salary is double or triple that of one holding a doctorate in academia or elsewhere, one can understand why law and the legal profession may be more attractive to a prospective student than pursuing a doctorate. See generally 2012 Best Law Schools: University of Virginia School of Law, US NEWS & WORLD REP., http://gradschools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/university-of-virginia-03162 (last visited Jan. 23, 2013) (finding median private sector starting salary among University of Virginia School of Law graduates to be $160,000); David J. Hanson, Starting Salaries, CHEM. & ENGINEERING NEWS (Mar. 14, 2011), http://cen.acs.org/articles/89/i11/Starting-Salaries.html (finding the median new Ph.D. graduate starting salary to be $76,250 in 2009).

23. 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 black males. See, e.g., Ron Matus, The Invisible Men, ST. PETERSBURG TIMES (Apr. 17, 2005), http://www.sptimes.com/2005/04/17/Worldandnation/The_invisible_men.shtml (“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 eleven public universities, black women outnumber black men 2-to-1.”).

24. 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 pursuit of higher education. As to these individuals, who I presume have viable alternatives and therefore choose not to apply to law
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. 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, are also very low.

Where does the leakage begin? To determine leakage, I accept as given the simple and basic premise that people of all races are inherently equal as it pertains to the possession or distribution of important attributes like 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 is 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 to the contrary: that there is indeed a law school for everyone should they apply to the right law school based on their LSAT score and that we shouldn’t lose any test-taker from an underrepresented minority group. Seeinfra notes 70-71 and accompanying text.) 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.

25. I choose matriculation or attendance at law school at this stage as opposed to acceptance to a law school because as discussed below, see infra notes 53-54 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 stanch. 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.

26. 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 120-180 wherein the median score for all test takers is roughly 156 and a ten point difference represents one standard deviation in the score achieved. SeeLisa Anthony Stilwell et. al., Law School Admission Council Technical Report 11-02, Predictive Validity of the LSAT: A National Summary of the 2009 and 2010 LSAT Correlation Studies 7 (2011), http://www.lsac.org/lsacResources/Research/TR/pdf/TR-11-02.pdf. See also infra notes 50-52 and accompanying text.

intelligence, talent, and athletic ability. 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. Indeed, I base that assumption in large part on the fact that there is no biological definition of race. As I have stated elsewhere, I conclude that when we refer to race we are reifying a social construction of race rather than a biologically defined construction. As a social construction, race has become a powerful factor in American society, but there is no scientific reason why one socially constructed group—i.e.,

28. I have made this argument in several articles including most recently, Johnson, supra note 1, at 335. See also Alex M. Johnson, Jr., How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods, 143 U. PA. L. REV. 1595, 1606 (1995).

29. As Thomas Sowell has noted, the concept of race has a certain fluidity that has evolved over time to fit the societal context:

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 Mongoloid groupings.

THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 6 (1994); see also Christopher A. Ford, Administering Identity: The Determination of "Race" in Race-Conscious Law, 82 CALIF. L. REV. 1231, 1239 (1994) (arguing that racial identity is largely a social rather than a biological construct).


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

KWAME A. APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 35 (1992) (citations omitted) (emphasis in original). For a more thorough discussion of this issue, see also Alex M. Johnson, Jr., Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law, 84 CALIF. L. REV. 887, 911 (1996) (arguing that racial classification is voluntary and self-referential).

32. See Johnson, supra note 2, at 336.
whites—would possess more of one biological attribute, say intelligence, than another socially constructed group like African-Americans.\footnote{35}

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 are certain groups, like African-Americans or Hispanics,\footnote{34} not proportionally represented in certain categories? To be more direct, the precise question is, why is it that those historically discriminated against, that is, African-Americans, Hispanics, and Native Americans,\footnote{35} are underrepresented in certain categories?

\footnote{33. I would be remiss if I did not note the recent development in biomedical research of designing and marketing drugs for members of certain racial groups. \textit{See} Maura Lerner, \textit{Heart Drug for Blacks Gets OK}, \textit{Minneapolis Star Tribune}, June 24, 2005, at A1 ("FDA approves BiDil, a heart drug developed and targeted for African-Americans."); Nicholas Wade, \textit{Genetic Find Stirs Debate On Race-Based Medicine}, \textit{N.Y. Times}, Nov. 11, 2005, at 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, this issue was addressed at a conference 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. \textit{See} Symposium, \textit{Debating the Use of Racial and Ethnic Categories in Research}, 34 J.L. Med. & Ethics. 483 (2006) (presenting ten articles from the University of Minnesota conference examining the use of racial and ethnic categories in biomedical research); \textit{see also} Alex M. Johnson, Jr., \textit{The Re-Emergence of Race As A Biological Category: Societal Implications—Reaffirmation of Race}, 94 Iowa L. Rev. 1547 (2009) (responding to the incipient re-emergence of race as a biological category).

\footnote{34. Under the current OMB guidelines Hispanics can be of any race. \textit{See} Office of Mgmt. & Budget, Exec. Office of the President, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,789 (Oct. 30, 1997). ("The standards have five categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. There are two categories for data on ethnicity: 'Hispanic or Latino' and 'Not Hispanic or Latino.'") (emphasis in original). Hence, Hispanics more closely resemble an ethnic rather than a racial group, bound by language and culture rather than grosser morphological traits. Elsewhere I have argued that Hispanics occupy a unique position in the racial hierarchy of the United States:

As currently constructed, the term Hispanic is an ethnic rubric under which people of all racial types can be classified. Unlike whites or blacks, Hispanic as a racial category is meaningless because an Hispanic can be of any race. Hence, being identified as an 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.


\footnote{35. The noticeable omissions in this group are Asian-Americans who are not underrepresented in either law school or the legal profession. \textit{See supra} note 55 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. \textit{See} Robert S. Chang, \textit{Toward an Asian American Legal Scholarship: Critical Race Theory, Post-}
In the absence of racism and its effects, both past and present, our society would presumably produce a percentage of minority students matriculating at law schools and entering the legal profession proportional to the percentage of these groups in American society.

