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PORTIA DENIED: UNMASKING GENDER BIAS ON THE LSAT AND ITS RELATIONSHIP TO RACIAL DIVERSITY IN LEGAL EDUCATION

William C. Kidder†

At nearly every stage of their development women attorneys incorrectly believed that once they themselves had proven their competence, acceptance for women in the next generation would be assured. . . . What they failed to realize. . . .was that they long ago had proven their competence and that there really were unspoken, undefined, invisible barriers that were keeping them from attaining positions of power and importance in the legal profession.

- Karen Berger Morello, THE INVISIBLE BAR²

1. Portia is a central character in WILLIAM SHAKESPEARE'S THE MERCHANT OF VENICE. In order to save the life of a friend, Portia disguises herself as a lawyer (necessarily a male lawyer) to argue his case. Her impassioned plea for mercy includes the famous lines:
   The quality of mercy is not strain'd,
   It droppeth as the gentle rain from heaven
   Upon the place beneath. It is twice blest;
   It blesseth him that gives and him that takes.

2. Researcher, Testing for the Public, Berkeley, California; J.D. Candidate, University of California, Berkeley School of Law (Boalt Hall); B.A., Psychology, University of California, Berkeley, 1996. I am grateful to the following scholars for their reviews of various drafts of this article: Derrick Bell, Richard Delgado, Linda Hamilton Krieger, Margaret Montoya, Rachel Moran, Michael A. Olivas, David Benjamin Oppenheimer, Daria Roithmayr, Lois Schwartz, Marjorie Shultz, Jan Vetter, David M. White, Stephanie Wildman, Eric K. Yamamoto, Sheldon Zedeck and Heather Zenone. Special thanks for the critical response by Richard H. Sander. As always, this project would not have been possible without the support of Gale Drake Jones, who every day makes the "grass greener and the rain wetter." All errors and omissions are solely my responsibility.


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I. Introduction

Currently, the Law School Admission Test (LSAT) is the foremost gatekeeper to obtaining a legal education at schools accredited by the American Bar Association (ABA). In this Article I analyze the causes, consequences and fairness of gender and racial/ethnic differences on the LSAT. In Part I, I review the history of women's representation in legal education, and note the present gender gap in LSAT performance. In Parts II and III, I attempt to remedy a deficit in the current literature by documenting how the LSAT decreases women's and (particularly) minorities' admission opportunities in the 1990's, even compared to men and Whites who had
similar accomplishment levels over four years of college. As a way of studying the impact of current definitions of merit, I compare present admission practices with two admission models based on undergraduate grade-point averages. Either alternative admission model results in the admission of about two thousand more women to ABA schools, and would create overall gender parity in legal education.

In Part IV, I summarize the statistical methods for evaluating the significance of score differences on the LSAT between two test takers, and I review professional standards for appropriate test use. I then contrast the lack of statistical significance—between two test takers—of the modest LSAT gender gap with the practical consequences of LSAT misuses in admissions, financial aid allocation, employment decisions and school funding. Finally, in Part V, I review the educational literature regarding the sources of potential LSAT test bias. I argue that the strong possibility of bias in forms such as stereotype threat, speededness, subject matter selection and item bias, undermine claims by test producers that the LSAT is fair—or even meaningfully "standardized"—in its treatment of women and racial/ethnic minorities.

A. Historical Background

Women's³ representation in American law schools is hindered by both historical and contemporary obstacles. After comprising less than three percent of law school enrollments for decades, women's enrollments started to increase slowly during the 1960's.⁴ By 1968, five percent of law school students at ABA schools were women.⁵ During this era, overt sexual discrimination was common.⁶ Harvard admitted its first woman in 1950, and Notre Dame did so in 1969.⁷ In 1968, ten law schools accredited by the American Bar Association (ABA) had no female students.⁸ By 1978 there were almost 32,000 women in ABA schools, or 28 percent of total

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3. I realize that the terms "women" and "people of color" can be interpreted as mutually exclusive categories, which is not my intent. When I refer to women I simply mean women overall, including White women and women of color. Conversely, when I refer to "people of color" or "minorities," I am referring to women and men. I also attempt to identify where there are important differences—in the context of law school admission opportunities—by gender among people of the same race or ethnicity as well as by race among people of the same gender. For a discussion of the difficulties involved in using the terms "women" and "people of color," see Donna E. Young, Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching, 11 BERKELEY WOMEN'S L.J. 270, 271 n.4 (1996).

4. See Barrie Thome, Professional Education in Law, in EDUCATION FOR THE PROFESSIONS OF MEDICINE, LAW, THEOLOGY, AND SOCIAL WELFARE 166 (1973); see also Amy Singer, Numbers Too Big to Ignore, AM. L. 5, 6 (Mar. 1999) (listing ABA statistics on women in law school between 1950 and 1998).

5. See Thorne, supra note 4, at 166.

6. See David M. White & Terry Ellen Roth, The Law School Admission Test and the Continuing Minority Status of Women in Law Schools, 2 HARV. WOMEN'S L.J. 103, 105 n.10 (1979) (reporting that in 1964, the Dean of the Harvard Law School assured male students that "there could never be a great influx of women into the school . . . because the policy was never to give any man's place to a woman.").

7. See Thorne, supra note 4, at 160; see also Singer, supra note 4, at 6.

8. See Thorne, supra note 4, at 160.
enrollments. A decade later this figure swelled to 49,000, representing 41 percent of all ABA law students. As of 1998 there were 57,000 total female law students (45 percent). In summary, women’s enrollments have attained near-parity with men’s in legal education, and if current trends continue, women may constitute half of ABA law students in the first few years of the twenty-first century.

It should be noted that the expansion of women’s opportunities in legal education up to the early 1970’s predominantly benefited white women. Unfortunately this issue is difficult to document because the Law School Admission Council (LSAC) studies tended to (and still do) report gender or race/ethnicity but not breakdowns of race/ethnicity by gender. Yet, the available evidence suggests that women comprised a small proportion of African American and Latino law students during the early years of affirmative action, even as these groups were themselves a small fraction of the total student population. For example, one LSAC study reported that out of 34,394 students who took the December 1971 LSAT, only 4.6% were African American and only 1.4% were Chicano. The number of minority women within this already small population is quite meager; only about 392 African American women (1.1% of the total population) and 53 Chicanas (0.15% of the total population) took the December 1971 LSAT. Figures for Asian American and Native American test takers were not reported in Swineford’s study.

In recent years, however, the trend of women’s relative underrepresentation among minority law students has reversed; racial and ethnic minority groups now include a greater proportion of women compared to Whites. Again, one caveat to this finding is that few studies combine reports of gender and race. Fortunately, one LSAC study by Wightman reported the gender representation of all racial/ethnic groups for the entire 1990-91 cycle of applicants to ABA schools. While 40% of 1990-91 White applicants were women, the corresponding figures for minorities were consistently higher: Mexican American, 43%; Native American, 44%; Hispanic, 45%; Asian American, 47%; Puerto Rican, 48; and African American, 57%. Since then, an even greater proportion of applicants of color are women. Between 1990-91 and 1996-97, minority male applications

10. See id.
11. See id.
13. See id. The figure for Chicanas is listed in Swineford’s report. The figure for African American women is derived from the fact that Blacks were 4.6% of the population and that there were 1,190 African American male test takers in December 1971.
14. See id.
16. See id.
increased only 0.4%, while minority female applications went up 16.5%. Overall, the proportion of law school applicants who are now people of color is greater than the above figures would indicate because during the same period applications from Whites fell by over one-third.

B. The Current Status of Women Law School Applicants

At first blush, the aforementioned figures indicate a pattern of women’s ever-increasing representation in law school. However, there is reason to believe that women are, and in the foreseeable future will continue to be, underrepresented in the legal profession. Despite the fact that among college freshmen, higher proportions of women aspire to earn a law degree, women represented 48 percent of law school applicants to ABA schools in 1997-98.

The gender gap in law school applications is more significant than it initially appears because for some time now women have earned 53% of the bachelor’s degrees in the U.S. Furthermore, women within the law school applicant population—as is true generally—earn higher undergraduate grade-point averages (UGPAs) than men. Contrary to the suspicions of some scholars, women’s higher UGPAs among law school applicants are not, for the most part, attributable to the self-selection of majors that are less rigorous or more leniently graded. Therefore, this performance gap is most appropriately treated as reflecting real differences in educational attainment that ought to bode well for women in the law school admissions process. Despite higher UGPAs, women are less likely than men to be admitted to ABA law schools. The question then becomes why?

17. See LSAC, Applicant Data Reveal National Trends, LAW SERVICES REPORT 1, 6 (July/Aug. 1998) (reporting male and female percentage changes between 1990-91 and 1996-97 as follows: Native American, +6.2% and +35.8%; Asian American, +6.1% and +28.3%; African American, -4.8% and +6.2%; Hispanic, -5.2% and +17.7%; Mexican American, +6.8% and +28.4%; and Puerto Rican, +9.8% and +33.8%).

18. See id. at 6 (reporting that White male applications dropped 39.2% and White female applications dropped 29.2%).


20. See LSAC, 1997-98 NATIONAL DECISION PROFILES (1999). This includes 177 of 179 ABA schools. Excluded are law schools in Puerto Rico.


23. See WIGHTMAN, AN ANALYSIS OF LSAT PERFORMANCE, supra note 15, at 29 (reporting essentially the same magnitude of UGPA gender differences between male and female law school applicants majoring in Business, Computer Science, Health Professions, Humanities, Natural Sciences, Social Sciences, and other majors). Wightman also reported that Engineering is the singular exception to this trend, with men and women obtaining equal UGPAs. See id. It should be noted, however, that Engineering majors make up such a small fraction of law school applicants that this is of little significance for the entire applicant pool. For example, in 1990-91, there were 3,151 Engineering students who applied to ABA schools, compared to 21,229 Business majors, 17,195 Humanities majors, and 38,203 Social Science majors. See id.
C. The LSAT as Gendered Gatekeeper

Although women confront myriad barriers before they commit to law school, after they start their legal education and once they enter the profession, this article focuses on the persistent barrier that the Law School Admission Test (LSAT) poses for women—and women of color in particular—who apply to law school. The LSAT is most frequently treated by law school admission decision-makers as the single most significant element of an applicant’s file. Consistent with other standardized tests in higher education, women trail men on the LSAT by an average of approximately one-tenth of a standard deviation. Table 1 summarizes the performance of men and women on the LSAT (currently scored on a 120 to 180 scale) between the 1991-92 and 1995-96 admission cycles.

24. See White & Roth, supra note 6, at 103-04 (citing gender differences in encouragement to become lawyers related to childhood, adolescent and collegiate socialization patterns).
25. See, e.g., Lani Guinier et al., Becoming Gentlemen: Women’s Experiences at One Ivy League Law School 143 U. PA. L. REV. 1 (1994) (finding that law school had a disproportionately negative impact on the academic self-concept of female students at the University of Pennsylvania School of Law and that this alienation corresponded to lower levels of academic achievement); Suzanne Homer & Lois Schwartz, Admitted but not Accepted: Outsiders Take an Inside Look at Law School, 5 BERKELEY WOMEN’S L.J. 1 (1989-90) (finding similar gender differences at UC Berkeley’s Boalt Hall School of Law).
27. See Wightman, Sex Differences in LSAT Scores, supra note 21, at 272 (finding that for 1991 applicants to ABA schools, LSAT scores and UGPAs jointly have a correlation coefficient with actual admit/deny decisions of .71 for both male and female applicants). A correlation coefficient is a measure of the strength of association between two variables. A common statistical procedure is to square the correlation coefficient to calculate the total amount of variation accounted for by the relationship of these two variables. Thus, a correlation of .71 means that just over half of all the differences in admission decisions are accounted for by a combination of LSAT scores and UGPAs. Since LSAT scores are weighted more heavily than UGPA (usually 60/40) in admission indices, the test is the single most decisive factor in determining who will be admitted to law school. See id. at 270.
28. See WIGHTMAN, WOMEN IN LEGAL EDUCATION, supra note 22, at 14 (noting that women do less well than men on the Scholastic Assessment Test (SAT), Graduate Record Exam (GRE), Medical College Admission Test (MCAT), and Graduate Management Admission Test (GMAT)).
29. See Wightman, Sex Differences in LSAT Scores, supra note 21, at 256. Wightman’s findings are based on a database of all 1991 ABA law school applicants. However, it appears that the gender gap favoring men on the LSAT may have increased slightly since 1991. In 1995-96 the gap was 1.9 points, which is about two-tenths of a standard deviation. See supra Table 1.
Table 1: 1992-96 Average Scores on the LSAT for Male and Female Applicants to ABA Law Schools

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>MALE</td>
<td>Average Number</td>
<td>152.6</td>
<td>152.9</td>
<td>153.2</td>
<td>152.4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>55,460</td>
<td>51,458</td>
<td>49,682</td>
<td>45,945</td>
</tr>
<tr>
<td>FEMALE</td>
<td>Average Number</td>
<td>151.0</td>
<td>151.3</td>
<td>151.5</td>
<td>150.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>41,140</td>
<td>39,899</td>
<td>39,531</td>
<td>37,933</td>
</tr>
<tr>
<td>GENDER GAP</td>
<td>Male Avg. – Female Avg.</td>
<td>1.6 pts.</td>
<td>1.6 pts.</td>
<td>1.7 pts.</td>
<td>1.8 pts.</td>
</tr>
</tbody>
</table>

