A Reply to *A Systemic Analysis of Affirmative Action in American Law Schools: Flaws in the Theory?*

by Alex M. Johnson, Jr.

*T*he presence of underrepresented students of color in American law schools and other graduate and professional schools will remain controversial as long as affirmative action is used in some way, shape, or form to admit these students of color in an attempt to diversify student bodies. And although the United States Supreme Court has most recently given the legal green light to the continued use of affirmative action in higher education, court challenges continue to persist regarding the legality of affirmative action in other milieus. At the same time, many opposed to affirmative action continue to develop novel and imaginative reasons as to why affirmative action should not be used notwithstanding its legality. A case in point is Professor Richard Sander's recent article, in which Professor Sander contends that African-Americans are harmed by the continued use of affirmative action and should support its elimination.

This article addresses the contention that affirmative action is ultimately costly to those who benefit in the short term from its continued use. In particular, it addresses the claims put forward by Professor Richard Sander in his article *A Systemic Analysis of Affirmative Action in American Law Schools.*[1] In the article, Professor Sander contends that African-Americans are harmed when affirmative action is used to admit them to more selective law schools—schools that they would not otherwise qualify for based solely on merit (with merit being defined by Professor Sander as the applicant's LSAT score combined with undergraduate grade point average).

The Effect on Certain Minority Groups of Using LSAT Scores for Entry into Law Schools

Members of certain subgroups, identified by race and ethnicity, have lower average LSAT scores than members of the white group, the dominant group in terms of both numbers and test-taking abilities. African-Americans, Hispanics, and Native Americans on average score lower than whites on

this all-important standardized test.[2] The average scores for four groups are summarized in Table 1, excerpted from results reported by Professor Linda Wightman.

TABLE 1. LSAT AND UGPA MEANS AND STANDARD DEVIATIONS BY RACE/ETHNIC GROUP FOR 2000–01 LAW SCHOOL APPLICANTS (EXCERPTED FROM ORIGINAL)

	Asian-American	Black	Hispanic	White
N	4,258	7,404	2,682	47,541
LSAT				
Mean	153.33	143.32	148.25	153.85
Standard Deviation	9.49	8.07	8.71	8.30
UGPA				
Mean	3.20	2.87	3.05	3.23
Standard Deviation	0.46	0.48	0.47	0.45

For African-Americans the LSAT score differential is most severe, totaling 10 points.[3] This differential or score gap between blacks and whites is what created the need for the use of affirmative action that was most recently addressed by the U.S. Supreme Court in *Grutter v. Bollinger*.[4] Table 1 clearly demonstrates that for those applicants to law school in the fall of 2000 (at the time that Ms. Grutter was being denied admission to the University of Michigan Law School), African-Americans had average scores of 143.32 while whites' scores averaged 153.85. The differences between other subgroups and whites were not as severe and disappeared entirely with Asian-Americans, whose average score of 153.33 is statistically equivalent to the whites' average score of 153.85.

PROFESSOR SANDER'S THEORY

At the same time the policy of affirmative action was being upheld by the Supreme Court in *Grutter*, Professor Sander was claiming that his research concluded that the costs incurred by certain recipients of affirmative action (blacks) outweighed the benefits gained by them.[5] His argument begins with the noncontroversial and incontrovertible fact that many blacks, due to affirmative action, are admitted to law schools with lower LSAT scores than other admittees of the same schools (whites and Asians) who do not benefit from affirmative action. As a result, he contends, these African-American beneficiaries of affirmative action earn lower grades than their white and Asian classmates. Finally, Professor Sander alleges that these lower grades cause blacks to

subsequently pass state bar examinations at a lower rate than they would have without the "benefit" of affirmative action. As detailed below, Professor Sander claims that the elimination of affirmative action would result in slightly fewer blacks matriculating to law schools, but ultimately more blacks passing the bar and becoming lawyers.

Professor Sander goes on to claim that there are actually fewer African-American attorneys practicing law today than there would be if affirmative action had been eliminated. Indeed, Professor Sander claims that one law school class (the class that matriculated in 2001 and began taking the bar exam in the summer of 2004) would have produced 169 more African-American lawyers if affirmative action had not been used to admit African-Americans to law schools that they would not have qualified for otherwise.

