



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2020

Access Law Schools & Diversifying the Profession

Deseriee A. Kennedy

Touro Law Center, dkennedy@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Civil Rights and Discrimination Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), and the [Social Justice Commons](#)

Recommended Citation

92 TEMP. L. REV. 799

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

ACCESS LAW SCHOOLS & DIVERSIFYING THE PROFESSION

*Deseriee A. Kennedy**

ABSTRACT

Lawyers do not reflect the racial diversity in the United States. The legal profession continues to struggle with ways to achieve and maintain racial diversity. Law schools play a critical role in the path to practice, and therefore an examination of the barriers to the profession they create is warranted. This Essay critiques the overreliance on standardized testing in law school admissions and advocates for an open admissions process that prioritizes racial and academic diversity. It suggests that the benefits of minimizing the role of standardized tests far outweigh any perceived costs in legal education. This Essay concludes that the quality of a law school should not be mainly measured by the numerical indicators of their first-year students but by their ability to provide a transformative education for a diverse group of students with a range of academic abilities and skills.

TABLE OF CONTENTS

INTRODUCTION.....	799
I. RACIAL DEMOGRAPHICS AND DISPARITIES IN LAW SCHOOLS AND THE LEGAL PROFESSION	801
II. LAW SCHOOL ADMISSIONS & UNDERREPRESENTATION.....	802
III. ACCESS SCHOOLS, DEEMPHASIZING THE LSAT, AND DIVERSITY	807
CONCLUSION.....	810

INTRODUCTION

Charles Hamilton Houston said:

A lawyer's either a social engineer or . . . a parasite on society A social engineer [is] a highly skilled, perceptive, sensitive lawyer who underst[ands] the Constitution of the United States and kn[ows] how to explore its uses in

* Associate Dean of Diversity & Inclusion and Professor of Law, Touro College, Jacob D. Fuchsberg Law Center; Temple Law School Freedman Fellow, LL.M.; Harvard Law School, JD, 1987. Based on a presentation given at the *Temple Law Review* symposium, *Disrupting Hierarchies in Legal Education: Commemorating the Impact of the Freedman Fellow Program*, in Philadelphia, Pennsylvania, on October 25, 2019. For an overview of the symposium, see Alicia Kelly & Richard K. Greenstein, *Disrupting Hierarchies in Legal Education: Commemorating the Impact of the Freedman Fellow Program*, 92 *TEMP. L. REV.* 713 (2020). The author thanks Aarti Ramani for her research assistance as well as Rick Greenstein and the organizers of the symposium.

the solving of “problems of . . . local communities” and in “bettering conditions of the underprivileged citizens.”¹

In order to effectuate change and engineer social justice, it is critical that the legal profession more aptly represent the growing diversity in the United States. Unfortunately, the profession has failed to achieve significant diversity. In fact, some have asserted that law is the “whitest” profession.² U.S. Census data reveal a higher rate of cultural diversity in other occupational fields, including medicine, accounting, architecture and engineering, computer systems analysis, and medical science research, than found in the legal field.³ Despite articulated efforts, diversifying the profession by including more Black and Latinx lawyers is stagnating.⁴

As law schools grapple with how to address changes in the law student population and declining enrollments, calls for rethinking legal education and reexamining law school admissions policies have increased in volume. Law schools have experimented with increasing experiential learning opportunities, flirted with apprenticeship models, and argued for deemphasizing the Socratic method.⁵ Law schools have even begun to alter admissions processes.⁶ The number of law schools accepting the Graduate Record Examination (GRE) as an alternative to the Law School Admission Test (LSAT) continues to grow.⁷ However, none of these changes have resulted in a significant growth in the diversity of the profession or any sustained increase in the admissions of Black and Latinx students to law schools.⁸

This Essay proposes the need to make admissions to law school more open and less dependent on standardized test scores. Section I briefly reviews the racial disparities that persist in law school and in the profession as compared to other professions and the

1. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (1983) (third omission in original); see also *Our History*, HOW. U. SCH. L., <http://law.howard.edu/content/our-history> [<https://perma.cc/6XW9-HJET>] (last visited May 1, 2020).

2. E.g., Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1012 (2009); Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—A Case for Cultural Competency*, 38 S.U. L. REV. 1, 39 (2010).

3. Anderson, *supra* note 2, at 1012.

4. E.g., THE LEGAL EDUC. AND PIPELINE TASK FORCE OF THE COMM. TO ENHANCE DIVERSITY IN THE PROFESSION, NEW YORK CITY BAR, *SEALING THE LEAKS: RECOMMENDATIONS TO DIVERSIFY AND STRENGTHEN THE PIPELINE TO THE LEGAL PROFESSION* 3 (2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019527-Diversity_Pipeline.pdf [<https://perma.cc/XA4W-EBK3>].

5. See Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 563 (2015); Bryant G. Garth, *Having It Both Ways: The Challenge of Legal Education Innovation and Reform at UCI and Elsewhere: Against the Grain and/or Aspiring To Be Elite*, 10 U.C. IRVINE L. REV. 373, 387–88 (2020) (discussing the success of Northeastern’s experiential learning program); Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICKINSON L. REV. 551, 575 (2018) (noting that California considered requiring “practical skills training” before being admitted to the bar); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 122 (1999).