II. THE CURRENT STATE OF LSAT-RELATED BIAS IN LAW SCHOOL ADMISSIONS

A. The Paucity of Reliable Studies on Gender Bias

In general, far too little attention has been given to the admission consequences of women’s lower LSAT scores. Despite a growing body of academic literature analyzing women’s experiences in legal education, no contemporary independent studies assess the impact of the LSAT on women’s admission chances. A recent study by Linda Wightman of the Law School Admission Council (LSAC) concluded that the LSAT does not cause gender bias in ABA law school admissions. Yet, there are reasons to believe this

31. See Katherine Connor & Ellen J. Vargas, The Legal Implications of Gender Bias in Standardized Testing, 7 BERKELEY WOMEN’S L.J. 13, 20 (1992) (finding that the “literature does not include analyses of the impact of these tests on the admission of women to colleges and graduate and professional schools”).
32. See WIGHTMAN, WOMEN IN LEGAL EDUCATION, supra note 22; Guinier et al., supra note 25.
33. Illustrative of the lack of careful inquiry applied to this issue is the ABA report on women in legal education. See ABA COMMISSION ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN THE LEGAL PROFESSION (1996). The ABA Commission recommended that admission processes in each law school give “no inappropriate advantage to individuals on the basis of gender” and that they should “ensure that women are being admitted in appropriate numbers given their credentials.” Id. at 53. Yet, perhaps concluding that actual admission practices were beyond the scope of its inquiry, the ABA Commission neglected to conduct its own assessment of gender fairness in law school admissions. The Commission raised the question of why women do not yet occupy half of the seats in American law schools, yet it concluded that the “reasons for this discrepancy are unclear.” Id. at 6.
34. “Gender bias” is used in this article rather than “sex bias” in order to emphasize social rather than biological dimensions of this issue. Still, the term “gender bias” is presently used in the same sense conveyed by Wightman, meaning differences in admission opportunities when there are strong reasons to believe that none should exist. See Wightman, Sex Differences in LSAT Scores, supra note 21.
35. See Wightman, Sex Differences in LSAT Scores, supra note 21, at 274. Wightman used a logistic regression model to compare actual admission decisions with projected admission decisions for the 1991 national class of law school applicants. Under a combined LSAT/UGPA model, Wightman concluded that her results “did not reveal evidence of sex bias in the admission decision process, in that the proportion of women predicted to be admitted using a model of LSAT and UGPA to predict admission for men is approximately equal to the proportion actually admitted.” Id. Also of note, the ABA Commission apparently relied on an earlier version of this Wightman article when it chose not to investigate gender fairness in
conclusion is misleading. 36

B. The LSAT's Impact on Admissions Opportunities for Racial and Ethnic Minorities

An appropriate investigation of the claim that the LSAT disproportionately lowers opportunities for women would measure women's admission chances based on a UGPA model, then study whether including the LSAT increases or restricts opportunities. 37 On this point, much can be learned from Wightman's other major study using the same 1991 database, where she calculated admission chances for racial and ethnic groups. 38 Table 2 summarizes Wightman's findings, after making the two models comparable by adjusting the number of total admits in each model to be the same as the number of actual admits in 1991. 39 Including the LSAT in law school admissions. See ABA, ELUSIVE EQUALITY, supra note 33, at 6 (citing WIGHTMAN, AN ANALYSIS OF LSAT PERFORMANCE, supra note 15).

36. But see Wightman, Sex Differences in LSAT Scores, supra note 21. If the aim of Wightman's study was to investigate negative admission consequences of the LSAT in particular, as both the title and the body of her article suggest, her methodology is inappropriate. Wightman accounted for women's higher UGPAs in other sections of her study. See id. at 263. Yet, when it came to analyzing actual law school admission data, this caveat disappeared. See id. at 270-72. Therefore, one cannot infer that the LSAT does not produce gender bias in law school admission decisions because women's higher UGPAs may mask the test's deleterious influence. In fact, inferences of LSAT gender bias can be confirmed from the very findings that Wightman uses to counter such claims. For example, according to Wightman, despite having LSAT scores a mere one-tenth of a standard deviation lower than men, women need to obtain UGPAs one-half of a standard deviation higher than men in order to maintain parity in the proportion of applicants receiving admission offers. See id. at 262. Actually, the data provided in two other Wightman studies indicates that female law school applicants have about .10 higher grade-point averages than men, which is one-quarter of a standard deviation for both men and women. See WIGHTMAN, WOMEN IN LEGAL EDUCATION, supra note 22, at 11 (finding that for the same 1991 cohort of applicants, one standard deviation in UGPA was .40 for women and .43 for men, respectively); WIGHTMAN, AN ANALYSIS OF LSAT PERFORMANCE, supra note 15, at 29. Therefore, Wightman's report of a one-half standard deviation gap is most likely an editorial error. The significance of this fact can best be understood by means of a hypothetical example of two applicants. Imagine that Michael and Michelle are two prospective law school applicants, and both had the same major at the same college. If Michael and Michelle both entered their last semester with 3.50 UGPAs, in order for Michelle to neutralize the average influence of LSAT gender bias on her admission chances, she would have to start by pulling all A+s in her last term. See LSAC, LAW SCHOOL ADMISSIONS REFERENCE MANUAL 3.12 (1995) (noting that the Law School Data Assembly Service, a division of LSAC, calculates UGPAs according to a standard format before issuing transcript summaries to law schools, and that the LSDAS grading scale converts A+s to a 4.33 UGPA). If Michelle was lucky enough to even have professors who were willing to issue the occasional A+, she would still have to rely on Michael not improving upon his A- to overcome the admission consequences of the LSAT gender gap that Wightman claims lacks "apparent practical significance." Wightman, Sex Differences in LSAT Scores, supra note 21, at 256.

37. Cf. David Kaye, Searching for Truth About Testing, 90 YALE L.J. 431, 455 n.100 (1980) (book review) (suggesting that to assess the impact of the LSAT on minority admissions the "better comparison is between race-blind admissions based on LSAT alone, UGPA alone, and UGPA and LSAT combined").


39. See id. Before making adjustments, Wightman's UGPA model admitted 38,251 applicants and the LSAT/UGPA model admitted 43,777 applicants, while the actual number of admits was 50,640.
admissions disadvantages every racial/ethnic minority group in Wightman’s study.

Bearing in mind that both models are “race blind,” it is highly significant that Table 2 indicates that more than twice as many African Americans would be admitted to law school under a UGPA model compared to an LSAT/UGPA model. Puerto Rican applicants are also particularly hard-hit by the LSAT. A similar, if less dramatic, pattern occurs for other groups of color. Even Asian Americans, celebrated by some as the so-called “model minority,” would see a not-insignificant 13% increase in admits under a UGPA model compared to an LSAT/UGPA model. Overall, the admission chances of people of color would increase by 41% under a UGPA admission model compared to an LSAT/UGPA model. This difference of 1,638 students is particularly important when the representation of people of color is already small under “race-blind” admissions.

40. Of course, given the maldistribution of opportunity historically, the term “race blind” conveys a false sense of neutrality. See Daria Rothmayr, Deconstructing the Distinction Between Bias and Merit, 85 Cal. L. Rev. 363, 368-69 (1997) (arguing that “merit standards” are “necessarily subjective and race-conscious; they are developed in a historically contingent social context and are authored by members of groups who have enough social power—which historically has been based in part on their race and ethnicity—to define what counts as social value... In some meaningful sense, then, merit standards can be redescribed as a form of bias that has come to be socially accepted.”).


TABLE 2: Projected 1991 Admission Figures by Racial Group UGPA Model Compared to LSAT/UGPA Model

<table>
<thead>
<tr>
<th>Racial Group</th>
<th>UGPA Only</th>
<th>LSAT/UGPA</th>
<th>Difference (UGPA - LSAT/UGPA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>1,769</td>
<td>822</td>
<td>+947</td>
</tr>
<tr>
<td>Mexican American</td>
<td>398</td>
<td>300</td>
<td>+98</td>
</tr>
<tr>
<td>Hispanic</td>
<td>1,062</td>
<td>810</td>
<td>+252</td>
</tr>
<tr>
<td>American Indian</td>
<td>199</td>
<td>177</td>
<td>+22</td>
</tr>
<tr>
<td>Asian American</td>
<td>1,954</td>
<td>1,727</td>
<td>+227</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td>210</td>
<td>118</td>
<td>+92</td>
</tr>
<tr>
<td>People of Color Total</td>
<td>5,592</td>
<td>3,954</td>
<td>+1638</td>
</tr>
<tr>
<td>White</td>
<td>45,048</td>
<td>46,684</td>
<td>-1636</td>
</tr>
<tr>
<td>Overall Total</td>
<td>50,640</td>
<td>50,638</td>
<td>same</td>
</tr>
</tbody>
</table>

Conversely, White students are the only group that is advantaged by a LSAT/UGPA model compared to a UGPA model. Under the UGPA model Whites would comprise 89% of law students, and people of color 11%, whereas under the LSAT/UGPA model Whites would comprise 92% of law students, and people of color 8%. Because Whites predominate in the applicant pool, a 41% increase in the admission of people of color under a UGPA model would only lower the admission of White applicants by less than 4%. Just as the LSAT (compared to UGPA) appreciably privileges White students in law school admissions, could it favor male applicants as well?

43. See Wightman, Threat to Diversity, supra note 38, at 16. In order to obtain overall admission projections based solely on numerical indicators (LSATs and UGPAs), Wightman combined two figures. Students projected to be admitted to at least one of the ABA law schools to which they applied—and who were actually admitted—were added to the students not actually admitted but who would have been under a numbers-based system.

44. See id. Wightman and LSAC studies consistently report Mexican American and Hispanic as mutually exclusive categories.

45. The difference of two applicants is simply a byproduct of rounding within ethnic groups.
III. RESULTS OF AN ANALYSIS OF LSAT-RELATED GENDER BIAS IN LAW SCHOOL ADMISSIONS

A. Are Men and Women with the Same UGPAs Equally Likely To Be Accepted?

LSAC annually provides summary information broken down by LSAT and UGPA bands for all applicants to ABA law schools. This permits a fairly straightforward analysis of the disparate impact of the LSAT on women’s and people of color’s admission opportunities. If the principle of ceteris paribus—hold everything else constant—is applied, do men and women, or Whites and minorities, have equal admission chances when they apply with equivalent UGPAs? Table 3 reveals the sizeable and systematic preference the LSAT affords male candidates in law school admissions, as evidenced by the fact that men are admitted at a higher rate than women with the same grades. Over the last five years—the 1993-94 to 1997-98 admission cycles—women were disadvantaged relative to men by the LSAT in each of the sixteen UGPA bands. The gender gap in admission rates was remarkably consistent from year to year even though overall applications dropped by one fifth between 1993-94 and 1997-98, and even though the proportion of female applicants climbed modestly during this period.

The focus on the adverse consequences for women of the LSAT, compared to UGPAs, is not to suggest that college grades are, or should be, a totally fair and sufficient measure of merit. However, since jointly the LSAT and UGPA explain the majority of the variance in ABA admission decisions, it is justifiable to make them the focus of my investigation into the gender and racial fairness of current admission practices. In other words, the comparison

46. LSAC, 1997-98 DECISION PROFILES, supra note 20. Given that this data is annually sent to law schools, it is surprising that women’s or minorities’ lower admission rates have not received much, if any, attention in the contemporary law review literature.

47. The admission percentage is defined as the proportion of applicants getting into one or more of the schools to which they applied. It would be preferable to present similar data that controls for men and women applying to the same school. Comprehensive data from individual schools on the gender representation of their applicant pool and admitted candidates is difficult to obtain, for obvious reasons. It can also be expected that there could be a selection bias issue if data were voluntarily made available at individual law schools. Schools that most harshly discriminate against women can be expected to be the least willing to share comprehensive admissions data. This would call into question the generalizability of school-specific data unless all law schools agreed (or were compelled) to open up their admission decisions to outside scrutiny. However, the reliability of the aggregate LSAC data is enhanced by Wightman’s finding that overall “women do not differentially select themselves out of the application process in response to their lower scores.” See Wightman, Sex Differences in LSAT Scores, supra note 21, at 261.

48. These facts suggest that the gender gap in admission rates is not an artifact caused by aggregating five years of data.

49. Although the LSAT is the focus of this critique, grades, too, suffer from myriad infirmities that would caution against over-reliance in admission decisions. Grades, for example, will inevitably reflect previous and ongoing forms of inequality, and they may be only marginally related to the skills required to be an effective practicing attorney.

50. See supra note 27.
of LSATs and UGPAs is not conducted in order to validate either criteria, but rather to inform policymakers by reporting admission disparities using the two most influential factors in selection decisions. Both the LSAT and UPGA-only admission models substantially simplify actual law school admission decisions. However, if significantly more women are admitted under a UPGA-only model compared to an LSAT/UPGA model, it is reasonable to conclude that admission practices combining college grades with all of the other usual considerations (like letters of recommendation and personal statements) will admit more women than LSAT/UPGA admission practices in which all of those other factors are weighed in the same manner. I address elsewhere the question of whether it is justified to rely on LSAT scores in law school admissions based on the test’s ability to predict first-year law school grades.