Put simply, African-Americans have lower average scores on the LSAT than whites. As a result, there are fewer higher-scoring African-Americans to compete with whites in obtaining admission to the so-called selective or elite law schools. These schools, however, driven by their desire to have a diverse class, employ affirmative action to admit African-Americans with lower scores than their white peers. Given their elite status, these schools are able to enroll the best African-American applicants, leaving those with lower scores for less selective schools and so on. These African-American students, as predicted by their relatively lower LSAT scores, receive lower grades on average than their white peers at the same institutions and, as a result, may finish at or near the bottom of their respective law school classes.

According to Professor Sander's thesis, the problem created by the use of affirmative action in law school admission is exacerbated when these African-American law graduates sit for state bar examinations. Once again, the news is not good for the African-American subgroup. Professor Sander demonstrates that African-Americans do not pass the state bar examinations at the same rate as whites, a fact that was first shown by the LSAC's Bar Passage Study over a decade ago.[6] In attempting to determine why African-Americans do not do as well as whites on state bar examinations, Professor Sander focuses his attention on the law school grades of African-American students.

Integral to Professor Sander's thesis regarding the "cost" of affirmative action is his assertion that the crucial factor in predicting success on the bar exam is the grade point average attained in law school. In essence, the higher one's law school grade point average (LGPA), the better the chance of success on a bar examination.[7] Professor Sander claims that even when we control for LSAT scores and UGPA, "blacks have a much higher chance of failing the bar than do whites—apparently, entirely as a result of attending higher-ranked schools and performing poorly at those schools."[8] To connect the dots more directly, Professor Sander claims that the poor law school grades he documents for African-American students are attributable to the fact that, due to affirmative action, those students were admitted to more selective law schools than their credentials would otherwise warrant. Thus, within most law schools, the African-American students' objective credentials—LSAT scores and undergraduate grade point averages—are not as strong as those of their white counterparts attending the same school, resulting in a "mismatch" between the African-American students and the other students attending the same institution. The relatively lower grades that

result from the student attending a school that he or she would not otherwise be attending, but for the operation of affirmative action, then correlate to a decreased chance of success on the bar exam.

The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school (say Vanderbilt, ranked between fifteenth and twentieth in most surveys) will have a significantly lower chance of passing the bar than the same student would have had if she had attended a school that admitted her on the basis of academic credentials alone (say, University of Tennessee, ranked between fortieth and sixtieth in most surveys). As we have seen, the evidence shows that a student's race has nothing to do with her chances on the bar; her law school grades have everything to do with it.[9]

HOWEVER, EVEN THOUGH [IN THE ABSENCE OF AFFIRMATIVE ACTION] FEWER AFRICAN-AMERICANS WOULD HAVE TAKEN THE BAR EXAM, PROFESSOR SANDER PREDICTS THAT THERE WOULD HAVE BEEN 169 MORE AFRICAN-AMERICANS PASSING THE BAR EXAMINATION AND OBTAINING LICENSES TO PRACTICE LAW (A 7.9 PERCENT INCREASE) IF PREFERENCES FROM AFFIRMATIVE ACTION HAD NOT BEEN USED TO ADMIT THESE STUDENTS TO SCHOOLS THAT THEY WOULD NOT OTHERWISE HAVE BEEN ELIGIBLE TO ATTEND.

Professor Sander starts with the conclusion that a student who would achieve C's at Vanderbilt, but who would achieve B's at Tennessee, will presumptively do better on the bar if she attends Tennessee based on the better grades she would receive at Tennessee. This conclusion is based on two assumptions. First, Professor Sander says that he has "heard" that "less elite law schools" do a better job teaching black letter law and preparing their students for the bar exam (although if this were true, one would expect that students at "less elite schools" would pass the bar at a higher rate than their counterparts at the elite schools). The second hypothesis given as to why the B student at Tennessee would do better than the C student at Vanderbilt is that "students simply learn less when they are academically mismatched with their peers."[10] This allegedly leads to disengagement with the academic enterprise, resulting in poorer grades.