A close examination of the numbers—a look at what is flowing through the pipeline—reveals the impact and effect of racism, past and present, on those minorities attending law school and entering the legal profession. According to the 2000 U.S. Census, the total population of the United States was at that time a little over 281,000,000. Of that number, 35,306,000 were identified as Hispanic/Latino or 12.5% of the population. African-Americans totaled slightly less at almost 34,000,000 or 12.1% of the population. Asian-Americans totaled a little over 10,000,000 or 3.6% of the population. Lastly, American
Indian/Alaskan Natives totaled slightly over 2,000,000 and comprised 0.7% of the population as of 2000. 39 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. 40 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 American; and 1502 (0.20%) were Native American. 41

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 a legal career for minorities, there should be 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 (and usually last) professional degree. 42 However, the legal profession attracts a disproportionately low number of underrepresented minorities rather than a disproportionately high number. That puzzle is the issue that I turn to in the next Part with a primary focus on the admissions 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.

II. THE FIRST AND MAJOR LEAK IN THE PIPELINE: ADMISSIONS

The relevant pool of candidates for admission to law school are those who have or who will shortly have a bachelor’s degree from an accredited university or college. 43 Using statistics provided by Wilder’s report and focusing on

39. Id.
40. WILDER, supra note 19, at 4 (citing the U.S. Census Bureau data from 1999).
41. Id.
42. See supra note 22 and text accompanying; see also infra notes 50-52 and text accompanying.
43. 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 considerable 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.

degrees that were awarded in 1999-2000, 22.5% of bachelor’s degrees were awarded to members of minority groups, including 9.0% to African-Americans, 6.3% to Hispanics, 6.5% to Asian-Americans,44 and 0.7% to American Indians.45 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 Asian Americans and Native Americans) who attend college and receive a bachelor’s degree of some type.46 Given the assumptions regarding race and intellectual ability 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-eligible population mirrors their respective percentages in larger society as reported in the Census data. This leakage is indeed quite serious and, if corrected, could provide law schools with a significant number of underrepresented minority applicants and matriculants.47

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

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

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

46. 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.

ABA PRESIDENTIAL ADVISORY COUNCIL supra note 43, at 3 (citations omitted).

47. The factors that caused this leakage and actions recommended to correct this leakage are beyond the scope of this Article. However, many of the presenters at the Pipeline Conference referenced above 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%.

Id. at 2 (citations omitted).
that exist prior to applying to law school and who have therefore graduated from high school, matriculated at a college or university and have earned at least a bachelor's degree from a college or university. Just as importantly, my focus is on those minority students who have already indicated, at least by taking the LSAT, that they have some interest in pursuing a legal career.

A. Leakage at Test-Taking Stage (Those Who Take the LSAT and Do Not Apply to a Law School)

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% 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-American, 8.4% were Hispanic, 6.9% were Asian-American and 0.8% were American Indians/Alaska Native). Consequently, law and the legal profession remain popular destinations for minority students, and disproportionately so, if measured by those interested in taking the LSAT. 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 number 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, regardless of race or ethnicity. A review of the data reveals that

48. I concur in the recommendations in the Pre-Conference Report, that we as a society must: 1) start early in plugging the leaks in the pipeline by improving the skills of minority students on standardized tests to eliminate the score gap between whites and minorities which is addressed below; 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. Id. at 7-10.

49. See infra notes 50-52 and accompanying text.

50. WILDER, supra note 19.

51. More recently, almost one third (32.5%) of the LSAT examinees in 1999-2000 were members of minority groups, compared with 22.5% of those who received bachelor’s degrees in that year. By way of contrast, non-Hispanic whites represented 70% of the LSAT-takers in 1994-1995 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).
11.5% of LSAT test-takers in the 1999-2000 testing year were African-American, which totals 9,473. Of that number, 7,305 or 77.1% chose to apply to at least one law school. In other words, 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%. Whites pursued the non-application route at a rate of slightly higher than 20%, while the different minority groups pursued this option at different rates ranging from 18-25%. Although I am not a psychometrician, I believe the differential rate of non-application among various subgroups is statistically insignificant.

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. 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 or 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.

B. Leakage at the Application Stage (Those Who Apply to Law School but Receive No Positive Admission Decision)

On the other hand, there is significant and disproportionate leakage in the pipeline from the pool of those who apply to law school and fail to be admitted to any 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. However, 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

52. Wilder, supra note 19, at 17 tbl.12.
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.\textsuperscript{53} I believe the reasons for the disproportionate leakage are complex and multiple. 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 score and undergraduate grade point average (UGPA), the better their 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.\textsuperscript{54}

What is not as well known or understood is that underrepresented minority groups score less well on the LSAT as groups than similarly situated whites.\textsuperscript{55} African-Americans, for example, score approximately one standard deviation below that of similarly situated whites.\textsuperscript{56} This score-scale differential between whites and members of underrepresented minority groups, especially African-Americans, is well-known among psychometricians. However, the cause of this

\textsuperscript{53} Id. at 17 (citation omitted).

\textsuperscript{54} 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, level of extracurricular activities, community involvement) will, if forced to make a choice on which applicant to admit, admit the applicant with the higher UGPA. Many schools, more than 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, who 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 representing an applicant with a 2.0 UGPA and a 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 6, at 344-45.

\textsuperscript{55} 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 19, at 18 tbl.14 (indicating that Asian-Americans score an average of 152.7 on the LSAT, while whites average 153.6; African-Americans average 142.8, Hispanics average 147.4, and Native Americans average 148.6).

\textsuperscript{56} By "similarly situated," I am controlling for socioeconomic 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. Id.
pattern is largely unexplainable 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 biological 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.