### Table 3: Male & Female Acceptance Rates to Law School (All Applicants to ABA-Accredited Schools)
1993-94 to 1997-98 Admission Cycles

<table>
<thead>
<tr>
<th>GPA RANGE</th>
<th>MEN (# Applicants)</th>
<th>WOMEN (# Applicants)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.75+</td>
<td>89.9% (15,130)</td>
<td>88.8% (16,171)</td>
</tr>
<tr>
<td>3.50-3.74</td>
<td>85.0% (26,538)</td>
<td>82.5% (28,066)</td>
</tr>
<tr>
<td>3.25-3.49</td>
<td>79.4% (34,046)</td>
<td>76.4% (33,802)</td>
</tr>
<tr>
<td>3.00-3.24</td>
<td>73.1% (38,118)</td>
<td>67.1% (33,373)</td>
</tr>
<tr>
<td>2.75-2.99</td>
<td>63.9% (33,901)</td>
<td>55.8% (26,683)</td>
</tr>
<tr>
<td>2.50-2.74</td>
<td>55.0% (26,995)</td>
<td>44.7% (18,670)</td>
</tr>
<tr>
<td>2.25-2.49</td>
<td>44.7% (17,875)</td>
<td>33.7% (10,713)</td>
</tr>
<tr>
<td>2.00-2.24</td>
<td>35.5% (8,850)</td>
<td>23.1% (4,729)</td>
</tr>
<tr>
<td>TOTALS</td>
<td>68.9% (201,453)</td>
<td>66.0% (172,207)</td>
</tr>
</tbody>
</table>

The disparities between male and female admission rates increase as UGPAs decrease, so the women who are least likely to be admitted to law

51. See WIGHTMAN, WOMEN IN LEGAL EDUCATION, supra note 22, at 14 (noting that in her study of the admission opportunities of men and women “the primary interest here is to explore gender differences not to validate the LSAT nor the law school admission process”).

52. Adding other admission factors likely will have similar effects on both the UPGA-only and LSAT/UPGA admission models, rendering comparisons of the two models sound. Also, Wightman’s study of the 1991 national applicant class reports that accounting for a great many additional factors (such as letters of recommendation), either alone or in combination, does not improve the correlation between her hypothetical admission models and actual admission decisions. See Wightman, Threat to Diversity, supra note 38, at 17. One interpretation of this finding is that such “biodata” is considered in a wide variety of ways based on different subjective evaluations of admission officers and faculty members, causing the aggregate influence on admission decisions to be unpredictable.

53. See Kidder, The Rise of the Testocracy, supra note 42 (reviewing the law school performance literature and arguing that, based on the fact that most every “outsider” group is overpredicted—women, people of color, friendly students, public interest-oriented students, etc.—the criterion variable of law school grades is itself biased and therefore cannot serve as a neutral benchmark for assessing the validity of the LSAT for admission purposes).

54. See LSAC, 1993-94 DECISION PROFILES (1995); LSAC, 1994-95 DECISION PROFILES (1996); LSAC, 1995-96 DECISION PROFILES (1997); LSAC, 1996-97 DECISION PROFILES (1998); LSAC, 1997-98 DECISION PROFILES (1999). In each year, between 175 and 177 law schools (out of 178-179) reported data that was consolidated into these reports—about 98% of ABA schools. Prior to 1993-94, gender was not reported in the Decision Profiles.
school are also the ones whose admission rates lag furthest behind men with the same UGPA. Women often need UGPAs a quarter-point higher than men merely to equalize their admission chances. Just as important, women with 2.0 or higher UGPAs do not have overall admission rates that are equal to men. This means that in terms of admission consequences, even the appreciably better performance of women in college is insufficient to counterbalance the negative impact produced by modest LSAT score differences.

B. Race and Gender: A Double Burden for Women of Color Applying to Law School?

Just as women overall are adversely affected by the emphasis placed on the LSAT in law school admissions, so too does the LSAT have the effect of disproportionately excluding racial/ethnic minorities from ABA schools. This was already addressed in the comparison of “race blind” UGPA versus LSAT/UGPA admission models. What may be more surprising to some is that even when diversity is a factor in admission decisions, the negative impact of the LSAT is so severe that among applicants with approximately the same UGPAs, Whites consistently have the greatest chance of being accepted into ABA law schools.

Table 4 displays aggregate ABA admission data covering the 1993-94 to 1997-98 admission cycles. The gap in overall admission rates between Asian Americans and Whites, for example, is about the same magnitude as the gap between men and women in admission rates. However, all other minority subgroups—Native American, Hispanic, Mexican American and African American—face a substantially greater barrier to opportunity. For example, Black law school applicants with 2.5-2.74 UGPAs are slightly less likely to be offered admission than are Whites with more modest 2.0-2.24 UGPAs. The far greater difference in overall admission rates of people of color reflects the

55. There are many law schools not accredited by the ABA. To the extent that this paper focuses exclusively on ABA schools, there are two reasons: 1) data at a national level is only available for ABA schools, and 2) the vast majority of states only have ABA schools because of restrictions on who is eligible to sit for state Bar Examinations. Thus, for many applicants, ABA schools are the only realistic option. California is the largest exception to this trend. Also noteworthy is that ABA-accreditation and reliance on the LSAT are not unrelated. ABA accreditation requirements prescribe use of an admission test, and it just so happens that the LSAT is the only test so far that satisfies this requirement. See ABA GUIDE (1998), supra note 9, at 467 (listing ABA Standard 503: “A law school that is not using the Law School Admission Test sponsored by the Law School Admission council shall establish that it is using an acceptable test.”). The ABA has been reluctant to approve other testing alternatives. See LAWRENCE VELVEL, THE DEEPLY UNSATISFACTORY NATURE OF LEGAL EDUCATION TODAY 88 (1992) (contending that the Massachusetts School of Law uses a writing-based alternative to the LSAT, and that the school was denied accreditation in part because it was not using the LSAT). Thus, as a practical matter, the ABA requires law schools to use the LSAT, though no ABA rules specify how much weight it is to be accorded.

56. This is an even worse disparity than in the Michael and Michelle example, supra note 36.

57. See supra Table 2 and accompanying text.
combined consequences of lower UGPAs and even lower LSAT scores.\textsuperscript{58}

Table 4: Cumulative Acceptance Rates to ABA Law Schools in the 1993-94 to 1997-98 Admission Cycles\textsuperscript{59} (# of Applicants)

<table>
<thead>
<tr>
<th>GPA Range</th>
<th>White</th>
<th>African American</th>
<th>Chicano</th>
<th>Hispanic</th>
<th>Asian/ Pac. Is.</th>
<th>Native American</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.75+</td>
<td>90%</td>
<td>83%</td>
<td>89%</td>
<td>88%</td>
<td>87%</td>
<td>85%</td>
</tr>
<tr>
<td>(25,472)</td>
<td></td>
<td>(910)</td>
<td>(280)</td>
<td>(633)</td>
<td>(2,109)</td>
<td>(162)</td>
</tr>
<tr>
<td>3.50-3.74</td>
<td>85%</td>
<td>76%</td>
<td>85%</td>
<td>80%</td>
<td>82%</td>
<td>81%</td>
</tr>
<tr>
<td>(42,993)</td>
<td></td>
<td>(2,344)</td>
<td>(649)</td>
<td>(1,332)</td>
<td>(3,848)</td>
<td>(329)</td>
</tr>
<tr>
<td>3.25-3.49</td>
<td>79%</td>
<td>69%</td>
<td>77%</td>
<td>75%</td>
<td>77%</td>
<td>79%</td>
</tr>
<tr>
<td>(51,690)</td>
<td></td>
<td>(4,057)</td>
<td>(1,093)</td>
<td>(2,098)</td>
<td>(4,474)</td>
<td>(502)</td>
</tr>
<tr>
<td>3.00-3.24</td>
<td>73%</td>
<td>58%</td>
<td>71%</td>
<td>67%</td>
<td>72%</td>
<td>70%</td>
</tr>
<tr>
<td>(51,687)</td>
<td></td>
<td>(6,519)</td>
<td>(1,415)</td>
<td>(2,612)</td>
<td>(4,403)</td>
<td>(588)</td>
</tr>
<tr>
<td>2.75-2.99</td>
<td>64%</td>
<td>48%</td>
<td>56%</td>
<td>56%</td>
<td>62%</td>
<td>58%</td>
</tr>
<tr>
<td>(41,194)</td>
<td></td>
<td>(7,662)</td>
<td>(1,400)</td>
<td>(2,403)</td>
<td>(3,540)</td>
<td>(605)</td>
</tr>
<tr>
<td>2.50-2.74</td>
<td>56%</td>
<td>38%</td>
<td>46%</td>
<td>45%</td>
<td>52%</td>
<td>50%</td>
</tr>
<tr>
<td>(28,221)</td>
<td></td>
<td>(8,171)</td>
<td>(1,211)</td>
<td>(2,057)</td>
<td>(2,564)</td>
<td>(542)</td>
</tr>
<tr>
<td>2.25-2.49</td>
<td>47%</td>
<td>28%</td>
<td>37%</td>
<td>33%</td>
<td>32%</td>
<td>41%</td>
</tr>
<tr>
<td>(16,266)</td>
<td></td>
<td>(6,671)</td>
<td>(654)</td>
<td>(1,334)</td>
<td>(1,517)</td>
<td>(365)</td>
</tr>
<tr>
<td>2.00-2.24</td>
<td>39%</td>
<td>21%</td>
<td>30%</td>
<td>25%</td>
<td>32%</td>
<td>31%</td>
</tr>
<tr>
<td>(6,733)</td>
<td></td>
<td>(4,141)</td>
<td>(377)</td>
<td>(616)</td>
<td>(697)</td>
<td>(199)</td>
</tr>
<tr>
<td>TOTALS</td>
<td>72%</td>
<td>46%</td>
<td>61%</td>
<td>60%</td>
<td>69%</td>
<td>62%</td>
</tr>
<tr>
<td>(264,216)</td>
<td></td>
<td>(40,475)</td>
<td>(7,079)</td>
<td>(13,085)</td>
<td>(23,152)</td>
<td>(3,292)</td>
</tr>
</tbody>
</table>

Given that women are slightly less likely to be offered admission than men, and that people of color are (in some cases substantially) less likely to be admitted than Whites, do minority women face even greater obstacles to entering the legal profession? It appears that the answer could be yes, but with several caveats. It is inappropriate to simply treat disadvantage by gender and race in an additive manner, for that would presume no overlap between these two axes of subordination. Actually, Wightman found that there is considerable overlap: just over half of the gender gap in LSAT scores was accounted for by controlling for the race and ethnicity of applicants.\textsuperscript{60}

Secondly, while issues of race and ethnicity are imbricated with the LSAT

\textsuperscript{58} Among 1995-96 applicants, the LSAT and UGPA averages by race/ethnicity were as follows: Native American 148.8 and 2.96, Asian American 152.6 and 3.14, African American 142.7 and 2.78, White 153.9 and 3.16, Chicano 148.3 and 2.95, Hispanic 147.7 and 2.99, and Puerto Rican 139.9 and 2.99. See LSAC, SUMMARY OF NATIONAL APPLICANT COUNTS, supra note 30. See also Wightman, Threat to Diversity, supra note 38, at 36 (noting that among 1990-91 first-year law students that Blacks had UGPAs nearly one standard deviation below Whites and LSAT scores over one-and-a-half standard deviations below Whites).

\textsuperscript{59} LSAC, DECISION PROFILES, 1993-94 through 1997-98, supra note 54. This includes 98% of ABA law schools. This chart does not include Puerto Rican admission rates among ABA schools in the U.S. mainland and not ABA schools in Puerto Rico. See WIGHTMAN, AN ANALYSIS OF LSAT PERFORMANCE, supra note 15, at 27. This reporting difference causes admission data for Puerto Ricans to be less representative because many applicants apply only to schools in Puerto Rico, or a combination of schools in Puerto Rico and the U.S. mainland.

\textsuperscript{60} See WIGHTMAN, AN ANALYSIS OF LSAT PERFORMANCE, supra note 15, at 30-32 (conducting multiple regression analyses and finding that more than half of the observed differences in LSAT scores between men and women are attributable to race/ethnicity).
gender gap, it is also not reducible to race and ethnicity. Within nearly every ethnic group, women have slightly lower LSAT scores than men from the same ethnic group. Conversely, women’s pattern of obtaining higher UGPAs is fairly uniform within racial/ethnic groups. Unfortunately, data on men’s and women’s admission rates reported within racial/ethnic groups is not publicly reported. Nonetheless, if the general pattern holds true—women’s higher UGPAs and lower LSATs result in slightly lower overall admission rates—then it would be consistent for women of color to have slightly lower admission rates than men from the same racial ethnic subgroups, even as minority men are disadvantaged compared to White candidates, and White women are disadvantaged compared to White male applicants. In the absence of clear answers, it is particularly important to keep in mind that any discussion of an LSAT gender gap is substantially also a question of racial inequities, and conversely, any admission practice that adversely effect people of color will disproportionately disadvantage women, given the composition of the applicant pool. This will be even more so if current application trends continue.

C. How Many Women are Affected by LSAT-Related Gender Bias in Law School Admissions?

If for no other reason than their unsettling consistency, the results of Table 3 appear to support the conclusion that there are gender biased consequences in law school admissions associated with the LSAT. Indeed, the figures on race and ethnicity in Table 4 paint an even bleaker picture. Yet, since the gender differences, for example, among applicants with equivalent grades are

61. See id. at 25 (reporting an LSAT gender gap among Native American, African American, Hispanic, Mexican American, Puerto Rican, White, Other and “No Response” applicants, and reporting no gender gap among Asian Americans.).

62. See id. at 26 (reporting UGPA differences in favor of women in the range of .10 to .15 grade-points among Native American, Asian American, African American, Hispanic, Mexican American and White applicants).

63. It is possible that LSAC distributes such information to admission offices, but as far as I could tell, no information of this sort appears in LSAC’s publication list or in the materials they send to law school libraries. I invite other authors to pursue this matter further.

64. Because of a lack of data, this is admittedly speculative and is as much an invitation for further research as anything else.

65. The two trends to which I refer are the growing proportion of overall applicants who are women and the marked increase in female minority applications compared to the stagnation of male minority applications. See supra Part I.