Working through the numbers and focusing on the law school matriculants who enrolled in 2001, Professor Sander claims that although 14 percent fewer African-American students would have been admitted without affirmative action (3,182 versus 3,706) and 14 percent fewer African-American students would have enrolled in a law school (2,983 versus 3,474), there would have been only 8.1 percent fewer African-Americans graduating from law school in 2004, presumably because there would have been less attrition due to the lack of an academic mismatch. However, even though fewer African-Americans would have taken the bar exam, Professor Sander predicts that there would have been 169 more African-Americans passing the bar examination and obtaining licenses to practice law (a 7.9 percent increase) if preferences from affirmative action had not been used to admit these students to schools that they would not otherwise have been eligible to attend.[11]

FLAWS IN PROFESSOR SANDER'S THEORY

Professor Sander's argument regarding the failure of African-Americans to pass the bar as a result of the use of affirmative action is seriously flawed for a number of demonstrable reasons. First, Professor Sander does not provide any hard evidence for his "mismatch" theory regarding law school grades and their impact on bar passage. Although there is a correlation between LGPA and bar passage, a correlation between two variables does not necessarily mean that one variable causes the other, and therefore there is no evidence that a student at Tennessee earning B's will have any better chance of passing a bar examination than will a student at Vanderbilt who is earning C's, given Vanderbilt's higher passage rate. And if Professor Sander's beliefs that "less elite" law schools do a better job of preparing students for the bar and that law school grades are the main determinant of bar passage were true, wouldn't everyone be better off at lower-tier law schools?

> ALTHOUGH THERE IS A CORRELATION BETWEEN LGPA AND BAR PASSAGE, A CORRELATION BETWEEN TWO VARIABLES DOES NOT NECESSARILY MEAN THAT ONE VARIABLE CAUSES THE OTHER, AND THEREFORE THERE IS NO EVIDENCE THAT A STUDENT AT TENNESSEE EARNING B'S WILL HAVE ANY BETTER CHANCE OF PASSING A BAR EXAMINATION THAN WILL A STUDENT AT VANDERBILT WHO IS EARNING C'S, GIVEN VANDERBILT'S HIGHER PASSAGE RATE.

Two of the other demonstrable fallacies in Professor Sander's thesis have to do with the nature and predictive ability of standardized tests, which Professor Sander first lauds and then ignores in order to focus on grades. In other words, there is no question that the LSAT is almost as valid a predictor for success on the bar examination as are law school grades (which are themselves strongly correlated with the LSAT score).[12] If this is the case, then the law school attended, and the grades received, may not make as much difference in the student's chances of passing the bar examination as Professor Sander suggests. And if the "mismatch" causes recipients of affirmative action preferences to earn lower grades than they would have earned at lower-tier schools, one would expect the performance of those students on the bar examination to be even worse, by comparison to whites, than on the LSAT, which has not been shown. In fact, in a recent study of performance on the New York Bar Examination, the performance of African-American candidates relative to white candidates on the bar examination was slightly better than the performance of African-American candidates relative to white candidates on the LSAT. The difference was very small, but it was clearly inconsistent with implications of the "mismatch" hypothesis.[13] This piece of the puzzle must be explored and explained by Professor Sander to confirm his thesis. The strong correlation between LSAT scores and bar passage rates may refute Professor Sander's thesis that the lower grades attained in law school (which he claims are attributable to affirmative action) are what cause a lower bar passage rate for these recipients of affirmative action.

Second, the bar examination is a high-stakes standardized test and there is a considerable amount of data proving that African-Americans, and other

underrepresented minorities, do not do as well on standardized tests in general.[14] There is a plausible and better explanation for the lower passage rate on bar examinations by African-Americans: the score gap that appears in all standardized tests appears as well, not surprisingly, on the bar examination—another standardized test.[15]