Wilder observes:

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 Hispanic applicants are most seriously affected by the differential rates of acceptance. Whereas 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 in the admitted pool. In short, there are substantial losses at the stage of admission to law school among certain racial-ethnic groups, a finding that merits further study.

The problem is complicated, however, by a second variable: law school selectivity. 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, U.S. News & World Report 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 2010 Edition, had a 2009 acceptance rate of 8% and a 25-75 percentile LSAT score of 170-176. The school ranked second by U.S. News in its 2010 Edition, Harvard Law School, had an acceptance rate of 11% for the same period and a 25-75

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57. For a discussion of the "mystery" of the score-scale differential, see Johnson, supra note 1, at 332-37 nn.88-109 and accompanying text.

58. WILDER, supra note 19, at 18 (internal references omitted) ("The situation is more complicated, however, than the overall rates suggest. Acceptance into law school is highly correlated with applicants' academic credentials; that is, their LSAT score and undergraduate grade-point averages (UGPAs). 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.").

59. Id.
percentile LSAT of 171-176.\textsuperscript{60} 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. Furthermore, applicants have access to information about their realistic chances of being admitted and should be reasonably aware of those chances.\textsuperscript{61}

The third and final variable in this equation is the applicant's choice of where to apply given the information that is available and discussed above.\textsuperscript{62} One of the advantages of the law school admissions process is that it is highly decentralized, allowing any applicant 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


\textsuperscript{61} Today a potential applicant can go online and enter his or her LSAT and UGPA and select any or all of a limited group of ABA-approved law schools to receive data on the chances of being admitted to that law school with the expressed academic credentials. See Law School Admission Council, UGPA/LSAT Search Results, LSAC, https://officialguide.lsac.org/Release/UGPALSAT/UGPALSAT.aspx (last visited Jan. 23, 2013). I note in passing that the site has been "rigged" so that no matter what academic variables are input, the applicant has a 0-10% 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 0-10% chance of getting into Harvard 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 workgroup on Alternative Testing Scores of the LSAC that debated and recommended this change.

\textsuperscript{62} 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 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. For further details regarding the medical schools' procedure for admission, see ERAS Support Services at ECFMG, EDUC. COMM'N FOR FOREIGN MED. GRADUATES, http://www.ecfmg.org/eras (last updated June 11, 2012).
application fee as long as the applicant can demonstrate his or her need. 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. Unfortunately, the data demonstrate that applicants do not necessarily apply to law schools to which they have a legitimate chance of admission.

Using my experiences as the Dean of the University of Minnesota Law School and a long-time faculty member of the University of 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 white and Asian applicants, should apply to schools to which they have a chance of being admitted rather than applying solely to the best or most prestigious schools. University of Virginia Law School, for example, often received more than 200 applications from members of underrepresented groups with LSAT scores below 150 who had little or no chance of being admitted, regardless of 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, these students, it is fair to surmise, would not be admitted to any law school. If these students, however, applied to other schools in Minneapolis with a 149 LSAT score, they would have an excellent chance of being admitted to Hamline, William Mitchell, and the University of St. Thomas.


64. When I was Chair of the LSAC, I was astounded to learn that every year several individuals apply to more than 100 law schools which, assuming an average application fee of $60, totals more than $6,000. Indeed, one year I was chair I was informed that a single individual had applied to more than 150 law schools 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 for Fall 2005 who made 543,000 applications to ABA approved schools for an average of 5.7 applications per applicant to an ABA approved school. See Law School Admission Council, LSAC Volume Summary, LSAC, http://www.lsac.org/lsacresources/data/lsac-volume-summary.asp (last visited Jan. 23, 2013).

65. See supra notes 55-58 and accompanying text.

66. The 2010 Official Guide to ABA-Approved Law Schools reports the following 75th and 25th percentile for these three schools as:
   Hamline University School of Law—156-150;
   University of St. Thomas School of Law—160-154; and
   William Mitchell College of Law—157-150.
   See American Bar Association, Hamline University School of Law, LSAC, http://www.lsac.org/lsacresources/publications/2010og/aba6513.pdf (last visited Oct. 31, 2012); American Bar Association, University of St. Thomas School of Law—Minneapolis,
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 to which law schools to apply, and 2) an over-emphasis by law schools in using the LSAT score as part of the admissions process. As to the former, I cannot statistically document that African-Americans are advised to apply to law schools to which they have no chance of gaining admission or that, receiving correct advice from pre-law advisors, these applicants ignore that advice and choose to apply to law schools where their chances of gaining admission are nil. I can, however, document that African-Americans with similar credentials to whites are admitted at the same rate as whites at the high end of LSAT attainment. 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.67

C. The Impact of Affirmative Action on Applicant Misapplication

If the goal is to reduce the leakage in the pipeline at this stage in the process, the first step that should be taken is educational. 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 continue to be used in law school admissions as part of the holistic approach, evaluating the whole person in admissions.68 Yet, given the misapplications that I have personally observed as a member of two law schools’ Admissions Committees, I contend that certain applicants erroneously believe that affirmative action means that a member of an underrepresented group 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.69 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.70 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 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 decreases. At some point an LSAT score below a certain number makes it increasingly difficult, if not impossible, to admit a student, 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 fact that it is extremely improbable that a student with an LSAT score of 140 or even 150 has been admitted to the University of Michigan Law School in recent history.

