

## **RESPONSE TO PROFESSOR SANDER**

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I'd like to welcome Professor Sander to Touro Law Center. I'm very glad that he joined us in this discussion. This provides us with an opportunity to consider reasons why there seems to be underperformance by African American students at most American law schools, and it gives us an opportunity to consider what can be done to remedy this problem. Professor Sander has offered one remedy and I will suggest other remedies.

Professor Sander's analysis and conclusions rest, in large part, upon a false assumption. Professor Sander assumes that LSAT scores of African American students predict, in a statistically reliable way, the likelihood of success by African American students in law school. He states that African American students, in general, rank low in their classes at elite law schools, and I assume he is correct about this. He discusses a higher attrition rate for African American students than for white students, and I assume he is correct in this as well. Where I differ from Professor Sander is in his assumption that the LSAT scores of African American students demonstrate that they have a lower level of academic ability than white students. It is his incorrect conclusion about the academic ability of African American law students that leads him to his misguided, and potentially harmful, "mismatch" theory.

Professor Sander bases his analysis, for the most part, on LSAT scores of African American law students and compares these LSAT scores to higher LSAT scores of white law students. During Professor Sander's presentation, we were shown a "credentials gap" chart, for the Michigan Law School, with "index numbers" for blacks versus whites. This chart primarily reflects differences in the LSAT scores of the two groups. That is, what Professor Sander refers to as a "credentials gap" primarily is an LSAT score gap.

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What Professor Sander has not taken into account is the possibility that LSAT scores, whatever their value might be for predicting academic success by white students, may have very little, if any, value for predicting academic success by African American students. Even though the LSAT scores of African American students, in general, are lower than the LSAT scores of white students, in general, this does not mean that the LSAT scores of African American applicants predict, in a meaningful way, which African American applicants are likely to be academically successful at any particular law school. When African American students, as a group, rank toward the bottom of their class at a law school, the reasons for this may be entirely unrelated to LSAT scores and the information and skills tested by the LSAT. What I am suggesting, and will discuss further in this presentation, is that admissions committee decisions concerning which African American applicants are most likely to succeed at any particular law school should be based almost entirely on factors other than LSAT scores, because LSAT scores of African American applicants provide very little, if any, meaningful guidance concerning likely academic success by African Americans at any particular law school.

Professor Sander understands statistics and is familiar with the concept of differential validity of tests. Differential validity means that a predictive ability test, like the LSAT, may have different amounts of predictive value for different racial and gender groups. For example, women as a group traditionally have lower LSAT scores than men even though they perform at least as well as men at most law schools. As a result, the predictive correlations between LSAT scores and law school grades differ for the two gender groups. As I will discuss, the predictive correlations between LSAT scores and law school grades also are different for minority students, especially African American students, than for white students.

On various occasions during the last twenty years, I have conducted statistical correlation studies at Touro Law Center to determine the extent to which LSAT scores of minority students at the Law Center actually predict the academic performance of these students. These studies consistently have demonstrated random, or nearly random, correlation between LSAT scores and law school grades of our minority students. This has been particularly true for African American students. These statistical studies demonstrate error by Professor Sander in assuming that LSAT scores of African American students at elite law schools, that are lower than the LSAT scores of white students at these law schools, reflect a lower level of academic ability of the African American students. African Americans, as a group, receive significantly lower LSAT scores than white students, as a group, but the lower LSAT scores do not reflect a lower

level of academic ability. Professor Sander's error about the predictive ability of the LSAT leads him to his erroneous conclusion that African American law students are "mismatched" with the white students attending the same law schools.

Professor Sander asserted that the credentials factors he discussed are highly predictive. However, I have yet to see a properly conducted differential validity analysis done by the Law School Admission Council (LSAC), or anyone else, that demonstrates that the LSAT predicts, in a significant way, the academic performance in law school by minority students in general, or African American students in particular. The most recent LSAC correlation materials I have seen, which purport to demonstrate predictive value of the LSAT for African American students, are based upon a comparison of the mean LSAT scores and mean first year grade point averages of African American students at 167 ABA approved law schools, with the data for all 167 law schools combined for analysis. If data for all 167 law schools are combined, the mean LSAT scores and mean grade point averages of the African American students are lower than the mean LSAT scores and mean grade point averages of white students, but this does not demonstrate that LSAT scores of African American applicants to any particular law school would provide meaningful guidance as to which applicants are most likely to be academically successful at that law school. The LSAC correlation data do not demonstrate that higher LSAT scores, standing alone, predict higher grades for African American students at any particular law school. They do not demonstrate that, at any particular law school, African American applicants with relatively high LSAT scores (who are likely to be accepted) are more likely to succeed academically than African American applicants with lower LSAT scores (who are likely to be rejected).<sup>2</sup>

If the LSAC really wanted to determine how useful the LSAT is for predicting academic success by African American law students at individual law schools, a properly conducted predictive correlation analysis easily could be

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<sup>2</sup> The LSAC data to which I refer is contained in LSAC Technical Report 00-02: *Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on the 1996-1998 Entering Law School Classes*. This Technical Report is dated April 2003 and was prepared by Lisa C. Anthony and Mei Liu. In my discussion with Professor Sander, following the Journal symposium program, he referred to the Anthony and Liu technical report as a differential validity study performed at individual law schools. He apparently didn't realize that the study simply compared mean LSAT scores and mean grade point averages for all 167 law schools combined. Although the technical report purports to provide differential prediction data, it is flawed because of the failure of the researchers to conduct a differential validity study at individual law schools. A comparison of means for all 167 law schools combined provides no meaningful guidance concerning the predictive value of the LSAT at individual law schools.

conducted. Such an analysis would be conducted separately at law schools, using five or six years of data for the LSAT scores and first year grade point averages of African American students. The results from the correlation analysis conducted at separate law schools then would be analyzed to determine what national trends were revealed, and what admissions guidance should be given to law schools. This would help individual law schools determine how they should use LSAT scores in making admissions decisions concerning African American applicants, and permit these law schools to avoid inadvertent discrimination against African American applicants through reliance upon non-predictive LSAT scores.