Professor Sander claims that the lower law school grades achieved by African-Americans, allegedly as a result of affirmative action or preferences in admission, are the primary or even the sole cause of the failure of these same students to pass the bar exam. This focus on grades attained by African-American students who fail the bar examination ignores three facts that are important to Professor Sander's thesis. First, and as discussed above, LSAT scores have a strong correlation with bar outcomes. Second, African-American law students at more selective schools have the highest LSAT scores among all African-American test takers. The African-American students attending these elite schools score, on average, above the LSAT mean or they would not have been admitted to these elite law schools, even with preferences in effect.[16] Third, the data from the Bar Passage Study documents that those who score at or above the LSAT mean have essentially the same rate for eventual bar examination passage.[17] This is one of the most telling statistics documented by the Bar Passage Study, but it is ignored by Professor Sander. Moreover, this data is ignored in a manner that is seriously misleading since many of the students Professor Sander claims are hurt by preferential admission—particularly those at elite law schools— are the same ones scoring at or above the mean on the LSAT.[18]

Although affirmative action is the focal point of Professor Sander's article, the premise of the article is that there are fewer African-American lawyers as a result of their relatively poor performance on the bar exam. Professor Sander, however, pays scant attention to the bar exam and possible reasons for this poor outcome, other than his focus on the low grades attained by these beneficiaries of affirmative action. By focusing almost exclusively on low grades as the cause for differential bar outcomes for African-Americans, Professor Sander ignores a wealth of data documenting that members of minority groups, especially African-Americans, perform poorly on essentially all standardized tests for inexplicable reasons.[19]

I have previously commented on the fact that the score differential between whites and members of subgroups is not unique to the LSAT.

> Quite the contrary, on every high-stakes test [those tests upon which something important turns—like admission to the bar through a licensure test] used to determine admission to college or graduate school, there is a score-scale differential between white test-takers and members of underrepresented subgroups. . . . Although this "score gap" is the subject of numerous articles and discussions, the score-scale differential between whites and African-Americans is not unique to the LSAT, and any claim of discrimination leveled against the LSAT must, by necessity, be leveled against almost every standardized test used in America.[20]

My purpose in this article is not to provide an explanation for the observed differential performance (such a feat is beyond the scope of the article

and ken of the author) or to point to what Professor Sander calls the "fairness" critique to allege that these tests are biased.[21] My point is simply to note that there clearly are other reasons for the differential performance of African-Americans on these tests that have nothing to do with grades and, hence, nothing to do with affirmative action. This conclusion suggests that affirmative action is not an impediment to the production of African-American lawyers, but that perhaps the differential performance on all standardized tests is the key to solving this particular problem.

CONCLUSION

Criticism of the continued use of affirmative action in law schools has recently shifted in focus; instead of addressing the claims of those alleging reverse discrimination—the so-called victims of affirmative action—the current criticism is centered on the claim that the beneficiaries of affirmative action are harmed by its use and would be better off without it. That claim, however, is specious. It is indisputable that almost all law schools use affirmative action in their admission practices to admit African-American students. That use, which starts at the "top" of the law school hierarchy, does impact each and every other law school in the hierarchy, such that matriculating African-American law students who benefit from the use of affirmative action are able to attend more selective law schools than they would attend without the use of affirmative action.

IT IS IMPOSSIBLE TO PROVE OR DISPROVE THE CLAIM THAT THERE WOULD BE FEWER OR MORE AFRICAN-AMERICAN LAWYERS WITHOUT THE OPERATION OF AFFIRMATIVE ACTION. ONE CAN HYPOTHESIZE THAT THERE WOULD BE FEWER LAWYERS GIVEN CERTAIN ASSUMPTIONS—E.G., NO AFFIRMATIVE ACTION—JUST AS EASILY AS ONE CAN HYPOTHESIZE THAT THERE WOULD BE MORE LAWYERS OF COLOR IN THE ABSENCE OF AFFIRMATIVE ACTION.

That fact, however, has not been shown to lead to fewer African-American law students or lawyers. It is impossible to prove or disprove the claim that there would be fewer or more African-American lawyers without the operation of affirmative action. One can hypothesize that there would be fewer lawyers given certain assumptions—e.g., no affirmative action—just as easily as one can hypothesize that there would be more lawyers of color in the absence of affirmative action. What is clear, and not a hypothesis, is that in the absence of affirmative action, certain law schools, those that are the most selective, would have very few African-Americans in their student populations. Whether that situation would lead to more or fewer lawyers of color is anyone's guess in an age when the underrepresentation of certain minority groups in law schools and their absence in the legal profession is a continuing source of consternation for those involved in legal education and those who serve as gatekeepers to the legal profession.