Which is not to say that affirmative action is not at work in the University of Michigan Law School’s admission process. The reality is that a student from

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

539 U.S. at 315 (citations omitted).

72. *Id.* The Court elaborated:
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).


an underrepresented minority group who scores a 140 or even a 150 will not be admitted to Michigan given the difference between that student’s score and the median score of the admitted students at that school—the gap may simply be too wide.\textsuperscript{75}

At first (and cursory) glance, the reader may conclude that I, like some other notable opponents of affirmative action,\textsuperscript{76} 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. That would be contrary and inconsistent to my earlier articles in which I 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.\textsuperscript{77}

\textsuperscript{75} Furthermore, there are justifiable reasons why a school may choose to admit someone with an LSAT that is, say, 10 points below their median LSAT score, but not 20 points below. Without going into too much detail, it is well-known that LSAT and UGPA, when combined, provide some predictive validity and ability for correlating first-year and cumulative Law School Grade Point Average (LGPA). Although the correlations are strong from a psychometric perspective given the limited nature of the two variables and what they represent, the LSAC research has concluded repeatedly that there is a variance in outcomes that does not correlate to these two variables—that there is roughly a 43 correlation between these two variables and first-year grades. As a result, grades and LSAT scores account for approximately 25\% of what goes into achieving that first-year grade point average. Nevertheless, there is a strong correlation that the greater the disparity between LSAT scores, the more likely the disparity in first-year grades achieved by two different students. My point is that a student with an LSAT score that is 20 points lower than the median of the class is more likely to struggle compared to other students than one with an LSAT score that is 10 points lower than the median score. That, coupled with the fact that the applicant pool at a school like the University of Michigan Law School is deep enough 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 10 points lower than the median score will have their application summarily 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, at 2 (2000). Wightman’s 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 data from the study demonstrates the utility of LSAT scores and UGPAs in the law school admission process beyond the prediction of first-year grades, placing to rest a common criticism of their use that the LSAT score only predicts first-year grades. The study, on the contrary, shows that the predictive power of these measures extends to law school performance as measured by cumulative law school grades. It does not predict achievements beyond law school, such as success as a lawyer.

\textsuperscript{76} See Sander, supra note 3. I disagree with Professor Sander’s thesis and concur in the rebutal presented by Professor Wilkins. See Wilkins, supra note 3.

\textsuperscript{77} 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
My point is more subtle and realistic when an analysis of the pipeline is made to determine where and why there is significant leakage. The policy of affirmative action has created unrealistic expectations in the applicant pool and perhaps in certain pre-law advisors as well. Here, education is the key and appropriate remedial response. Consequently, African-American and other underrepresented minority applicants with an LSAT score of 165 may have a shot at being admitted to Yale Law School, but students—all students, including members of underrepresented minority groups—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 (read identical) as other students who are not beneficiaries of affirmative action.

The reality is that admissions decisions, although strongly influenced by the objective indices—UGPA and LSAT—create a pool of admissible applicants who possess a range of scores and UGPAs. Just as admissions decisions are not strictly or solely a numerical determination (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 objective indices by admitting students 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 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 9473 African-American test-takers or 11.5% of all test-takers. Of that number, 7305 (77.1% of the test-takers) made the decision to apply to at least one law school. Then, fewer than half of those who chose to apply, 43.7% of 8503, (this number differs from the 7305 noted above because it includes test-takers who had taken the LSAT in previous administrations and were applying to law school at that time) were admitted, equaling 3718 African-Americans. That means African-Americans comprised 7.4% of the admitted pool although they were 11.4% of the applicant pool, compared to 65.1% of the white applicants (they disproportionately comprise 72.2% of the admitted pool),

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.”) (quoting Linda F. Wightman, 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, 15 (1997)).

78. Here I agree with Professor Sander and the primary thesis of his article, see supra note 3, 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.
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 3096 out of that 3718 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, Chicanos 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 favorable admissions 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. Once admitted to a law school, the rate of matriculation is fairly uniform across racial groups. The same cannot be said for the bar examination.

III. THE BAR EXAM: A SERIOUS KINK IN THE PIPELINE

Almost all would agree that the individual state bar examinations act as a severe impediment to certain members of underrepresented minority groups becoming practicing attorneys.79 The LSAC’s path-breaking Bar Passage Study,80 as well as studies done by Dr. Stephen Klein,81 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

79. As noted above, 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.


significant differential success rate for whites and members of underrepresented minority groups with respect to both first time and eventual bar outcomes.82

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.83 Instead of summarizing those articles and their remedies (which include, but are not limited to exhorting law schools to provide better bar exam preparation as part of their curriculum, providing bar review courses free of charge, and providing financial assistance to those preparing for bar exams so that they can concentrate on their preparation as opposed to working),84 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 unfortunately disproportionately at the bottom. Although these efforts have been criticized elsewhere for their impact on minority exam takers,85 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 a second factor or impediment to the production of lawyers of color as a result of 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

82. See infra Appendix I (reproducing WIGHTMAN, supra note 80, at 32 tbl.10 (summarizing eventual bar examination outcome for different ethnic groups)).


84. Id.

85. Merritt, Hargens, and Reskin note:

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

Deborah J. Merritt et al., Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam, 69 U. CIN. L. REV. 929, 930 (2001) (citation omitted).
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.

A. Misapplication on the Bar Examination

First, an observation that often goes unnoticed but is critical to my analysis and claim of misapplication: African-American law students and bar applicants should be drawn proportionately from African-American communities throughout the United States. By that I mean, if five percent of all African-Americans reside in New York City,86 one would assume that roughly five percent of the African-American bar applicants in a given year would also be from New York state. There obviously will not be a perfect correlation, but there should at least be rough correlations so that it would be fair to say that five percent of African-American bar applicants in a given year will not be, say Minnesota residents, which has a much smaller population (and therefore percentage) of African-Americans. Related to the observation is the commonsensical assumption that those residing in a given geographical locale, say Southern California, will more than likely take a bar exam in the state in which they reside—California—as opposed to moving to another state for the sole purpose of either accepting a job or taking a bar with a lesser or lower cut score. In other words, it makes perfect sense that African-Americans will take the bar exam in states with large African-American populations and that Hispanics will likewise take the bar exam in states with large Hispanic populations like California, Texas, Arizona, and Florida.