The statistical studies that I have conducted over the years, and anecdotal comments made to me by professors and administrators from other law schools, demonstrate that LSAT scores have very little, if any, meaningful correlation with the academic ability of African American law students. The most commonly repeated comment I have heard is that African American students with very low LSAT scores do poorly in law school while, above a fairly low level, LSAT scores have little correlation with academic performance by African American students. My own studies over the years indicate that African American students with LSAT scores below the bottom fifteen to twenty percentiles, in LSAT test scores, will have a noticeably reduced likelihood of academic success, whereas there is random, or near random, correlation between LSAT scores and grades above the bottom fifteen to twenty percentiles. Stated differently, the LSAT seems to work fairly well for African American students as a pass/fail test, with a passing score somewhere in the bottom fifteen to twenty percentile range. Above this very low level, the LSAT is almost meaningless as a ranking device for African American applicants. If my data are reflective of correlation patterns at other American law schools, use of LSAT scores by those schools to reject African American applicants who have LSAT scores above the bottom fifteen to twenty percentiles, and who have strong predictors of success in other areas, will result in rejection of fully qualified African American applicants without there being a justification for the rejection based upon actual likelihood of academic success.

But if low LSAT scores do not explain the relatively low grades of African American students at elite law schools, and at many other law schools, what does explain it? I believe that the explanation lies in the educational environment that faces African American students at most predominantly white law schools. My conclusion is that, at most law schools, African American students are not fully included in the student-to-student information systems through which the most important information is communicated to first year students concerning the methods of study and exam preparation a law student

must employ to succeed in law school. In addition, at most law schools, African American students face an unwelcome, and at times hostile, environment caused, in large part, by false and negative assumptions and stereotypes about their academic ability. These false and negative assumptions and stereotypes have many sources, but the most significant source would appear to be widely publicized and stigmatizing information about lower LSAT scores of African American law students.

A hostile environment for African American students also is caused by overt and subtle expressions of bias directed at African American students on a regular basis, with the subtle expressions of bias being invisible to most white students. These expressions of bias, which undermine academic performance, work in harmful combination with the isolation experienced by African American Law students because of the very low number of African American students enrolled at most law schools.

This is not theory and conjecture on my part. My comments are based upon discussions with large numbers of minority students over many years. In addition, my comments are based upon a survey conducted for me three years ago by the National Black Law Students Association (NBLSA). The survey gathered information concerning the experiences and perceptions of African American students at law schools throughout the country. The survey results revealed similar patterns of hostile environments for African American students at different law schools, with many, if not most, African American students not feeling completely welcome and respected at their law schools. The NBLSA survey results are consistent with the results of a survey of law student experiences conducted, in 1991, by the LSAC. Fifty-six percent of African American responders reported that they experienced racial discrimination at the law schools they were attending.<sup>3</sup>

At Touro Law Center, there was a very hostile environment for African American students prior to 1990. During this early period of time, African American students had low grades and a high academic dismissal rate. In 1990, we established the Legal Education Access Program (the LEAP Program), which

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<sup>3</sup> Law School Admission Council, *Databook on Women in Law School and the Legal Profession*, page 44, Table 24 (LSAC 2003). There were 501 African American female responders, 59% of whom reported experiencing racial discrimination at the law schools they attended. There were 287 African American male responders, 50% of whom reported experiencing racial discrimination at the law schools they attended. The combined reporting rate for African American females and males was 56%. [There appears to be slight error in the Table 24 calculation of percentages, but 56% appears to be accurate for both gender groups combined.]

relies upon highly successful upper-division minority students who mentor first year minority students and make sure they feel welcome at the Law Center. The upper-division students, serving as LEAP Teaching Assistants, also make sure the first year minority students know what they must do to achieve a high level of academic success by giving them the study and exam skills information that would flow to them much more easily if they were white students at a predominately white law school. This doesn't level the playing field, but it does reduce the tilt enough so that our minority students can be successful. The result is that minority students at Touro do as well in their grades as do non-minority students, and excel in other student activities at the Law Center.

What I am suggesting is that the lower level of academic performance by African American students, that is viewed by Professor Sander as the result of a mismatch between the academic ability of African American students and the academic ability of white students, actually is the result of discrimination against African American students in many, if not most, law school educational environments, discrimination that denies them full access to crucial study and exam skills information, undermines their confidence, and causes them to feel isolated, unwelcome and disrespected.

I'm not suggesting a LEAP program for other law schools. But our experience at Touro Law Center does suggest that, at other law schools, differences in academic performance by African American students are not the result of differences in academic ability. Rather, other factors prevent African American students from being successful at many, if not most, law schools, with the most significant factor, and most easily corrected factor, being the LSAT-based low enrollment numbers of African American students. This low enrollment leads to racial isolation and creates a permissive environment for the other forms of discrimination facing African American law students.

The proper response is to remedy current discrimination against African American students at most American law schools by improving the educational environment for African American students and by increasing their numbers by eliminating LSAT-based racial discrimination in the admissions process. African Americans students should not be denied access to law schools because of misuse of LSAT scores, or because of the misguided mismatch theory of Professor Sander.