The real issue, however, is whether the absence of African-American students in our most selective and prestigious law schools is an acceptable cost to incur in order to prove what is perhaps a flawed hypothesis. Such an alteration in current educational policy might well undo several decades of progress in the diversification of law schools and, subsequently, the bar. The status quo, in this context, seems eminently acceptable.

This article is a truncated and adapted version of a longer work designed for publication in a law review or other journal. 🔖

ENDNOTES

1. 57 STAN. L. REV. 367 (2004).

2. For those unfamiliar with the test, the current test has a score scale of 120 to 180. The mean score for applicants taking the LSAT from June 2006 to February 2007 (four administrations) was 150.78 for the 2006–2007 testing year. *See* INTERPRETIVE GUIDE FOR LSAT SCORE USERS (Law School Admission Council 2007). The mean score of African-Americans of 143 falls in the bottom 20 percent of all test takers whereas the mean score for whites of 153 puts them in the top 45 percent of all test takers. *Id.* That 10-point differential then becomes very important and significant in terms of where an applicant ranks vis-à-vis other applicants when measured by the LSAT.

3. Linda Wightman, *The Consequences of Race Blindness: Revisiting Prediction Models,* 53 J. LEGAL EDUC. 229, 245 (2003). Note here that Asian-American students' average scores are almost equal to those of white students and that Asian-Americans are not included in the underrepresented subgroups.

4. 539 U.S. 306 (2003).

5. The focus in Professor Sander's article is on African-Americans, whom he calls "blacks," as opposed to other underrepresented minorities who might also benefit from affirmative action.

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

   Sander, *supra* note 1, at 370.

6. I was a member of the Workgroup that implemented the Bar Passage Study. Superbly led by then Judge Henry Ramsey (now Dean Ramsey), the Workgroup believed that the BPS, as we referred to it, would dem-
onstrate that blacks were not passing bar exams at the same rate as whites. However, the lack of information was so prevalent and the misinformation so negative regarding minority passage rates (popular and other press reports detailed pass rates as low as 10 percent in some states, typically California), that we as a group felt that any accurate data would be helpful in addressing the problem. Imagine our pleasant surprise when we discovered that over 70 percent of all minority test takers ultimately passed a bar examination. Although this pales by comparison to the 98 percent passage rate for whites, this was still good news. Professor Sander tends to focus on the differential. *See* Sander, *supra* note 1.

7. Sander, *supra* note 1 at 442–454. Although Professor Sander spends several pages detailing the correlation between law school grades and bar passage, he spends little time detailing why higher law school grades translate into better bar passage chances. Common sense leads me to conclude initially that higher grades mean more knowledge and understanding of the law, which translates into better and more thorough answers to bar examination questions as well as less cramming for the bar exam. I do agree with Professor Sander's base premise that the better you do in law school, the more likely you are to pass a bar examination. It seems intuitively obvious that better students, as evidenced by their grades, will do better on an examination which essentially tests the same subject matter and the same skills—knowledge of basic legal principles, reading comprehension, analytical ability, the ability to apply legal principles to legal problems, and the ability to write cogently and clearly—that are assessed in law school.

8. *Id.* at 446.

9. *Id.* at 448–49 (citations omitted). I have several additional criticisms of this part of his thesis. First, this theory has no statistical or scientific basis. Second, even if true, it is unclear how it relates to passing another standardized test given in a totally different environment, where the exam taker is not only competing with those from his or her school with higher scores, but also competing with those from the less elite schools with equivalent scores, and those with even lower LSAT scores from even less elite schools. Finally, and as addressed *infra, see* notes 14–18 and text accompanying, what of the predictive or correlative nature of the LSAT? Taking Professor Sander's thesis to its logical conclusion, one can make the claim that a black student attending Stanford with a 165 LSAT who achieves a B+ average (with Stanford's mean grade of essentially A putting that student in the bottom of her class) has a worse chance of passing the California Bar than a black student with a 150

LSAT who attended and graduated from Southwestern University School of Law in the middle of her class. This, notwithstanding the fact that Stanford has a 92 percent pass rate on the California Bar Examination and Southwestern has a 58 percent pass rate on the same exam according to the data from THE OFFICIAL GUIDE TO LAW SCHOOLS.