Second, a caveat: very few jurisdictions (California, with various studies by Dr. Klein as the exception),87 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 Asian-Americans pass at a much higher rate than other 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 given the data produced by the LSAC's Bar Passage Study. 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.88 There obviously would be more minority lawyers if these putative lawyers took the exam in states with lower passing scores.

Here are the facts gleaned from the LSAC's Bar Passage Study, the only national study to date that addresses potential differential passage rates on state bar exams among various racial and ethnic groups.89 For the cohort studied in the Bar Passage Study, over 40% took the bar exam in five jurisdictions out of the thirty-nine that participated in the study (in descending order): New York, New Jersey, California, Georgia, and Maryland (568 out of 1368 exam takers).90 Roughly 70% took the bar exam in ten states, the five noted above and in descending order: Texas, Illinois, Florida, Pennsylvania, and Louisiana (952 out of 1368).91 Finally, over 80% 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).92

88. I am not naive enough to believe that individuals choose to take a bar exam principally based on their chance of passing that bar exam—although I do recall in the late 80s and early 90s 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.

89. Wightman’s LSAC Bar Passage Study which served as the principal data source and reference for Sander’s article, supra note 3, 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 WIGHTMAN, supra note 80, at 2. 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.

90. WIGHTMAN, supra note 80, at 17.

91. Id.

92. Id.
This is hardly surprising or earth-shattering data. A simple review of a map of the United States would reveal urban populations with high percentages of minorities in the states with a high percentage of minority exam takers. But what if New York, California, and Maryland have some of the toughest bar exams in the country which results 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 an even stronger correlation among LSAT, LGPA, and bar passage. African-Americans, scoring one standard deviation below whites and Asian-Americans, do less well in law school (as measured by grades) and do less well on bar exams (the eventual passage rate 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 with lower pass rates.

This particular question has been addressed in the Bar Passage Study. In evaluating the variability in bar passage rates among jurisdiction, the study considered whether applicants from some ethnic groups disproportionately tented to take the bar in jurisdictions where pass rates were more stringent. Specifically, Figure 1 of the study 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. 97 Table 2 presents the data from which Figure 1 was constructed and includes the counts and percentages by jurisdiction for members of the other ethnic groups included in this study. 98 This table illustrates that the number and percentage of examinees from different ethnic groups were not proportionally parallel across jurisdictions. 99

Although the Bar Passage Study is unable to provide bar passage data for each jurisdiction, per agreements with the participating jurisdictions that individual jurisdictions would not be identified or reported, 100 some tentative conclusions were drawn that support my thesis of misapplication. Particularly, the analysis shows that the difference in passage odds between the Northeast region and the Far West region is especially concerning because of the large proportion of participants of color who sat for the bar in those regions. 101 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 the odds of passing in the Northeast. 102

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 passage rates and as a result disproportionately fail the exam at higher rates than whites—it still leaves the question of what realistically can be done to improve the flow in the pipeline for lawyers of color. It is not realistic to suggest, as it is with law school

97. See infra Appendix 2 (presenting WIGHTMAN, supra note 80, at 15 fig.1). 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. WIGHTMAN, supra note 80, at 15-16.

98. See infra Appendix 3 (presenting WIGHTMAN, supra note 80, at tbl.2)

99. The study notes:
For example, a third of Asian Americans tested in California, as did a third of Mexican Americans. Another 35.7 percent of Mexican Americans tested in Texas. Thus only two jurisdictions account for 68 percent of the total number of Mexican American test takers among these study participants. More than a quarter of those test takers who categorized themselves as "other Hispanic" tested in Florida and 20 percent of American Indians tested in California.

WIGHTMAN, supra note 80, at 15-16.

100. Wightman's Bar Passage Study was, however, allowed to present data regarding the number of test-takers for each jurisdiction by race-ethnicity. See infra Appendix 3 (presenting WIGHTMAN, supra note 80, at 17 tbl.2).

101. Id. at 48 (citations omitted).

102. Id. 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. See infra Appendix 4 (presenting WIGHTMAN, supra note 80, at 21 tbl.4).
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 with which test-takers pass the bar exams in those states. The reason why African-Americans and other underrepresented minorities take bar exams in the indicated states 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 populations.

Consequently, I assert that unless it can be demonstrated that those currently passing the bar are not adequately performing 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, hopefully not intentionally, to disproportionately exclude underrepresented minorities from the practice of law. Moreover, because it is unrealistic to assume that there will be a demographic shift or significant increase in minority populations in states with lower cut/passing scores for the bar exam, I contend that either uniform cut/passing scores or a national bar exam should be implemented for the legal profession.

The solution, therefore, is a unified or homogenized cut score for existing state bar examinations in lieu of a truly 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. Although a national bar exam will accomplish the same purpose, the less radical alternative, and the one that maintains the existing state bar fiefdoms, acknowledges that we already have in place a nascent national bar examination that simply lacks the homogeneity of a unified cut or passing score. This recommended move to a fairer, less arbitrary, uniform cut or passing score can be easily accomplished given the existing structure of state bar examinations. More importantly, the selection of a uniform score on a unified bar examination that a majority of the states already embrace will eliminate the detrimental

103. There is no evidence that bar examiners are intentionally increasing cut scores with the goal of excluding or limiting minority attorneys in the profession. Quite the contrary, most profess support for increased diversification of the profession. The motivation, however, for increasing the cut score and making bar passage more difficult appears to be a desire to limit and control the supply of lawyers at a time when the number of lawyers is growing exponentially. In other words, the aim is to protect those currently in the profession from increased competition. For an in-depth analysis of this thesis, see William C. Kidder, The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification, 29 LAW & SOC. INQUIRY 547, 555-58 (2004).
impact on would-be attorneys of color created by existing state bar examinations given their arbitrary use of differential cut or passing scores.\textsuperscript{104}