66. It is possible that there are other forms of bias aside from the LSAT, which could at least partially account for the differences in opportunity between men and women applying to ABA schools. For an excellent discussion of how subtle and often unconscious biases infiltrate the social psychology of selection and hiring decisions, see Linda H. Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161 (1995). However, given that LSAT scores and UGPAs combined correlate .71 with actual admission decisions to ABA schools, see Wightman, Sex Differences in LSAT Scores, supra note 21, at 272, and since women have appreciably higher UGPAs on average, see id. at 257, the modest gender gap on the LSAT is the most likely cause of women’s lower admission rates.
sometimes only a few percentage points, it is fair to ask whether or not gender bias on the LSAT actually hinders a sizable number of women who aspire to go to law school. Table 5 addresses this concern by comparing the number of actual female law school admits in each UGPA band to the number of women who would have been admitted to ABA schools if women were granted admission percentages (in each UGPA band) equal to those currently held by men.

Table 5: Women's 1993-94 to 1997-98 Projected Admission Totals to ABA Law Schools if the Same UGPAs Meant the Same Admission Rates as Men Obtain

<table>
<thead>
<tr>
<th>UGPA Range</th>
<th># of Admits</th>
<th># of Projected Admits</th>
<th>Difference</th>
<th>Annual Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.75+</td>
<td>14,359</td>
<td>14,538</td>
<td>+179</td>
<td>+36</td>
</tr>
<tr>
<td>3.50-3.74</td>
<td>23,166</td>
<td>23,856</td>
<td>+690</td>
<td>+138</td>
</tr>
<tr>
<td>3.25-3.49</td>
<td>25,817</td>
<td>26,839</td>
<td>+1022</td>
<td>+204</td>
</tr>
<tr>
<td>3.00-3.24</td>
<td>22,377</td>
<td>24,396</td>
<td>+2019</td>
<td>+404</td>
</tr>
<tr>
<td>2.75-2.99</td>
<td>14,892</td>
<td>17,050</td>
<td>+2158</td>
<td>+432</td>
</tr>
<tr>
<td>2.50-2.74</td>
<td>8,342</td>
<td>10,269</td>
<td>+1927</td>
<td>+385</td>
</tr>
<tr>
<td>2.25-2.49</td>
<td>3611</td>
<td>4,789</td>
<td>+1178</td>
<td>+236</td>
</tr>
<tr>
<td>2.00-2.25</td>
<td>1092</td>
<td>1,679</td>
<td>+587</td>
<td>+117</td>
</tr>
<tr>
<td>TOTALS</td>
<td>113,656</td>
<td>123,416</td>
<td>+9760</td>
<td>+1952</td>
</tr>
</tbody>
</table>

Table 5 indicates that in the last five admission cycles, an annual average of 1,952 additional women would have been offered a seat in an ABA law school if women with the same grades were granted admission with the same frequency now enjoyed by men. From the perspective of how this bias impacts women's representation in the field of law, the most disturbing fact is how the LSAT's winnowing effect shapes the legal profession over time. For

67. As explained in Part IIID, infra, the preferable method of assessing the consequences of women's slightly lower LSAT scores is to reallocate offers by UGPA because this keeps the total number of offers constant. Table 5 (which increases total admission offers up until the point that women reach parity with men) is presented as supplemental data because it provides a picture of how the denial of opportunity is distributed among women along the UGPA continuum. Secondly, it is closer to actual admission practices in the sense that there is not an "all or nothing" cut-off.

68. Breaking up applicants into groups whose UGPAs are within one-quarter of a point is more appropriate to the issue of gender bias on the LSAT than calculations based on cumulative data of male and female admission ratios. Again, this is so because calculations based on summary statistics will underestimate the disparate impact of the LSAT due to the masking effect of women's higher UGPAs. See Part IIIB, infra. Nonetheless, if women with 2.0+ UGPAs simply had the same overall acceptance rate as men currently enjoy (to the nearest hundredth of a percentage point), there would have been an annual average of approximately 1,000 more women admitted to ABA law schools between 1993-94 and 1997-98.

69. See LSAC, DECISION PROFILES, supra note 54.
instance, if one held this pattern of 1,952 fewer women admitted annually for a dozen years, the LSAT’s admission bias would deny opportunity to a number of women equivalent to all female admits to ABA schools in 1997-98. For historical perspective, 1,952 women is a higher figure than the total number of female first-year students enrolled at ABA law schools in 1968-69.70

**D. Second Method of Determining LSAT Gender Bias: Reallocating Admission Offers by UGPA Ranking**

Another means of assessing the impact of the LSAT on women’s admission opportunities is to hold constant the total number of ABA admission offers and reallocate those offers based on a ranking of all applicants by UGPA.71 This method more closely approximates Wightman’s logistic regression projections,72 and asks a different question than that addressed by Table 5. Yet, ranking applicants by UGPA and imposing a cut-off at the number of ABA admission offers currently available, yields results strikingly similar to Table 5.

Table 6 indicates that in the last five years an annual average of 1,940 more women (and fewer men) would have been offered admission under a UGPA ranking system. Just as important, the gender gap in admission offers would virtually disappear, a fact that cannot be overemphasized given the history of barriers faced by women seeking entrance into the legal profession.73 Under a UGPA admissions model, admission offers to women between 1993-94 and 1997-98 would rise from 22,731 to 24,671 annually—an increase of 8.5 percent.

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71. The assumption of keeping admission offers constant is justified by the fact that men and women who are accepted to law school have virtually identical yield rates (the percentage who accept offers of admission) between 1993-94 and 1997-98. *See LSAC, Decision Profiles, supra* note 54.
73. *See supra* notes 4-7, 25.
Table 6: Women’s Cumulative 1993-94 to 1997-98 Admission Projections Based on a Ranking of Applicants by UGPA

<table>
<thead>
<tr>
<th></th>
<th>1993-94 to 1997-98 Total</th>
<th>Annual Average</th>
</tr>
</thead>
<tbody>
<tr>
<td># Actual Admits</td>
<td>113,656</td>
<td>22,731</td>
</tr>
<tr>
<td>(Percent of Total)</td>
<td>(45.0%)</td>
<td>(45.0%)</td>
</tr>
<tr>
<td># Projected Admits</td>
<td>123,357</td>
<td>24,671</td>
</tr>
<tr>
<td>(Percent of Total)</td>
<td>(48.9%)</td>
<td>(48.9%)</td>
</tr>
<tr>
<td>Difference</td>
<td>+9,701</td>
<td>+1,940</td>
</tr>
<tr>
<td>(Projected – Actual)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

IV. CONSEQUENCES VERSUS SIGNIFICANCE OF GENDER BIAS

A. How Two Questions Can Change the Face of the Legal Profession

Women’s and minorities’ diminished opportunities to attend ABA law schools are all the more alarming because a two-point gender gap on the LSAT lacks statistical significance when comparing any two individual applicants. This lack of significance will be illustrated by pointing out what two points means to the average LSAT test-taker. A discussion of statistical significance, professional standards for test use, and admissions consequences of a two point LSAT gap follows.

The median score on the LSAT is a 151. Starting with an example of two students, suppose that Michelle obtained a 150 on a recent LSAT and Michael scored a 152 on the same test. In practical terms, this means that Michael answered only two more questions correctly out of the 101 scored.

74. See LSAC, Decision Profiles, supra note 54. These are estimations because the UGPA data in the Decision Profiles is reported categorically for each quarter-point interval. Holding overall admission offers constant resulted in a cut-off in the middle of the 2.75-2.99 UGPA band. The ambiguity of the within-cell cut-off was resolved by subtracting sufficient numbers of male and female applicants within the band until the overall number of offers was reached. Subtraction of male and female candidates within the 2.75-2.99 band was done based on the proportion of men and women within the band. Because of women’s higher UGPAs, this is actually a conservative estimate of their projected representation. For example, although men comprised about 56% of the applicants in the 2.75-2.99 band (and thus 56% of those subtracted in order to hold admission offers constant), they represent an even higher proportion of those with grades near the bottom end of this range. Since it is the applicants at the lower end of the band who would not be admitted, the number of women who would be admitted under this UGPA cut-off model is slightly underestimated.

75. Consistent with Tables 3, 4 and 5, Table 6 presents actual and projected figures based on all applicants with 2.0+ UGPAs, and so excludes a very small number of applicants whose grades were not reported or were below 2.0.

76. See LSAC, Reference Manual, supra note 36, at 3.6. The average LSAT score for test-takers is a couple of points lower than that for applicants, see supra Table 1, because lower scoring test-takers are disproportionately discouraged from applying to law school. See Wightman, Sex Differences in LSAT Scores, supra note 21, at 261. Under this “consequential validity” view of test use, the LSAT would be biased against women even if it did not result in unequal admission chances, but still disproportionately discouraged women from applying. See id. at 272.

77. See supra note 21.
questions on the test. In the high-stakes contest of law school admissions, these two questions will place Michael at the 54th percentile of applicants and Michelle at the 46th percentile. Because there have been as many as 100,000 law school applicants in recent years, the two additional questions that Michelle missed can rank her several thousand places behind Michael in the national applicant pool.

**B. Reliability and Professional Standards for Test Use**

Given the possibility that adverse consequences can result from seemingly miniscule test score differences, does Michelle's slightly lower score signify that she possesses less academic potential? In the field of educational measurement, this question is addressed with the standard error of measurement (SEM) and standard error of difference (SED). The SEM is an estimation of how close a student's score on the test they took is to the "true score" the student would receive if the test contained no measurement error. In other words, SEM estimates the reliability—how consistently the test measures the skills under investigation—of the LSAT for a single test-taker.

Currently, the SEM for the LSAT at a two-thirds confidence level is plus or minus 2.6 points. At a ninety-five percent confidence level, the LSAT has a SEM of plus or minus 5.2 points. Thus, it could only be concluded with ninety-five percent confidence that Michelle's true score is between a 145 and a 155.

Of course, one LSAT score means nothing in isolation. Scores are used in admissions to compare multiple candidates and make selection decisions. Comparing two applicants magnifies the imprecision of the LSAT because each score simultaneously contains imperfect reliability. The standard error of difference is the more appropriate tool for assessing reliability when comparing two applicants. The SED for the LSAT is plus or minus 3.6

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78. See LSAC, THE OFFICIAL LSAT PREP TEST 41 (June 1997). On the June 1997 test, 59 correct answers yields a 152, whereas 57 correct answers yields a 150. Each question on the LSAT is given equal weight in scoring and there is no penalty for guessing. See LSAC, REFERENCE MANUAL, supra note 36, at 9.2.

79. See LSAC, REFERENCE MANUAL, supra note 36, at 3.6. The percentile difference of 2 points changes depending on the location of test takers on the overall distribution of scores. For example, an LSAT score of 159 is at the 80th percentile, whereas a 161 is at the 86th percentile, which is a smaller percentile difference than between a 150 and a 152. See id.


81. SEM is gauged by the standard deviation of scores for all test takers and is expressed by the following formula: \( SEM = \frac{sd}{\sqrt{n}} \), where \( r \) is the reliability coefficient. See Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 UCLA L. REV. 1251, 1273 n.72-73 (1995).

82. See LSAC, REFERENCE MANUAL, supra note 36, at 3.5.

83. See LSAC, THE OFFICIAL LSAT PREP TEST, supra note 78, at 1.

84. See id.

85. See Selmi, supra note 81, at 1273 n.73. Selmi contends,
points at a two-thirds confidence level and plus or minus 7.3 points at a ninety-five percent confidence level. The Requiring ninety-five percent certainty, if Michael had a 157 and Michelle had a 143, it still could not be concluded that Michael possessed more "legal aptitude" than Michelle. Consequently, the two-point gender gap on the LSAT does not even come close to approaching statistical significance between any two applicants.

It should be acknowledged that the LSAT is considerably more reliable across an entire applicant pool because reliability increases with sample size. However, high aggregate reliability is an insufficient justification for extreme reliance on LSAT scores in individual admission decisions. The premise that it is acceptable to rely predominantly on LSAT scores in choosing individuals because a class of students with a LSAT median of 152 is more "able" than a class with a LSAT median of 150 is flawed in several respects.

As an initial matter, applicants, as individuals, are entitled to certain due process considerations in the evaluation of their candidacies, and should not be treated by law schools simply as a resource to be leached and discarded. Accordingly, the forthcoming Standards for Educational and Psychological Testing, collaboratively developed by the major American educational measurement organizations, is slated to include a chapter on test taker's rights. Just as important, major testing organizations like LSAC routinely recommend against excessive reliance on small test score differences in admission decisions. For two decades the LSAC has adopted "Cautionary Policies" designed to minimize indefensible uses of LSAT scores and to "protect applicants from inappropriate treatment and unfair decisions based on improper use of (LSAC) services."

LSAC's Cautionary Policies warn law schools not to give excessive weight to small differences in LSAT scores (regardless of the high aggregate reliability of the test): "Scores should be viewed as approximate indicators

[in order to] compare two observed scores, a more appropriate measure would be the standard error of the difference, which when reduced to its simplest formula is the square root of two multiplied by the standard error of measurement (√2 (SEM)). The standard error of difference takes into account the error that is present in both of the observed scores.

Id.

86. See LSAC, THE OFFICIAL LSAT PREPTEST, supra note 78, at 1 (calculating that the SED for the LSAT is approximately 1.4 times the SEM).

87. See LSAC, REFERENCE MANUAL, supra note 36, at 3.5. (reporting that the overall reliability coefficients for the LSAT range from .90 to .95, when comparing different test forms to each other).