10. *Id.* at 448.

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

Table 8.2: Estimating the Effects of Eliminating Racial Preferences on Black Admissions to Law School—2001 Matriculants

Stage of the System	Number of Blacks in the System Under Current Policies	Number of Blacks in the System with No Racial Preferences	% Change Caused by Moving to No Preferences
Applicants	7,404	7,404	—
Admittees	3,706	3,182	-14.1%
Matriculants	3,474	2,983	-14.1%
Graduates (2004 or Later)	2,802	2,580	-8.1%
Graduates Taking the Bar	2,552	2,384	-6.8%
Passing the Bar, First Time	1,567	1,896	+20.1%
Passing the Bar, Eventual	1,981	2,150	+7.9%

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

Sander, *supra* note 1 at 473 (citations omitted).

12. Kane, M., Mroch, A., Ripkey, D., & Case, S. (2006). *Impact of the Increase in the Passing Score on the New York Bar Examination*. Madison, WI: National Conference of Bar Examiners. *See* http://www.nybarexam.org/NCBEREP.htm.

13. *Id.* at Table 5.12, p. 120.

14. There is no accepted theory that satisfactorily explains possible causes for this differential. The cause of the gap remains a mystery beyond the ken of the author.

15. See *infra* note 20 and text accompanying for a discussion of the existence of this score gap in standardized tests.

16. Law schools were clustered into six groups in the Bar Passage Study by various common factors such as selectivity in admission, cost, faculty resources, etc., with Cluster 1 schools being the most selective or elite. The 18 law schools that make up the Cluster 1 group are easily all in the top 25 law schools as ranked by *U.S. News & World Report* in its annual rankings of law schools.

17. Table 12 of the Bar Passage Study documents a rather startling fact: there is essentially no difference among racial/ethnic groups on eventual bar examination outcome for those who score at or above the LSAT mean.

TABLE 12
Number and percentage of study participants by LSAT score group, ethnic group, and eventual bar examination outcome

Ethnic Group	At or Above LSAT Mean		Below LSAT Mean	
	Pass	Fail	Pass	Fail
American Indian				
Number	33	1	55	18
Percent*	97.06	2.94	75.34	24.66
Asian American				
Number	459	14	424	64
Percent	97.04	2.96	86.89	13.11
Black				
Number	162	7	900	299
Percent	95.86	4.14	75.06	24.94
Mexican American				
Number	105	4	247	42
Percent	96.33	3.67	85.47	14.53
Puerto Rican				
Number	36	2	66	24
Percent	94.74	5.26	73.33	26.67
Hispanic				
Number	171	7	292	50
Percent	96.07	3.93	85.38	14.62
White				
Number	11,189	199	7,455	442
Percent	98.25	1.75	94.40	5.60
Other				
Number	146	4	146	23
Percent	97.33	2.67	86.39	13.61
Total				
Number	12,301	238	9,585	962
Percent	98.10	1.90	90.88	9.12

*Percent shows the row percentage with each LSAT group.

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

TABLE 8
Number and percentage of applicants with LSAT scores at or above, and below the grand mean of the fall 1991 entering class who passed and failed their first bar examination, separately by ethnic group

	At or Above LSAT Mean		Below LSAT Mean	
Ethnic Group	Pass	Fail	Pass	Fail
American Indian				
Number	29	5	42	31
Percent*	85.29	14.71	57.53	42.47
Asian American				
Number	425	48	351	137
Percent	89.85	10.15	71.98	28.07
Black				
Number	149	20	691	508
Percent	88.17	11.83	57.63	42.37
Mexican American				
Number	98	11	204	85
Percent	88.91	10.09	70.59	29.41
Puerto Rican				
Number	34	4	55	35
Percent	89.47	10.53	61.11	38.89
Hispanic				
Number	159	19	230	112
Percent	89.33	10.67	67.25	32.75
White				
Number	10,860	528	6,868	1,029
Percent	95.36	4.64	86.97	13.03
Other				
Number	143	7	122	47
Percent	95.33	4.67	72.19	27.81
Total				
Number	11,897	642	8,563	1,984
Percent	94.88	5.12	81.19	18.81

*Percent shows the row percentage with each LSAT group.