B. *A National Bar Exam? No, a Logical Alternative*

The debate over the desirability—the costs and benefits—of a national bar exam is not a new one. Indeed, an entire article could be devoted anew to this issue and several articles have been written addressing precisely this issue.\textsuperscript{105} My goal herein is not to revisit in exhausting details the arguments for and against the existence of a national bar examination or uniform cut/passing score for licensure for attorneys. Instead, my goal is to emphasize the cost associated with the lack of a national bar examination: the paucity of African-American lawyers passing various state bar examinations with arbitrary differential cut scores.\textsuperscript{106} This focus takes on renewed emphasis when it is coupled with recent developments in bar examination testing (detailed below) that have resulted in many states separately using the same exam questions for simultaneous administrations (products developed, produced and sold by the National Conference of Bar Examiners—both essay and multi-state questions). In effect, this has created a de facto national bar examination with uniform testing material. The problem, however, is that even though a uniform instrument is tested across states, these states still retain and use their autonomy to impose differential cut scores that, as demonstrated above, have a detrimental impact on prospective attorneys of color.

Consequently, I contend the debate over a national bar examination is misplaced and somewhat outdated. I contend that we already have the beginnings of a national bar examination and predict that eventually, without further action on the part of the American Bar Association Section of Legal Education and Admission to the Bar, the National Conference of Bar Examiners, or any other relevant entity, the homogenization of state bar examinations will continue unabated. Furthermore, this process of

\textsuperscript{104} For a discussion of cut scores (unscaled) on the individual state Multistate Bar Exams that range from 119 to 150 on a 200 scale—that is 119 questions correctly answered to 145 questions correctly answered on a 200 question, six part multiple choice exam, see *infra* notes 108-112 and accompanying text.


\textsuperscript{106} For more on the issue of raising cut scores and the detrimental impact on African-American bar examinees, see Kidder, *supra* note 103, and *infra* notes 113-20 and accompanying text.
homogenization will eventually lead to states administering essentially the same tests and maintaining their role as gatekeepers to their individualized state bars with licensure continuing to be regulated at the state, rather than national level.

This de facto national bar exam will not resolve the issue addressed by this Article—the obstruction in the pipeline for the production of African-American lawyers created, in part, by the bar examination—because within this de facto national bar examination states are allowed to create their own passing or cut scores. This allows states to manipulate the passing rate for their state (making it easier or harder to pass the bar exam) and it is those states that require higher cut or passing scores that create the bottleneck that results in fewer African-American lawyers. Hence, I contend that what is needed is not a national bar examination, per se, because we already have a de facto national bar examination. What is needed, however, is uniformity with respect to the cut or passing score so that the score is set at a level that assures competence, but does not detrimentally impact, as the current system does, examinees of color—especially African-American examinees.\(^\text{107}\)

To prove my point regarding the current existence of a de facto national examination one need only detail the current use of the Multistate Bar Examination (MBE), the relatively recent Multistate Essay Exam (MEE), the Multistate Performance Test (MPT), and the Multistate Professional Responsibility Exam (MPRE). The data is available for all to examine. In the Comprehensive Guide to Bar Admission Requirements 2009, co-sponsored by the National Conference of Bar Examiners and the American Bar Association Section of Legal Education and Admission to the Bar,\(^\text{108}\) the details are quite telling and supportive of my thesis. Of the fifty-one jurisdictions, forty-nine administer the MBE, the only two outliers being the state of Washington and, as one might imagine given its civil law origins and status, Louisiana.\(^\text{109}\) Forty-eight states administer the MPRE leaving only Washington, Wisconsin and Maryland as the three inconsistent jurisdictions. A majority of jurisdictions—thirty-two—administer the Multistate Performance Test and a surprising twenty-one jurisdictions use the relatively recent MEE (the MEE is a packet of exam questions written and disseminated by the NCBE, but graded by the individual state’s bar examiners).\(^\text{110}\)

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107. Of course one can argue the opposite: that states with lower passing scores and higher bar passage rates should emulate California and make it harder to pass the bar in that state. This argument is addressed in the next section.


109. Id. at 17.

110. To be more precise:
The Multistate Essay Examination (MEE) is a collection of 30-minute essay questions and is administered by participating jurisdictions on the Tuesday before the last Wednesday in
The evidence is irrefutable: slowly but surely, we are slouching our way to a de facto national bar examination in which individualized state bar examiners administer and grade an increasingly uniform instrument to assess examinees' competency (and character) to practice law in that state's jurisdiction. The difference, and it is an important one, is the score used to determine who passes the bar in any given jurisdiction. This is especially pronounced with respect to the MBE, where cut scores range dramatically from state to state.

As detailed immediately below, the recent successful effort to raise the cut score in various states is another valid reason that African-American examinees are disproportionately negatively impacted by the bar examination, creating the most serious bottleneck in the production of African-American lawyers. When all the states' cut scores are averaged, the minimum passing score is 134.7. There are eighteen states that have cut scores below 135 and thirteen that have cut scores above the median of 135. Although one can debate whether a cut score should be set at 135 or at some lower number, if the goal is to increase the diversity in the bar, then the debate should be focused on the establishment of a uniform cut score and not necessarily on whether there should be a national bar exam.

C. 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 Asian-Americans. 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, 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. Specifically, more than a dozen states raised bar exam passing scores during the 1990s, including Texas, Illinois, Pennsylvania, and Ohio. Moreover, in September 2002, the bar examiners in New York—the state with the highest number of African-American test takers in the BPS—formally proposed that the court of appeals approve a tougher passing standard.