89. See Tenopyr, supra note 88, at 18.

rather than exact measures of an applicant’s abilities. Distinctions on the basis of LSAT scores should be made among applicants only when those score differences are reliable. Further support for the interpretation that LSAC is referring to test reliability between individuals, as opposed to cumulative reliability for all applicants, is found in LSAC’s recent practice of reporting each applicant’s score in a six-point band rather than as an exact score.

Both the courts and federal agencies like the Office for Civil Rights (OCR) of the U.S. Department of Education give great weight to generally accepted professional standards. For example, OCR’s latest Draft Federal Guidelines, also supported by the U.S. Commission on Civil Rights, rely extensively on professional standards. Similarly, the courts have looked to professional standards endorsed by test producers to judge appropriate uses of test scores. The courts have struck down uses of the SAT and ACT when such practices were at odds with professional standards, and where such misuses had an adverse impact on women or minorities. Therefore, a law school would presumably be on thin ice if its admission practices had a disparate impact on protected groups, and where it over-relied on LSAT scores in admission decisions, despite LSAC’s clear recommendations against such practices.

91. Id. at 27.
92. See LSAC, WHAT IS A SCORE BAND? (1997) (providing law schools and applicants with information about the reasoning behind LSAC’s method of reporting LSAT scores); see also Philip D. Shelton, Executive Director’s Report—The LSAT Median: So What? in LSAC, LAW SERVICES REPORT 3 (Mar./Apr. 1995) (recommending, as LSAC President, that, “Just as a single point or two should be irrelevant when evaluating an individual applicant for admission, one or two point differentials in schools’ ‘medians’ should not carry the significance it appears to have today.”).
95. See Sharif v. New York State Educ. Dep’t, 709 F. Supp. 345 (S.D.N.Y. 1989) (holding that New York State’s practice of awarding Regent College Scholarships solely based on SAT scores failed a Title IX disparate impact test because this use of the test lacked “educational necessity”). The Sharif court gave great weight to the fact that the College Board, makers of the SAT, promoted the test as a predictor of future college success rather than a measure of high school accomplishment. See id. at 362. Thus, the court held that New York’s “use of the SAT as a proxy for high school achievement is too unrelated to the legislative purpose of rewarding academic achievement in high school to survive even the most minimal scrutiny.” Id. at 364. For an analysis of Sharif from the perspective of one of the ACLU attorneys who represented the plaintiffs, see Kary L. Moss, Standardized Tests as a Tool of Exclusion: Improper Use of the SAT in New York, 4 BERKELEY WOMEN’S L.J. 230 (1988-89).
96. See United States v. Fordice, 505 U.S. 717, 736-37 (1992) (rejecting Mississippi’s exclusive reliance on the ACT for college admission purposes where the ACT Manual recommended that the test should not be the sole factor in admission decisions); see also Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1531 (M.D. Ala. 1991) (stating, “[T]he ACT is intrinsically unsuited to be used as an absolute criterion, particularly to determine future teaching ability, something far afield from its narrow, intended role in college admissions decisions.”).
C. Consequences of a Two-Point Gap in Admission Decisions

Unfortunately, neither the lack of statistical significance of the LSAT gender gap between individual applicants, nor LSAC's Cautionary Policies, guarantee that small score differences will not be given excessive weight in law school admission decisions. Examples abound of schools over-relying on minute LSAT score differences to such a degree that two points can literally make or break one's chances to become a lawyer. For instance, at one Midwest law school, the difference between admits at the 75th percentile of the class and those at the 25th percentile—spanning 261 admission offers—was only two points. An admissions policy report prepared by Boalt Hall students found that a mere one point increase on the LSAT raised admission chances from 13 to 31 percent. At many highly competitive law schools the difference between the 75th and 25th percentile of admits is only three or four points.

D. Consequences Beyond Law School Admission Decisions

The negative consequences of slightly lower LSAT scores may also carry over into educational and professional life. In fact, the danger of LSAT-related gender and racial/ethnic discrimination is greatest precisely in situations where competition is most severe because 1) the more difficult it is to distinguish among a great number of highly qualified candidates, the greater is the temptation to over-rely on small score differences to narrow the pool and 2) the gender gap on the LSAT increases substantially at upper end of the distribution. For example, in 1996-97 men comprised 53 percent of all law school applicants, yet they represented nearly two thirds of all applicants scoring 170 or above (about the 98th percentile) on the LSAT. Thus,

97. One step LSAC can take is to attach sanctions for LSAT abuses or make its Cautionary Policies a signatory document (asking law schools to publicly pledge to appropriate use of test scores). The LSAC debated these issues as early as 1981, but it has consistently declined to adopt such measures. See LSAC, Unethical Admission Practices, LAW SERVICES REPORT 5-8 (July-Aug. 1998) (reviewing the decisions that went into adopting the Cautionary Policies).

98. See ABA, GUIDE TO APPROVED LAW SCHOOLS 1999 EDITION 89 (1998) (listing the 25th and 75th percentiles of admitted students to Hamline Law School as 150 and 152).

99. See Cecilia Estolano et al., New Directions in Diversity: Charting Law School Admissions in a Post-Affirmative Action Era 26 (1997) (unpublished manuscript on file with author). This finding was for White applicants in the 1995 admissions cycle. It appears that this was a consequence of grouping applicants into different categories for administrative convenience. The high differential of one point resulted from falling on one side or the other of the boundary separating two of the categories.


101. See LSAC, REFERENCE MANUAL, supra note 36, at 3.6.

102. See LSAC, 1996-97 DECISION PROFILES, supra note 54.
when federal judges allow LSAT scores to decide close calls between applicants for extremely competitive and prestigious clerkship positions, when law firms use LSAT scores in hiring decisions, when law schools allocate scholarship money based on miniscule LSAT score differences, or when University Regents allocate funds for public law schools based on the number of incoming students with high LSAT scores. There is a strong

103. See NATIONAL ASSOCIATION FOR LAW PLACEMENT, 1999 FEDERAL AND STATE JUDICIARY CLERKSHIP DIRECTORY 53, 147, 157, 342, 343, 370 (1998) (listing six federal judges [all men, and including a judge on the U.S. Court of Appeals for the Ninth Circuit] who requested copies of LSAT scores in addition to law school transcripts, resumes, etc. Since the LSAT was not one of the check-the-box criteria, these judges had to go out of their way to insist that applicants provide LSAT scores); Ruth Berkowitz, One Point on the LSAT: How Much is it Worth? Standardized Tests as a Determinant of Earnings, 42 AM. ECONOMIST 80, 82 (Fall 1995) (reporting that many judges ask applicants to provide LSAT scores). See also DAVID OWEN, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE 291 (1985) (finding that “many law firms make hiring decisions in part on the basis of LSAT scores”); Berkowitz, supra note 103, at 82 (finding that many patent law firms ask applicants for LSAT scores); see also ALLAN NAIRN & ASSOCIATES, THE REIGN OF ETS, 232 (1980) (documenting how the U.S. Department of Justice and the Federal Trade Commission previously used LSAT scores in attorney hiring decisions).

105. Most ABA law schools offer academic scholarships, and LSAT scores are often a prime determinant of how scholarship funds are allocated. See LSAC, LAW SCHOOL LINKS (visited February 21, 2000) (providing financial aid and scholarship information on ABA law schools). While most schools do not publicize the extent to which scholarships are allocated based on small LSAT score differences, there are exceptions. See, e.g., ONU Pettit College of Law, Scholarships and Financial Assistance Listings (visited June 15, 1999) <http://www.law.onu.edu/financialaid/index.htm> (describing how at the Ohio Northern University Pettit College of Law, students with a 159+ LSAT are eligible for an $18,500 scholarship, those with scores of 157-158 were eligible for $17,500 scholarships, those with 154-156 scores were eligible for $14,500 scholarships, and finally applicants with 152-153 LSAT scores were eligible for scholarships up to $10,000). Although more information is needed to establish a causal relationship between over-reliance on LSAT scores and the diminished representation of women at ONU, it is unsettling that in the last five years women only comprise 30-35% of first-year students, which is well below the national average. See LSAC, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1999 EDITION 276 (1998); LSAC, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1998 EDITION 278 (1997); LSAC, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1997 EDITION 282 (1996); LSAC, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1996 EDITION 276 (1995); LSAC, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1995 EDITION 278 (1994). Perhaps a better comparison group is the other eight ABA schools in Ohio. Again, the disparity between ONU and these others is striking with respect to gender equity. In 1998, all of the other Ohio law schools had between 45% and 51% women, whereas ONU had 36% women. See LSAC, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 2000 EDITION 50-51 (1999). Other times, excessive reliance on LSAT scores in distributing scholarships can be inferred from the surrounding circumstances. For example, 1998 admits to the full-time program at provisionally accredited Chapman University School of Law had LSAT scores of 153 at the 75th percentile and 146 at the 25th percentile. See ABA, APPROVED LAW SCHOOLS 2000 EDITION, supra note 100, at 131. 1999 Chapman admits had LSAT scores of 159 at the 75th percentile and 151 at the 25th percentile. See Chapman University School of Law, Admissions and Financial Aid (visited February 21, 2000) <http://www.chapman.edu/law/admissions/admissions.html>. What happened between 1998 and 1999, a year when there was not a rise in applications nationally? Partly because Chapman was initially denied ABA accreditation, Dean Parham Williams enacted an aggressive plan to raise the LSAT averages of the entering class. See Karen Alexander, Chapman Law School Looks Beyond Past: New Building, Good Scores are Steps Toward Rebuilding Reputation, L.A. TIMES, Oct. 18, 1999, at B3 (reporting that Williams’ goal is to raise Chapman’s median LSAT score to the top 20 percent, and that the Chairman of First American Financial Corporation, a Chapman trustee, gave an undisclosed amount to provide academic scholarships to Chapman law students). As it turns out, over half of the 1999 entering class received academic scholarships, averaging $8,100. See Chapman, Admissions and Financial Aid, supra.

106. See Laurel-Ann Dooley, Making the Grade, 82 A.B.A. J. 36 (Dec. 1996). Dooley describes a plan approved by the Ohio Regents to tie state support for the six public law schools in the state to the LSAT scores and UGPAs of incoming students. The subsidy of $4,625 per full-time student has three tiers. The first tier issues funds based on the number of students with a 65th percentile LSAT score and 3.25 UGPA, and the second tier based on 80th percentile score and 3.5 UGPA). Whereas the first and second tier affect 90% of funding, the third tier—which is not linked to LSAT averages—only covers 10% of incoming students.
possibility that such misuses of test scores will have an unjustifiable—and often unacknowledged—disparate impact on women and (especially) people of color.

V. SOURCES OF TEST BIAS AGAINST WOMEN AND MINORITIES

The persistence of the LSAT gender and racial/ethnic gaps—bearing in mind the issue of statistical significance between two test-takers—requires investigating the possible causes of such test performance differences. This is especially true for those looking for ways to reduce the score gaps (and thus LSAT-related gender and racial/ethnic bias) and those seeking policy justifications for adjusting admission criteria to counteract LSAT gender and racial/ethnic bias. Test bias occurs when two populations differ in ways picked up by the predictor (LSAT) but which are not intended to be part of the construct (aptitude for the study of law) which the criterion variable (first-year law school grades) is intended to tap into. Possible forms of LSAT test bias linked to gender and race/ethnicity include stereotype threat, speededness, differential guessing, subject matter selection and item bias.

Stereotype threat refers to a form of bias not on the test itself, but rather in the psychosocial atmosphere in which standardized testing occurs. Specifically, stereotype threat research shows that members of groups known to perform less well on standardized tests can be made to perform less well when the stereotype of lower performance is evoked, whereas performance can be equal to other groups on the very same test when the stereotype is not imposed. Speededness refers to the ability of test takers to complete the test within given time constraints. Differential guessing refers to possible differences between subgroups in their proclivity to guess when they do not know the answer. Subject matter selection addresses how choices about content can influence score differences between subgroups. Item bias alludes to the possibility that individual questions pose extra burdens for certain test takers based on differences in backgrounds. Too often, test producers, who generally just measure correlations between predictors and criterion variables, do not vigorously investigate sources of test bias.108

Richard Aynes, Dean at Akron, testified in opposition to the plan: "It will affect racial diversity, gender diversity and economic diversity." Id. 107. In the psychometric literature the technical name for this sort of test bias is “construct irrelevant variance.” See Samuel Messick, Validity of Test Interpretation and Use, in EDUC. TESTING SERV. RES. REP. 9-11 (1990) (stating, “What matters is not only whether the social consequences of test interpretation and use are positive or negative, but how the consequences came about and what determined them. In particular, it is not that adverse social consequences of test use render the use invalid but, rather, that adverse social consequences should not be attributable to any source of test invalidity such as construct irrelevant variance.” Id. at 25.); Wightman, Sex Differences in LSAT Scores, supra note 21, at 273 (discussing construct irrelevant variance in the context of the LSAT).

108. See Samuel Messick, Foundations of Validity: Meaning and Consequences in Psychological Assessment, in EDUC. TESTING SERV. RES. REP. 7 (1993) (contending that “the ubiquitous problem of irrelevant test variance, especially method variance, is rarely if ever confronted in the content validity framework, even though irrelevant variance serves to subvert judgments of content relevance”).
A. Stereotype Threat

One plausible explanation of gender and racial/ethnic bias on the LSAT is what educational psychologists call stereotype threat. Studies in this field show that the mere self-awareness of a possibility that one’s test performance could confirm a negative suspicion about the intellectual ability of one’s group is itself sufficient to adversely affect performance on standardized tests. When the same test (derived from GRE questions) was either announced as being diagnostic of intellectual ability or portrayed as simply a non-diagnostic problem-solving task, African Americans (in this case the group facing stereotype threat) performed significantly lower in the diagnostic cohort when in the non-diagnostic cohort their performance was equal to Whites. In addition to those of African Americans, similar results have been found for standardized test performance of Latinos, women and students from low socioeconomic backgrounds.