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

    Sander is more equivocal with respect to bar passage rates among this group [those attending top or elite law schools]. Thus, he concedes that controlling for all other variables, students at more highly ranked schools have higher bar passage rates. He also asserts, however, that blacks who attend more highly ranked schools than their entering credentials warrant will have lower passage rates as a result of getting low grades. *He never tests this proposition directly, however, with respect to black graduates of top schools nor reports black passage rate by school tier.*

    David Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915, at 1927, n. 43 (2005) (citation omitted) (emphasis added).

19. Professor Sander does, however, acknowledge that standardized testing has been subject to attack by critics of the test.

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

American standardized tests are unfair to non-Anglos in general and blacks in particular. It is intrinsically unreasonable to weigh a test taken in a few hours as much as or more than four years of college work. The exams are biased because they largely test knowledge of culture-specific vocabularies. The widespread perception that blacks perform badly on such tests has produced a "stereotype threat" among blacks that further hinders performance. Affluent whites, meanwhile, enroll in expensive coaching classes to maximize their scores. Actual scores are highly correlated with socioeconomic status. The tests simply perpetuate privilege and are illegitimate. These arguments can be called the "fairness" critique.

Sander, *supra* note 1, at 419–20 (citations omitted). My argument is not that the test is unfair to certain applicants, but that the score gap appears in essentially all standardized tests—for whatever reason—including state bar examinations.

20. *See* Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 Ind. L. Rev. 309, at 340–41 (2006) (citations omitted).

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

    •African American and white preschoolers achieve similar scores on tests of motor and social

development (100.0 versus 102.6) and verbal memory (96.2 versus 97.7), but African American preschoolers score much lower than whites on tests of vocabulary (74.6 versus 98.2).

• Only 9 percent of African American 4th graders achieve scores at or above the proficient level on the NAEP reading test, compared with 37 percent of whites.

• One-half (48%) of African Americans score below the basic level on the NAEP 12th grade reading test, compared with 19 percent of whites.

• Only 4 percent of African American, but 17 percent of white, 8th graders achieve scores at or above proficient on the NAEP history test.

• Two-thirds (66%) of African Americans, but only 19 percent of whites, score below basic on the 4th grade NAEP geography assessment.

• Only 24 percent of African American 4th graders score at or above the basic level on the NAEP mathematics assessment, compared with 72 percent of whites.

• Two-thirds (66%) of African American 12th graders score below basic on the NAEP mathematics assessment, compared with only 28 percent of whites.

• Only one-third of African Americans who take an Advanced Placement examination receive a passing score, compared with about two-thirds of whites.

• Average scores on the SAT are about 100 points lower for African Americans than for whites on both the verbal (434 for African Americans versus 526 for whites) and quantitative components (423 versus 625).

• African Americans average 17.1 on the ACT, whereas whites average 21.5.

• African Americans score about 100 points lower than whites on the verbal, quantitative, and analytic components of the Graduate Record Examination (GRE).

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

Arie L. Nettles & Michael T. Nettles, *Issuing the Challenge*, in MEASURING UP: CHALLENGES MINORITIES FACE IN EDUCATIONAL ASSESSMENT 1, 2–3 (Arie L. Nettles & Michael T. Nettles eds.) 1999 (citing Press Release, Michael T. Nettles & Laura W. Perna (1998)).

21. This is not a screed or attack on standardized tests. In an earlier article, *see* Johnson, *supra* note 20 at 335–40, I support my assertion that the LSAT is not a discriminatory test and debunk many of the arguments made by those critical of the LSAT and the use of standardized tests in admissions. Indeed, I believe it fair to say that in that article I am supportive of the use of the test and critical of what Professor Sander, *supra* note 19, characterizes as the fairness critique. I do, however, come to the conclusion that there is a differential between the scores of whites and similarly situated minorities, especially African-Americans, and thus far no one has come up with a rational or suitable explanation as to the creation and persistence of this gap.

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