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, which he has used to recommend passing scores for the Ohio, Florida, Minnesota and Pennsylvania bar exams. In sum, Klein (1) collects expert judgments from regular bar graders, practicing attorneys, judges, and law professors about the quality of essays written on a recent bar exam; (2) then uses those judgments to estimate the percentage of examinees on that bar who would have failed the exam if the expert judgments

113. See supra notes 93-95 and accompanying text.
114. The Society of American Law Teachers notes:
In the 1980s and 1990s, many states and federal circuits established commissions on racial and gender equality. After extensive study, many of these commissions concluded that people of color were under-represented in the legal profession on both a state and national level, that 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.
SALT Statement on the Bar Exam, supra note 83, at 4.
116. Id. (citations omitted).
117. Merritt et. al., supra note 85, at 941-42 (citations omitted).
had been applied; and (3) once he has estimated that percentage, he determines the scaled score that would have produced the percentage of failed exams.¹¹⁸

Others have alleged that the increase in scores is due to a decline in the competency of the test takers.¹¹⁹ One would assume, though, that if the exam-takers were worse (less competent) than prior exam-takers, a higher failure rate would occur without an increase in the standard needed for passing.¹²⁰ 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 that has not been manipulated or changed to make it harder.¹²¹

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."¹²² Although each of these theories¹²³ 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,¹²⁴ there is unanimity of support for the view that efforts to raise bar standards have and will continue to have a disproportionately negative impact

¹¹⁸. Id. ("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.").
¹¹⁹. Kidder, supra note 103, at 550-51 (citations omitted).
¹²⁰. Id. at 552-53 (citations omitted).
¹²¹. In fact, I agree with Justice O'Connor's assessment, see supra note 4, that the qualifications of all law school students, including members of underrepresented groups, are getting better, not declining.
¹²². Kidder, supra note 103, at 555.
¹²³. Another theory, mentioned in passing in several articles, is that by raising their passing scores, states are simply attempting to keep up with other states that have raised their passing scores. See Merritt et. al., supra note 85, at 939 (citations omitted).
¹²⁴. See Daniel Holley & Thomas Kleven, Minorities and the Legal Profession: Current Platitudes, Current Barriers, 12 T. MARSHALL L. REV. 299 (1987); Kidder, supra note 103; Merritt et al., supra note 85, at 940-41 ("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.").
on those underrepresented in the legal profession—African-Americans, Native Americans and Hispanics.\textsuperscript{125}

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. There is ample evidence that the legal profession’s long history of exclusion continues to affect underrepresented minorities adversely, even if we concede, as evidence indicates, that overt discrimination against underrepresented minorities has dramatically decreased over the last several decades.\textsuperscript{126}

The analysis of 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 disproportionately continue to be members of underrepresented minority groups.\textsuperscript{127} This outcome, for some period of time, is inevitable due to differential outcomes on standardized tests that begin at the elementary school level and that persist up to and through the bar examination.\textsuperscript{128} 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{129} the correct response is the implementation of

\begin{footnotesize}
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\footnotesize
\textsuperscript{125} Merritt et al., \textit{supra} note 85, at 965-66 (citations omitted) ("[I]ncreasing 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 [In Merrit et al.: "extends"] 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.").

\textsuperscript{126} Wilkins, \textit{supra} note 3, at 1924 ("[A] mounting array of evidence confirms that most whites continue to hold a broad range of negative stereotypes about blacks even as they consciously profess to believe in racial equality. At the same time, an equally long line of research confirms what any observer of human nature takes for granted: that people instinctively prefer to work with others who are like themselves.").

\textsuperscript{127} See \textit{supra} notes 93-95 and accompanying text.

\textsuperscript{128} See Johnson \textit{supra} note 1, at 342 n.124.

\textsuperscript{129} Kidder notes:

It is not surprising that with respect to race and ethnicity, the NCBE and state bar examiners continue to champion the fairness of bar exam procedures and results. Thus, 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 other 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
\end{multicols}
\end{footnotesize}
either uniform cut/passing scores or 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{130} In the absence of a truly national bar examination what is needed is a uniform or homogenous cut or passing score that is set at a level that ensures the competence of attorneys practicing law, but does not detrimentally impact would-be attorneys of color, especially African-Americans.

CONCLUSION

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) and three years of law school (often at considerable cost), and concludes with the last hurdle—the bar examination.\textsuperscript{131} The various leaders of bar 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.

\textsuperscript{130} See supra notes 119-125 and text accompanying.

\textsuperscript{131} 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 Alan M. Ahart, Economic Observations on the Decision to Attend Law School, 27 J. LEGAL EDUC. 93, 100 (1975) and in William Boyd, Legal Education: A Nationwide Study of Minority Law Students 1974, 4 BLACK L.J. 527, 544 tbl.3 (1975).
The solution is either a uniform cut score or a national bar examination that does not penalize test takers of color who currently "misapply" by disproportionately taking bar examinations in states with the highest passing or cut scores. These prospective lawyers failing the bar exam in, say, California, are just as competent as many newly minted lawyers passing the bar in, say, Minnesota. The only thing that differentiates these two test-takers is that one had the good fortune to take the bar exam in a state with a lower passing or cut score. That is unacceptable.

Consequently, the bar examiners and the National Conference of Bar Examiners (NCBE) must resist exogenous pressures to raise cut or 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. Instead, those organizations should mount a campaign to roll back those efforts to raise scores and establish, through the use of empirical and other data, a cut score for their standardized tests that ensures competent attorneys without any unnecessary detrimental impact on examinees of color, especially African-American examinees. Through the promulgation of a uniform cut score at an acceptable level (I believe 130 to be more than adequate for the MBE for example), state bar examiners will be able to maintain their control over the process while not harming societal efforts to increase diversity in the profession.

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 in LSAT scores will not be far behind.