Stereotype threat is a type of test bias not necessarily in the test itself, but in the psychosocial atmosphere surrounding standardized testing. Steele and Aronson concluded:

The problem is that stereotypes afoot in the larger society establish a predicament in the testing situation—aside from test content—that still has the power to undermine standardized test performance, and, we suspect, contribute powerfully to the pattern of group differences that have characterized these tests since their inception.

Thus, stereotype threat may be a source of bias in standardized tests caused by the differential impact of societal stereotypes—a bias that can persist despite comprehensive efforts to ensure that test content is fair. In fact, application of Steele and Aronson’s findings calls into question one of the

110. See id.
112. See Steven J. Spencer et al., Stereotype Threat and Women’s Math Performance, 35 J. EXPERIMENTAL SOC. PSYCHOL., 4, 12 (1999) (using GRE questions on University of Michigan students and repeatedly finding that when the test was purported to yield a gender gap, women underperformed in relation to men, but when the same test was purported not to yield gender differences, women and men performed equally and finding a sort of in-group privilege effect whereby the men told that the test yielded a gender gap performed slightly better than the men told the test produced no such gap).
114. Steele & Aronson, supra note 109, at 810.
primary traditional rationales for reliance on the LSAT. On the one hand, the LSAC claims: "The LSAT permits the direct comparison of the abilities of persons from diverse educational backgrounds. . . . The primary advantage is that [LSAT scores] provide a standard measure and are administered to all applicants under standard conditions." On the other hand, stereotype threat research suggests that the LSAC's simplistic definition of standardized conditions obscures how a history of sexism, racism and classism can facilitate so-called standardized conditions which further privilege White and male and affluent (and therefore especially affluent White male) test-takers.

Consistent with the thesis that stereotype threat or other forms of test bias negatively affect women's performance on graduate and professional school admission tests is the finding that among the same group of students the gender gap widens on the GRE Math and Verbal sections compared to the SAT Math and Verbal sections. An ETS study by Angoff and Johnson of nearly 23,000 GRE General Test examinees found that the gender gap favoring men increased regardless of field of study during college. Table 7 lists the widening gender gap among students who took one of the same two versions of the GRE four or five years after taking the SAT.

115. LSAC, REFERENCE MANUAL, supra note 36, at 3.4. See also LSAC, LAW SCHOOL ADMISSION TEST: SOURCES, CONTENTS, USES, supra note 90, at 26 (stating, "Because the LSAT is administered to all applicants under standard conditions and each test form requires the same or equivalent task of everyone, LSAT scores provide a standard measure of abilities").

116. See William H. Angoff & Eugene G. Johnson, The Differential Impact of Curriculum on Aptitude Test Scores, 27 J. EDUC. MEASUREMENT 291, 292-93 (1990). The authors of this study concluded that the widening gap is to be expected among GRE-Math scores because men generally have greater exposure to mathematics in college, and thus are likely to develop greater math skills compared to women with the same initial SAT scores. See id. at 299. However, this begs the question—which the authors do not address—of why women's higher grades in college do not result in a shrinkage or even reversal of the GRE Verbal gender gap. This should be the case particularly for those in the humanities and social sciences, which place a premium on skills related to verbal aptitude.

117. See id.

118. See id.
Table 7: The Growing Gender Gap: SAT Versus GRE Verbal and Math Scores Among the Same Student Cohort

<table>
<thead>
<tr>
<th>Field of Study</th>
<th>No. of Cases</th>
<th>SAT Verbal</th>
<th>GRE Verbal</th>
<th>SAT Math</th>
<th>GRE Math</th>
</tr>
</thead>
<tbody>
<tr>
<td>Humanities</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>1305</td>
<td>548.0</td>
<td>547.7</td>
<td>574.6</td>
<td>575.2</td>
</tr>
<tr>
<td>Women</td>
<td>2145</td>
<td>551.2</td>
<td>535.2</td>
<td>532.2</td>
<td>517.4</td>
</tr>
<tr>
<td>Gap (M – W)</td>
<td>–</td>
<td>-3.2</td>
<td>12.5</td>
<td>42.4</td>
<td>57.8</td>
</tr>
<tr>
<td>Social Sci.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>3031</td>
<td>510.3</td>
<td>513.4</td>
<td>541.0</td>
<td>557.4</td>
</tr>
<tr>
<td>Women</td>
<td>5514</td>
<td>493.0</td>
<td>481.2</td>
<td>499.6</td>
<td>499.1</td>
</tr>
<tr>
<td>Gap (M – W)</td>
<td>–</td>
<td>17.3</td>
<td>32.2</td>
<td>41.4</td>
<td>58.4</td>
</tr>
<tr>
<td>Biological Sci.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>1561</td>
<td>502.8</td>
<td>505.0</td>
<td>560.5</td>
<td>598.3</td>
</tr>
<tr>
<td>Women</td>
<td>2969</td>
<td>495.4</td>
<td>482.6</td>
<td>521.1</td>
<td>535.0</td>
</tr>
<tr>
<td>Gap (M – W)</td>
<td>–</td>
<td>7.4</td>
<td>22.4</td>
<td>39.4</td>
<td>63.3</td>
</tr>
<tr>
<td>Physical Sci.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>4626</td>
<td>543.6</td>
<td>534.8</td>
<td>640.3</td>
<td>686.5</td>
</tr>
<tr>
<td>Women</td>
<td>1776</td>
<td>541.9</td>
<td>522.0</td>
<td>606.0</td>
<td>645.2</td>
</tr>
<tr>
<td>Gap (M – W)</td>
<td>–</td>
<td>1.7</td>
<td>12.8</td>
<td>34.3</td>
<td>41.3</td>
</tr>
</tbody>
</table>

Because a majority of law school applicants are from humanities and social science majors, Angoff and Johnson’s findings for the nearly 12,000 students from these majors are highly relevant to the issue of gender bias on the LSAT. Although there may be an explanation for the increased gender gap in quantitative scores, the verbal differences run counter to what would be expected based on educational attainment in college. For example, women in Angoff and Johnson’s study who majored in the humanities started out with SAT verbal scores 3.2 points higher than men. Despite the fact that women generally earn higher UGPAs in college (and among law school applicants majoring in the humanities and social sciences after four or five years of college, the same women humanities majors in Angoff and Johnson’s study ended up 12.5 points behind men on the GRE Verbal section. The GRE

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119. See id. at 293. The SAT and GRE Math and Verbal sections are all scored on a 200-800 scale, which facilitates reliable comparisons from one test to the other.
120. See Wightman, Threat to Diversity, supra note 38, at 49 (listing the field of majors by race/ethnicity for all 1991 applicants to ABA schools).
121. See Angoff & Johnson, supra note 116, at 299.
122. See Warren W. Willingham & Nancy S. Cole, Gender and Fair Assessment 128 (1997) (reporting that "[d]ata from a wide variety of sources and educational settings show that females in all ethnic groups tend to earn higher grades in school than do males, across different ages and eras, and across different subject matter disciplines. Many researchers in past times and today consider this to be such an obvious fact that they treat it as axiomatic.").
123. See Wightman, AN ANALYSIS OF LSAT PERFORMANCE, supra note 15, at 29.
Verbal gender gap widened by 15.7 points for humanities majors, by 14.9 points for social science majors, by 15.0 points for biological science majors and 11.1 points for physical science majors. Generalizing Angoff and Johnson’s (and Steele and Aronson’s) GRE research appears justified because LSAC research shows that the GRE General test and the LSAT have the same underlying structure on reading comprehension, logical reasoning and analytical reasoning questions.124

Although the SAT-GRE gender gap increase is fairly consistent across fields of study, this does not signify that stereotype threat that disproportionately harms women and minorities is inevitable. One of the more intriguing—and hopeful—aspects of the stereotype threat framework is that it is an attempt to understand phenomena of race- and gender-based differences in standardized test performance in the context of “the interaction between the individual and a threatening predicament posed by societal stereotypes.”125 Predicaments created by societal stereotyping are amenable to change.126 Contrary to essentialist (either biological127 or cultural128) assumptions about the nature of racial or gender score differences, stereotype threat has been shown to negatively effect traditionally privileged groups when experimental conditions are manipulated properly. One study found that announcing a test of GRE math questions as yielding superior performance by Asian Americans caused White male performance to decrease when it was otherwise equal.129

Consistent with the possibility of gender-related stereotype threat on the LSAT are numerous studies reporting that female college students report greater levels of anxiety when taking standardized tests compared to male college students.130 Furthermore, experimental studies show that treatment

124. See KENNETH M. WILSON & DONALD E. POWERS, FACTORS IN PERFORMANCE ON THE LAW SCHOOL ADMISSION TEST, LSAC Statistical Report, 93-04, at iv (1994) (arguing, “That LSAT logical reasoning, reading comprehension and analytical reasoning items and their GRE counterparts have a common factor structure is important because this finding suggests that future research involving these item types in the LSAT context can draw on relatively extensive GRE research findings . . . both for formulating working hypotheses and for evaluating LSAT research outcomes.”).
125. Spencer et al., supra note 112, at 26.
126. See Claude M. Steele, A Threat in the Air, 52 AM. PSYCHOL. 613, 625-26 (1997) (describing a summer intervention program for incoming University of Michigan freshman, using insights from stereotype threat research, which resulted in statistically significant improvement in college grades and graduation rates for African American students compared to control groups).
127. For arguments that African Americans are genetically endowed with lower average IQs than Whites, see RICHARD HERNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994); ARTHUR JENSEN, BIAS IN MENTAL TESTING (1980). For arguments that women’s lower performance in mathematics is a function of heredity, see C.P. Benbow & J.C. Stanley, Sex Differences in Mathematical Ability: Fact or Artifact? 210 SCIENCE 1262 (1980) and C.P. Benbow & J.C. Stanley, Sex Differences in Mathematical Reasoning Ability: More Facts, 222 SCIENCE 1029 (1983).
128. See Stephan Themstrom & Abigail Themstrom, Reflections on the Shape of the River, 46 UCLA L. REV. 1583, 1612 n.109 (1999) (“A possible explanation is that many law schools today also have Black peer groups with an oppositional culture that is not conducive to academic success.”); see also DINESH D’SOUZA, THE END OF RACISM (1995); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE (1997).
130. See Ray Hembree, Correlates, Causes, Effects and Treatment of Test Anxiety, 58 REV. EDUC. RES. 47, 61 (1988) (finding that in a meta-analysis of 39 studies of 11th and 12th graders and college
programs that lower test anxiety appreciably increase the performance of men and women.\footnote{131}

\textbf{B. Speededness and Differential Guessing}

Two potential sources of gender-specific LSAT test bias discussed by Wightman\footnote{132} are differences in speededness\footnote{133} and differences in omitting rather than guessing on items.\footnote{134} Wightman found there to be a "consistently higher rate of omitting items by women than men" on the LSAT.\footnote{135} Similar results occur on the GRE general test.\footnote{136} Furthermore, for Black, Puerto Rican and Hispanic test takers the LSAT has been found to produce "particularly dramatic" speededness differences compared to White students.\footnote{137} An earlier LSAC study found that when time pressures were eased on the LSAT, African Americans demonstrated greater score gains than did Whites,\footnote{138} suggesting a differential impact. It may also be the case that speededness is as much a symptom of other forms of test bias as it is a cause in its own right. Steele and Aronson, for example, found that invoking stereotype threat impaired the rate at which African Americans completed GRE questions.\footnote{139} Recent research also suggests that the LSAT is more speeded for female test takers than for male test takers.\footnote{140}

\footnote{131. See id. at 70 (summarizing the results of 38 studies of desensitization techniques whereby overall performance was increased on standardized tests by .32 standard deviation units over control groups).}
\footnote{132. See Wightman, Sex Differences in LSAT Scores, supra note 21, at 273.}
\footnote{133. See LINDA F. WIGHTMAN & DAVID G. MULLER, Comparison of LSAT Performance Among Selected Subgroups, LSAC Statistical Report 90-01, 6 (1990) (noting that speededness refers to the frequency with which test takers can complete the test in the allotted time, and that generally, a test is considered at least somewhat speeded if less than 90% of a test population completes it in time). Since there is no penalty for wrong answers and students are discouraged from leaving blanks, speededness can be very difficult to measure on the LSAT, and therefore its magnitude may be underestimated.}
\footnote{134. See Gershon Ben-Shakhar & Yakov Sinai, Gender Differences in Multiple-Choice Tests: The Role of Differential Guessing Tendencies, 28 J. EDUC. MEASUREMENT 23 (1991).}
\footnote{135. Wightman, Sex Differences in LSAT Scores, supra note 21, at 273.}
\footnote{136. See J. GRANDY, ETS, CHARACTERISTICS OF EXAMINEES WHO LEAVE QUESTIONS UNANSWERED ON THE GRE GENERAL TEST UNDER RIGHTS-ONLY SCORING,ETS Research Report 87-38 (1987) (reporting that, though women were 52\% of the total examinee population, they comprised over 60\% of the students omitting at least five answers in a section for the verbal, quantitative, and analytical sections).}
\footnote{137. WIGHTMAN & MULLER, supra note 133, at 6.}
\footnote{138. See Franklin R. Evans & Richard R. Reilly, A Study of Speededness as a Source of Test Bias, LSAC-71-2, REPORTS OF LSAC-SPONSORED RESEARCH, VOLUME II: 1970-1974, 111, 116 (1976) (finding that test takers at historically Black colleges (90\% of whom were African American) gained 33 points on one unspeeded reading comprehension section compared to speeded candidates at the same test sites, while at other test sites, test takers (overwhelmingly White) gained 22 points compared to speeded test takers at the same sites). But see Franklin R. Evans & Richard R. Reilly, The LSAT Speededness Study Revisited: Final Report, LSAC-72-3, REPORTS OF LSAC-SPONSORED RESEARCH, VOLUME II: 1970-1974, 191, 196 (1976) (reporting that African American women improved more than White women when ten minutes were added to a reading comprehension section, but that African American men achieved slightly less improvement than White men in the time-relaxed condition).}
\footnote{139. See Steele & Aronson, supra note 109, at 802.}
\footnote{140. See Wightman, Sex Differences in LSAT Scores, supra note 21, at 273-74 (reporting that "LSAT
C. Gendered Effects of Subject Matter Selection

Content coverage on the LSAT, like other standardized tests, can be altered to either increase or diminish the performance differences between groups. One important but little discussed example involves changes over time in the gender gap on the SAT. Prior to the 1970s, women tended to score slightly higher than men on the SAT verbal section. Since that time, women have fallen behind men about one-tenth of a standard deviation, which is the same magnitude of difference as on the LSAT. Why did this occur? Both testing critics and Educational Testing Service (ETS) researchers who were there at the time of the changes credit alterations in the subject matter of the SAT verbal section with causing men to obtain higher verbal scores, though this has been disputed by Nancy Cole, the current president of ETS. Supporting the interpretation that the introduction of more science passages lowered women’s scores are findings that scientific-oriented reading comprehension passages are differentially more difficult for women than comparable men. The latest review of the literature cites six recent studies to this effect, without any contrary findings.