133. 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. See Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. Personality & Soc. Psychol. 797, 797 (1995). Hence, once the minority status and stigma disappear it is my contention that the score-scale differential between the races will disappear as well.
TABLE 10

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

<table>
<thead>
<tr>
<th>Ethnic Group</th>
<th>Eventual Bar Examination Outcome</th>
<th></th>
</tr>
</thead>
<tbody>
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<td>Fail</td>
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<td>Number</td>
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<td>8.12</td>
</tr>
<tr>
<td>Percent</td>
<td>91.88</td>
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<tr>
<td>Percent</td>
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<tr>
<td>Percent</td>
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<td>11.56</td>
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<td>Number</td>
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<tr>
<td>Percent</td>
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<td>20.31</td>
</tr>
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</tr>
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<td>Percent</td>
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<td>10.96</td>
</tr>
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<td>641</td>
</tr>
<tr>
<td>Number</td>
<td>96.68</td>
<td>3.32</td>
</tr>
<tr>
<td>Percent</td>
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<td>3.32</td>
</tr>
<tr>
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</tr>
<tr>
<td>Number</td>
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<td>8.46</td>
</tr>
<tr>
<td>Percent</td>
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<td>8.46</td>
</tr>
<tr>
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<td>5.20</td>
</tr>
<tr>
<td>Percent</td>
<td>94.80</td>
<td>5.20</td>
</tr>
</tbody>
</table>

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

134. WIGHTMAN, supra note 80, at 32 tbl.10.
FIGURE 1. Distribution of black and white first-time bar examination takers across 22 jurisdictions that test the largest number of black applicants (in black applicant number order).
### Table 2

**Number and percentage of study participants by ethnic group and jurisdiction in which they took their bar examination (presented in descending order of black examinees)**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Black Total</th>
<th>White Total</th>
<th>American Indian</th>
<th>Asian-American</th>
<th>Native-American</th>
<th>Mexican American</th>
<th>Puerto Rican</th>
</tr>
</thead>
<tbody>
<tr>
<td>NY</td>
<td>133 97%</td>
<td>1,664 65%</td>
<td>6 72%</td>
<td>33 12%</td>
<td>47 9%</td>
<td>13 2%</td>
<td>2 0%</td>
</tr>
<tr>
<td>CA</td>
<td>115 84%</td>
<td>1,800 79%</td>
<td>21 18%</td>
<td>32 64%</td>
<td>70 150%</td>
<td>131 32%</td>
<td>17 102%</td>
</tr>
<tr>
<td>TX</td>
<td>90 72%</td>
<td>1,753 72%</td>
<td>10 9%</td>
<td>49 51%</td>
<td>45 67%</td>
<td>142 33%</td>
<td>1 0%</td>
</tr>
<tr>
<td>LA</td>
<td>85 62%</td>
<td>1,164 70%</td>
<td>3 27%</td>
<td>64 67%</td>
<td>22 42%</td>
<td>17 48%</td>
<td>7 35%</td>
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<tr>
<td>FL</td>
<td>70 51%</td>
<td>1,402 55%</td>
<td>8 28%</td>
<td>27 28%</td>
<td>138 260%</td>
<td>6 15%</td>
<td>12 46%</td>
</tr>
<tr>
<td>CA</td>
<td>69 49%</td>
<td>1,590 30%</td>
<td>3 27%</td>
<td>19 20%</td>
<td>9 17%</td>
<td>1 04%</td>
<td>3 23%</td>
</tr>
<tr>
<td>NC</td>
<td>48 35%</td>
<td>1,059 20%</td>
<td>3 27%</td>
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<td>1 08%</td>
<td>1 08%</td>
</tr>
<tr>
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<td>44 32%</td>
<td>1,141 27%</td>
<td>3 27%</td>
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<td>1 19%</td>
<td>2 10%</td>
</tr>
<tr>
<td>CA</td>
<td>38 28%</td>
<td>1,139 29%</td>
<td>1 0%</td>
<td>22 2%</td>
<td>3 06%</td>
<td>2 05%</td>
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<tr>
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<td>35 26%</td>
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<td>CA</td>
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<tr>
<td>CA</td>
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(continued)
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<th>White % of Group</th>
<th>American Indian % of Group</th>
<th>Asian-American % of Group</th>
<th>Hispanic % of Group</th>
<th>Mexican-American % of Group</th>
<th>Parent's Birth % of Group</th>
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<td>657</td>
<td>520</td>
<td>338</td>
<td>122</td>
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<td>4.4</td>
<td>4.5</td>
<td>2.3</td>
<td>2.4</td>
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</tr>
</tbody>
</table>
APPENDIX 4\textsuperscript{137}

TABLE 4

Number and percentage of study participants by region and pass or fail outcome of their first-time bar examination.

<table>
<thead>
<tr>
<th>Region</th>
<th>Pass</th>
<th>Fail</th>
<th>Total\textsuperscript{**}</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Rate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Far West</td>
<td>65.21</td>
<td>14.89</td>
<td>13.20</td>
</tr>
<tr>
<td>Great Lakes</td>
<td>62.63</td>
<td>7.92</td>
<td>16.91</td>
</tr>
<tr>
<td>Midwest</td>
<td>63.63</td>
<td>15.67</td>
<td>10.64</td>
</tr>
<tr>
<td>Mountain West</td>
<td>68.62</td>
<td>13.58</td>
<td>5.17</td>
</tr>
<tr>
<td>Northeast</td>
<td>69.04</td>
<td>13.08</td>
<td>2.98</td>
</tr>
<tr>
<td>New England</td>
<td>50.69</td>
<td>9.31</td>
<td>6.00</td>
</tr>
<tr>
<td>Pacific</td>
<td>62.93</td>
<td>17.10</td>
<td>12.84</td>
</tr>
<tr>
<td>South Central</td>
<td>65.37</td>
<td>13.63</td>
<td>12.00</td>
</tr>
<tr>
<td>Southeast</td>
<td>67.20</td>
<td>14.93</td>
<td>11.93</td>
</tr>
</tbody>
</table>

\textsuperscript{137} WIGHTMAN, supra note 80, at 21 tbl.4.

\textsuperscript{*}Percentage differs within each region who passed and failed.

\textsuperscript{**}Percentage differs the percentage of study participants who took their first bar exam in each region.