Alterations in the subject matter of the SAT verbal section, aside from revealing near-invisible value choices, are important to the present analysis of the LSAT because the gender gap favoring men (at least in the recent literature) is greatest on the reading comprehension section. In fact, a close monitoring data show that the percentage of test takers not reaching the last few items in each of the separately timed sections of the LSAT is higher for women than for men for every item type consistently across administrations. Similar gender differences in speededness have been found on the SAT. See Phyllis Rosser, The SAT Gender Gap: Identifying the Causes 64-65 (1989) (reporting time pressure differences on SAT verbal and particularly math sections, and concluding that “this artificial emphasis on speed is the antithesis of the current educational interest in teaching higher level thinking skills. This type of speeded test rewards the facile test taker rather than the sophisticated, thoughtful thinker who gathers new information and organizes, evaluates, and expresses original thoughts clearly and concisely.”).

144. See Thomas F. Dorlan & William H. Angoff, The Scholastic Aptitude Test, in The College Board Admissions Testing Program, 15, 25 (Angoff ed., 1971) (citing ETS’ goal of “balancing the content” of SAT verbal questions [by replacing some humanities passages with more scientific and practical affairs passages that favor men] as the cause for the gender gap reversal); Carol A. Dwyer, Test Content and Sex Differences in Reading, 29 THE READING TEACHER 753, 755 (1976) (stating that the change from women’s higher performance to lower performance relative to men “parallels development of sex related content specifications”).
145. See Loewen, supra note 143, at 86 n.15 (noting that Cole stated before the U.S. Commission on Civil Rights: “I can’t leave unchallenged the statement that we chang[e]d the test contents so that the girls would be disfavored back in 1972. I don’t care who said that was the case, that did not occur. . “).
146. See Brent Bridgeman & Alicia Schmitt, Fairness Issues in Test Development and Administration, in Willingham & Cole, Gender and Fair Assessment, supra note 122, at 190.
147. See Wightman & Muller, supra note 133, at 4 (reporting that the gender gap in averages and medians was much greater on reading comprehension than on analytical reasoning and logical reasoning
look at Wightman and Muller's study of 40,000 LSAT test takers reveals that the reading comprehension section alone accounted for 79% of the overall gender gap. This is significant because it is presumably in the area of reading comprehension that the selection of content is most directly related to performance.

LSAT subject matter selection patterns should be subjected to greater scrutiny because the performance differences favoring men on reading comprehension are at variance with evidence about verbal abilities more generally. Hyde and Linn's 1988 meta-analysis of 165 studies (and 441,000 subjects) of gender differences on verbal ability tests found essentially uniform results in favor of women by one-tenth of a standard deviation. This raises the question of whether much of the gender gap could be eliminated simply by, for example, replacing the usual science passage with a literature passage.

Recent events support the conclusion that the LSAT could easily be altered to lessen or eliminate the gender gaps. For example, minor changes on the PSAT in 1999 resulted in dramatically more gender equity in the allocation of National Merit Scholarships. As a result of complaints to OCR, the College Board agreed to add a multiple choice "writing" section. Subsequently, women garnered 45% of the National Merit Scholarships instead of the usual 40%. Bob Schaeffer, who spearheaded Fairtest's complaint to OCR, noted that since the gender gap on the PSAT was so quickly narrowed, "Why, for example, have similar changes not been made on the SAT, the GRE and related exams which show comparable bias?"

Some may argue that changing the subject matter of the LSAT is counterproductive because it could lower the predictive power of the test. Even assuming this is the case, it is possible to decrease predictive validity for appropriate psychometric and ethical reasons, and thus increase fairness to all applicants. This counterintuitive assertion can best be understood by means of an example. The psychometrician Lloyd Bond points out that there is a fundamental flaw in relying solely on predictive validity evidence because predictive validity can be erroneously high, that is, high for the wrong reasons. Bond demonstrates that bias can inappropriately inflate validity even in an ideal "double blind" predictive validation study. Suppose workers were hired without consideration of their test scores, and those test scores combined). Data from other recent test administrations on this point is needed, but to the best of my knowledge, is not presently published.

148. See id.
149. See J.S. Hyde & M.C. Linn, Gender Differences in Verbal Ability: A Meta-analysis, 104 PSYCHOL. BULL. 53-69 (1988). Thus, in the absence of test bias on the LSAT, it is very possible that women would do better, rather than the same, as men.
were inaccessible to supervisors. If *prejudicially* low ratings by supervisors, tainted by discriminatory bias against minorities, are correlated with test scores, the validity coefficients will be artificially inflated if those same minority workers also perform, on average, lower on the test.\(^1\)

In another article I argue that the atmosphere of legal education is much more akin to a racially biased supervisor than many people think.\(^2\) In fact, even after controlling for LSAT scores and UGPAs, virtually any and every "outsider" subgroup is overpredicted, that is performs less well than others with equal credentials.\(^3\) The fact that outsiders—students who are women, minorities, lower income, friendly, passionate, dedicated to public interest careers, carrying debt loads, and so forth—all perform less well than others (insiders) with equal qualifications suggests that the learning culture in legal education systematically reproduces traditional forms of hierarchy, and is biased against outsiders.\(^4\)

### D. Biased Questions

Another source of possible gender and racial/ethnic bias on the LSAT is the presence of biased questions. Since other authors have vivisected the race/gender/class implications of myriad LSAT questions,\(^5\) narrative analysis\(^6\) of item bias will be limited. An addendum is included with some examples of LSAT questions that are potentially biased against women and minorities. Despite claims by LSAC officials that biased and offensive questions were eliminated by the expansion of sensitivity review panels in the early 1980's\(^7\) possibly offensive and/or distracting LSAT questions persist long after the sensitivity review policies were adopted. An interesting example of bias is an LSAT question addressing women's and minorities' opportunities in higher education. The passage, question and answer choices are as follows:

The universities should not yield to the illiberal directives of

\(^{152}\) See id.
\(^{153}\) See Kidder, *The Rise of the Testocracy*, supra note 42.
\(^{154}\) See id.
\(^{155}\) See id.
\(^{157}\) Espinoza defines narrative bias as "the atmospheric, sometimes subtle, sometimes blatant, often pervasive bias of stories, manners, sensitivities, and paradigms." Espinoza, supra note 156, at 127. See also Richard Delgado, *Storytelling for Oppositionalists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (advocating the use of narratives to challenge mainstream legal discourse).
\(^{158}\) See Wightman, *Standardized Testing and Equal Access*, supra note 39, at 15 (stating, "[T]he most egregious test questions, for example those that dealt with...stereotypes of ethnic groups, are no longer found on standardized admission tests that routinely undergo DIF analysis and sensitivity review. Critics who cite examples of flagrant item bias or insensitivity problems typically use items from test forms developed and assembled prior to the introduction of bias detection methods in the 1980s (e.g. Espanoza [sic], 1993)").
Portia Denied

the Office of Civil Rights [sic]\textsuperscript{159} that mandate affirmative action in hiring faculties. The effect of the directives to hire minorities and women under threat of losing crucial financial support is to compel universities to hire unqualified minorities and women and to discriminate against qualified nonminorities and men. This is just as much a manifestation of racism, even if originally unintended, as the racism the original presidential directive was designed to correct. The consequences of imposing any criterion other than that of qualified talent on our educational establishments are sure to be disastrous in the quest for new knowledge and truth, as well as subversive of our democratic values.

Which of the following [sic], if true, would considerably weaken the argument above?

I. The directive requires universities to hire minorities and women when no other applicant is better qualified.

II. The directive requires universities to hire minorities and women only up to the point that these groups are represented on faculties in proportion to their representation in the population at large.

III. Most university employees are strongly in favor of the directive.

(A) I only
(B) II only
(C) III only
(D) I and II only
(E) II and III only\textsuperscript{160}

The answer credited as being correct is choice A (option I only).\textsuperscript{161} A major problem with this question deals with option II. Unfortunately, if a reader assumes that women and minorities possess equal “qualified talent” she may reasonably conclude that affirmative action hiring practices which are

\textsuperscript{159} Though commonly referred to as the Office of Civil Rights by the press, it is actually Office for Civil Rights.

\textsuperscript{160} LSAC, LSAT (Oct. 1988), Logical Reasoning, Question 22.

\textsuperscript{161} See id.
capped by the proportion of women and minorities in the population at large weakens the argument that affirmative action forces "universities to hire unqualified minorities and women." A reader who assumes that hiring in proportion to population statistics ushers in hordes of unqualified women and minorities is rewarded for having "legal aptitude." Secondly, readers must first work through the distraction and disorientation of this passage, which is more likely to adversely affect outsider students precisely because they are outsiders.  

E. Critique of Item Bias Detection Methods: The Indifference of DIF

For decades now, each question that appears on the LSAT goes through a rigorous, multi-staged statistical and sensitivity review process. Yet, the continued presence of insensitive and distracting questions despite the sincere and comprehensive efforts of LSAC researchers suggests that current bias detection methods are flawed. Typically, LSAC researchers assume that, if an individual question creates racial or gender disparities similar to disparities in overall test scores, then that item must not be biased. In other words, bias is treated as a discrete, accidental deviation from the overall absence of bias on the test.

The psychometric procedure for measuring item bias is called "differential item functioning" (DIF), which is an attempt to match people of approximately equal knowledge and skill to see whether different groups perform in substantially different ways on a test question. After conducting DIF analysis on the LSAT, Wightman and Muller concluded: "There is no evidence that any one item type particularly disadvantages minority test takers nor are there individual items that exhibit statistical evidence of bias toward any subgroup." The assumptions underlying the use of DIF as a remedy for item bias, and thus Wightman and Muller's conclusion, are questionable. Because LSAC DIF analysis does not provide for a standard of unbiasedness that is external to the LSAT, the claim that DIF establishes the absence of item bias against women and minorities has been criticized as seriously misleading, even
tautological.\textsuperscript{168} If gender or racially biased questions have spill-over consequences affecting performance on subsequent questions, or if stereotype threat creates a constant bias permeating the entire test (or both), the LSAC's bias detection methods would reveal no bias precisely when bias was most severe and systematic.\textsuperscript{169} Even Cole, the current ETS president, admits that there "is no statistic that can prove whether or not a test question is biased"\textsuperscript{170} and that DIF cannot "guarantee that there is no gender bias in the questions."\textsuperscript{171}

\textbf{F. Possible Interaction Effects}

This predicament of the appearance of no bias masking systematic bias may be an area where previously mentioned sources of gender bias (speededness, guessing patterns, stereotype threat) are in complex interaction with biased questions. Years ago Shepard hypothesized:

\begin{quote}
[E]mpirical methods for detecting bias are insensitive to any delayed or pervasive reduction in performance caused by perceived unfairness in the questions. Apart from the issue of bias, ambiguous items could conceivably frustrate examinees enough to lessen their scores on subsequent items. Similarly, one can imagine that offensive items or items entirely foreign to an examinee's experience could harm motivation and attention on later test questions.\textsuperscript{172}
\end{quote}

Assessing this hypothesis experimentally is difficult. For this reason, it is notable that stereotype threat impaired the rate and accuracy of minority

\textsuperscript{168} See Lorrie A. Shepard et al., \textit{Comparison of Procedures for Detecting Test-Item Bias with Both Internal and External Ability Criteria}, 6 J. EDUC. STAT. 317, 321 (1981). Shepard contends, a major limitation of all of the bias detection approaches employed in the research to date is that they are all based on a criterion internal to the test in question. They cannot escape the circularity inherent in using total score on the test or the average item to identify individuals of equal ability and hence specify the standard of unbiasedness.

\textit{Id.} at 321.

See also Gregory Camilli & Lorrie A. Shepard, \textit{The Inadequacy of ANOVA for Detecting Test Bias}, 12 J. EDUC. STAT. 87, 98 (1987) (demonstrating that item-by-group interaction procedures can miss the presence of real bias); Nancy S. Cole & Pamela A. Moss, \textit{Bias in Test Use}, in \textit{EDUCATIONAL MEASUREMENT, THIRD EDITION} 201, 210 (Robert L. Linn ed., 1989) (noting that the problems identified by Camilli and Shepard are "especially disturbing because many existing empirical item-bias studies have relied on these procedures").

\textsuperscript{169} Cf. Shepard et al., \textit{supra} note 168, at 321 (stating, "constant bias can only be identified if an external (and unbiased) criterion is used.").

\textsuperscript{170} Cole, \textit{supra} note 165, at 100.

\textsuperscript{171} Id. at 102; see also Lorrie A. Shepard, \textit{The Case for Bias in Tests of Achievement and Scholastic Aptitude}, in \textit{ARTHUR JENSEN: CONSENSUS AND CONTROVERSY} 177, 187 (Sohan Modgil & Celia Modgil eds., 1987) (claiming, "There is no statistical analysis that can be applied by rote to determine the unbiasedness of a test.").

\textsuperscript{172} Lorrie A. Shepard, \textit{Definitions of Bias}, in \textit{HANDBOOK OF METHODS FOR DETECTING TEST BIAS} 9, 22 (Ronald A. Berk ed., 1982).
achievement on GRE verbal questions when the test was purported to be diagnostic of aptitude. Disturbingly, requiring applicants to list their race before taking this test caused Blacks to guess less and Whites to guess more compared to the condition where race was not primed. These findings suggest possibly provocative feedback loops between stereotype threat, guessing patterns and responses to distracting LSAT questions.

VI. CONCLUSION

Within the first few years of the twenty-first century it is likely that more women than men will apply to ABA law schools. At the same time, women presently have slightly lower chances of being admitted to law school—both overall and among applicants with similar UGPAs. This occurs primarily because of a very modest gender gap on the LSAT, and because of the manner in which the LSAT is relied upon in making admission decisions. Moreover, people of color—especially African Americans—are less likely to be admitted to law school than Whites, even among applicants with similar achievement levels over four or more years of college. Again, test score differences between racial/ethnic groups on the LSAT primarily account for such glaring inequities, at least in the contemporary admissions climate, where LSAT scores serve as the polestar for making decisions about the future composition of the legal profession.

The day when women will occupy more than one-half of the seats in ABA law schools is near, and yet, even as that day approaches, for a growing proportion of female applicants the hope of equal access to the legal profession will prove increasingly elusive. The fruit of increased opportunity is, in this case, bittersweet because as a greater and greater proportion of women applicants are people of color, a larger and larger share of the female applicant pool will be denied the chances to become a lawyer because of group differences in LSAT scores.

It is also not certain that women of color will continue to constitute a growing share of the female applicant pool. For a second irony of women’s coming majority among law school students is that this increasingly accessible gateway of opportunity for White women will occur at the same time that the gatekeeper of the LSAT will enforce a system of White privilege more fiercely than in the past few decades due to the termination of affirmative action. Already the University systems in California, Texas and Washington have been forced to discontinue their race-conscious admission programs. In addition to the already severe reduction in the number of underrepresented minorities at the law schools at these universities, the situation is likely to

173. See Steele & Aronson, supra note 109, at 802.
174. See id. at 807.
175. In 1998, the law schools at UC Berkeley (Boalt Hall), UCLA and UC Davis enrolled a combined total of 19 African Americans and 51 Latinos, whereas in 1996—the last year of affirmative action—these three schools enrolled 43 African Americans and 89 Latinos. See Memorandum from Herma Hill Kay, Dean,
worsen as leading law school feeder institutions like UC Berkeley, UCLA and the University of Texas at Austin start graduating post-affirmative action classes. Some conservatives champion the idea that in the new “race blind” University of California system, Blacks and Latinos will be just as well off—indeed may even benefit from—attending less selective campuses like UC Riverside. Yet, if one looks at how UC Riverside applicants fare in the law school admission process compared to UC Berkeley or UCLA applicants—at least under the current system of “merit” criteria—it is clear that this argument is, at best, wishful thinking.

A review of ABA law school admission practices reveals that the LSAT works to the disadvantage of women in general, and women of color in particular. While the gender gap on the LSAT is statistically insignificant between two test takers, the test is not only over-relied upon in the admissions context, but is also misused in financial aid allocation, judicial clerkship selection, and employment decisions. I have argued that forms of test bias disadvantaging women and people of color—such as stereotype threat, speededness, subject matter selection and item bias—undermine the fairness of the LSAT as a tool in law school admissions. As we approach the stark post-affirmative action landscape, it is more important than ever to recall that accounting for cultural bias on standardized tests by taking account for race in higher education admissions is, as Justice Powell recognized in his landmark opinion in Bakke, not the same as granting an affirmative action “preference.”

176. See James Traub, The Class of Prop. 209, N.Y. TIMES, May 2, 1999, § 6 (Magazine), at 44; Themstrom & Themstrom, supra note 128, at 1626-28 (suggesting that the “redistribution” of African Americans from UC Berkeley to less selective UC campuses may even result in a higher number of Black graduates from the UC system overall). The trend these authors are responding to is that in the first year in which “race blind” admissions were in place, African American admissions to Berkeley dropped 57%, those at UCLA dropped 43%, but those at UC Riverside increased 34%. See Editors, University of California: Black Students Moving Down Into the Less Selective Campuses, 19 J. BLACKS IN HIGHER EDUC. 28, 28 (Spring 1998).

177. For example, in 1998 Boalt Hall enrolled 50 students from Berkeley, 21 students from UCLA and only two students from Riverside. See 1998 BOALT HALL ANNUAL ADMISSION REPORT, at Table 5. Similarly, in 1998 UC Hastings College of the Law enrolled 70 Berkeley students, 35 UCLA students and only 4 Riverside students. See University of California–Hastings College of the Law, Fall 1998 Entering Class Profile, 2 (1998). Furthermore, since 1994, Boalt received 3,065 applications from Berkeley and 165 from UC Riverside. See 1994 BOALT HALL ANNUAL ADMISSION REPORT; 1995 BOALT HALL ANNUAL ADMISSION REPORT; 1996 BOALT HALL ANNUAL ADMISSION REPORT; 1997 BOALT HALL ANNUAL ADMISSION REPORT; 1998 BOALT HALL ANNUAL ADMISSION REPORT; 1999 BOALT HALL ANNUAL ADMISSION REPORT. Of those who applied, Riverside students had about half the chance of being offered admission as Berkeley students. See id.

178. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (Opinion of Powell, J.) (stating, “Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioners do not articulate: fair appraisal of each individual’s academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no ‘preference’ at all.”); see also DeFatus v. Odegard, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting) (stating, “My reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.”).
VII. ADDENDUM: BIASED QUESTIONS ON THE LSAT

WOMEN

The bias and stereotyping in the following question is sufficiently obvious that commentary is not really necessary:

Fred is tall, dark, and handsome, but not smart.
People who are tall and handsome are popular.
Joan would like to meet anyone with money.

If the statements above are true, which of the following statements must also be true?
I. Fred is popular
II. Fred has money.
III. Fred is someone Joan would like to meet.179

AFRICAN AMERICANS

Often questions have subtle biases when certain wrong answers are differentially distracting based on cultural background. For example, a Reading Comprehension passage about Zora Neale Hurston's *Their Eyes Were Watching God* mentions how feminist criticism and Afrocentric standards of evaluation were important to the rediscovery of this work.180 However, “Afrocentric” or “Feminist” appear in four of the incorrect answer choices but none of the correct ones.181 Espinoza notes that “the discourse of the test does not challenge the emotional steadiness of White males. The distractor questions are discriminatory because they effect only the outsider test taker.”182

ASIAN AMERICANS

Asian Americans are sometimes portrayed in LSAT questions as hard working and industrious, which at first blush appears to be a positive thing. However, test takers who are concerned with how the Asians-as-hardworking stereotype contributes to a “model minority myth” injurious to both the Asian Americans and to other minorities may resist picking answers with this stereotype. One fairly recent passage about the success of Chinese and Japanese immigrants asked:

Which one of the following can best be described as a

179. LSAC, LSAT (June 1988), Logical Reasoning, Question 14.
181. See id.
182. Espinoza, supra note 156, at 134.
supply-side element in the labor market, as such elements are explained in the passage?

A) concentration of small businesses in a given geographical area
B) need for workers with varying degrees of skill
C) high value placed by immigrants on work (correct answer)
D) expansion of the primary labor market
E) development of an advanced capitalist economy

The above recent passage echoes a stereotyped notion of Asians which has been repeated in earlier versions of the LSAT, such as this sentence correction passage:

That almost every arable plot in China is tilled and irrigated by hand
A B indicates to most Westerners that they are a regimented people dedicated to
C D hard work.

No error.  

LATINOS

In a certain mythical community where there are only two social classes, people from the upper class are all highly educated, and people from the lower class are all honest. Maria is poor. If one infers that Maria is honest and uneducated, one presupposes that class status in the mythical society depends upon . . . (answer choices omitted).

Espinoza comments on this question: “Why Maria? Is Maria by any chance Hispanic? This is one of a handful of questions using non-Anglo names. The question creates a vision of insiders and outsiders based on ethnicity and class.”

STUDENTS SYMPATHETIC TO CRITICAL RACE THEORY/ OUTSIDERS GENERALLY

Espinoza argues that “[i]n a quest for diversity within test questions, the
LSAT only succeeds in objectifying outsiders, not including them. What the White people say is what is important. The outsider remains the object, the subject is the dominant society."¹⁸⁶ A recent example of "objectifying outsiders" in an attempt to include them is a reading comprehension passage addressing the works of Patricia Williams, Derrick Bell and Mari Matsuda.¹⁸⁷ This passage discusses the efforts by some critical race theorists to challenge the hegemony of traditional "objectivist" legal discourse by creating more accessible narratives. The third paragraph of this LSAT passage begins:

Legal scholars such as Patricia Williams, Derrick Bell, and Mari Matsuda have sought empowerment for the latter group of people (those who's stories are rejected as false because they are not fluent in traditional objectivist legal discourse) through the construction of alternative legal narratives.¹⁸⁸

When it comes to identifying the main idea of this passage, however, the political dimension of the Williams/Bell/Matsuda project disappears. While Option C, the “correct” answer, says “Some legal scholars have proposed alleviating the harm caused by the prominence of objectivist principles within the legal discourse,” Option A (“Some legal scholars have sought to empower people historically excluded from traditional legal discourse”) and Option D (“Some legal scholars have contended that those who feel excluded from objectivist legal systems would be empowered by the construction of a new legal language”) both contain other information making these options incorrect.¹⁸⁹ The choice of wording (“scholars have proposed” instead of “scholars have sought to empower” or “scholars have contended”) is closer to the ivory-tower idleness of a detached professor than the soulful commitment of a scholar/activist. The subtle emphasis on disinterest over dedication is hardly an accurate portrayal of the scholarly works of Williams,¹⁹⁰ Bell¹⁹¹ or

¹⁸⁶.  Id. at 136.
¹⁸⁷.  See LSAC, LSAT (June 1997), Reading Comprehension, Questions 9-16.
¹⁸⁸.  Id.
¹⁸⁹.  Id.
¹⁹⁰.  See PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 163 (1991). Williams states, To say that Blacks never fully believed in rights is true. Yet it is also true that Blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations.
¹⁹¹.  See DERRICK BELL, CONFRONTING AUTHORITY (1994) (reflecting on his experiences protesting injustice, including his eventually relinquishing a tenured faculty position at Harvard Law School because of the school’s resistance to hire women of color faculty).
Matsuda.\textsuperscript{192}

Question 14 of the same passage, which provides an example of "objectifying outsiders," asks:

The passage suggests that Williams, Bell and Matsuda would most likely agree with which one of the following statements regarding personal stories:

The correct answer reads:

B) Personal stories are more likely to deemphasize differences in background and training than are traditional forms of discourse.

However, much of Matsuda's work has focused on valuing distinct contributions arising from differences in background, rather than de-emphasizing differences.\textsuperscript{193}

Lastly, illustrative of Espinoza’s claim that the “outsider remains the object, the subject is the dominant society” is yet another question in this same passage about Williams, Bell and Matsuda. While the insider/LSAT rendition of outsider scholarship omits the political empowerment dimension of critical race theory, Question 15 asks:

Which one of the following statements about legal discourse in legal systems based on objectivism can be inferred

\textsuperscript{192} See Mari J. Matsuda et al., Words That Wound 3 (1993). Matsuda states, [c]ritical race theorists embrace subjectivity of perspective and are avowedly political. Our work is both pragmatic and utopian, as we seek to respond to the immediate needs of the subordinated and oppressed even as we imagine a different world and offer different values. It is work that involves both action and reflection. It is informed by active struggle and in turn informs that struggle.

\textit{Id.} at 3.

\textsuperscript{193} See Mari J. Matsuda, Public Responses to Racist Speech: Considering the Victim’s Story, in Words That Wound 17, 20 (asserting that “the victim’s story illuminates particular values and suggests particular solutions to the problem of racist hate messages.”); Mari J. Matsuda & Charles R. Lawrence III, Epilogue to Words That Wound, supra note 192, 133, 136. Matsuda and Lawrence contend that responding effectively to racist speech requires listening carefully to the stories of families who spend the night imprisoned by fear. . . . As critical race theorists, we do not separate cross burning from police brutality nor epithets from infant mortality rates. We believe there are systems of culture, of privilege, and of power that intertwine in complex ways to tell a sad and continuing story of insider/outside.

Matsuda & Lawrence, supra, at 133, 136.
from the passage?\footnote{194

The correct answer reads:

Expertise in legal discourse affords power in most Western societies.\footnote{195

194. LSAC, LSAT (June 1997), \textit{supra} note 187.

195. \textit{Id.}}