6. See Hilary G. Escajeda, *Legal Education: A New Growth Vision Part I—The Issue: Sustainable Growth or Dead Cat Bounce? A Strategic Inflection Point Analysis*, 97 NEB. L. REV. 628, 710–11 (2019); Christian Nolan, *LSAT or GRE? The Admissions Test Debate*, N.Y. ST. B. ASS’N J., Sept. 2018, at 22, 22.

7. Escajeda, *supra* note 6, at 710–11; Nolan, *supra* note 6, at 22.

8. See Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, A.B.A. (May 2, 2018), <http://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/> [<https://perma.cc/4Y4G-JKMH>].

general population. Section II explores the role standardized entrance examinations play in the continued underrepresentation of Black and Latinxs among lawyers, and Section III posits that access law schools, which deemphasize numerical criteria, have a unique role to play in diversifying the profession. Section III also proposes a process that promotes racial and academic diversity in the admissions process and suggests the measure of a law school's success should be in how it develops talent rather than the numerical credentials of its first-year class.

I. RACIAL DEMOGRAPHICS AND DISPARITIES IN LAW SCHOOLS AND THE LEGAL PROFESSION

Blacks and Latinxs face significant challenges in joining the profession. These barriers are present before, during, and after law school.⁹ Law schools that fail to reflect the diversity in the population are partly at fault for the lack of diversity in the legal profession. Additionally, Black and Latinx lawyers face considerable hurdles in practice that result in high attrition rates.¹⁰ The failure to retain lawyers of color results in their underrepresentation among leadership ranks, which exacerbates the diversity problem.¹¹ The American Bar Association (ABA) has studied the issue of law firm attrition and set a goal of increasing diversity in the profession.¹² The ABA proposed a number of reforms, including ways to support students of color in preparing for, succeeding in, and graduating from law school and having a long and successful legal career.¹³ The ABA has identified “[p]romot[ing] full and equal participation in the Association, our profession, and the justice system by all persons [and e]liminat[ing] bias in the legal profession and the Justice System” as two of its objectives.¹⁴ However, achieving these goals may require a radical rethinking of the barriers to enter law school, including standardized entrance examinations and the role they may play in maintaining the status quo of racial exclusion.

Compared to U.S. Census data, Blacks and Latinxs are underrepresented in the legal profession and law schools.¹⁵ According to 2019 ABA data, 85% of all lawyers are

9. Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 817–19 (2019).

10. *Id.* at 818; David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 14 (2004).

11. Elizabeth Kronk Warner, *Reflecting on the Importance of Diversity to the Profession and FBA*, FED. LAW., June 2015, at 3, 3; David B. Wilkins, *Five Reasons Why Law Firms Are Not Making Progress on Diversity*, CBA REC., May 1999, at 20, 21.

12. See AM. BAR ASS'N, DIVERSITY PLAN 1–2 (2011) [hereinafter ABA, DIVERSITY PLAN], http://www.americanbar.org/content/dam/aba/events/racial_ethnic_diversity/aba_diversity_plan_may_2011.pdf [https://perma.cc/ZQD5-U862]. ABA's Goal III, adopted by the House of Delegates in 2008, states that part of its mission is to “Eliminate Bias & Enhance Diversity.” *Id.* at 1.

13. See *id.* at 5–8.

14. *Id.* at 1.

15. See Laffey & Ng, *supra* note 8.

white.¹⁶ Non-Hispanic whites, therefore, at about 60.4% of the U.S population,¹⁷ comprise a disproportionate percentage of the legal profession. The ABA demographic data report that Blacks are 5%, Hispanics are 5%, and Asians are only 2% of all lawyers.¹⁸ Since these percentages have not changed significantly over the last ten years, any sense of racial progress and development of diversity has been illusory.¹⁹

Law school demographics present a similar picture.²⁰ White students represent approximately 62% of law students.²¹ Latinx students represent about 13% of law students compared to 18.3% of the population.²² Black Students represent 8% of law students compared to 13.4% of the population²³ and Asian/Pacific Islanders represent 6% of law students compared to 5.9% of the population.²⁴

II. LAW SCHOOL ADMISSIONS & UNDERREPRESENTATION

There are many factors that play a role in the underrepresentation of people of color graduating from U.S. law schools, including the law school application process. The lack of diversity in law schools can be connected to emphasis on entrance examinations, such as the LSAT, that play a role in narrowing the entry into law school and then into the

16. AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2019) [hereinafter ABA, POPULATION SURVEY], http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf [https://perma.cc/EQ7D-4NN4].

17. *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/fact/table/US/IPE120218> [https://perma.cc/HX2V-E2FQ] (last visited May 1, 2020). All whites constitute 76.5% of the population. *Id.*

18. ABA, POPULATION SURVEY, *supra* note 16.

19. *Id.*

20. See Anderson, *supra* note 2, at 1016–17; Don Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools*, 18 TEMP. POL. & C.R. L. REV. 177, 178–84, 197–201 (2008) (tracing the history of race and legal education).

21. See *Statistics: 2019 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/statistics.html [https://perma.cc/UD5T-DSUS] (last visited May 1, 2020) (noting 23,761 white men, women, and other enrolled in law school in 2019 out of 38,283 total); see also Anderson, *supra* note 2, at 1011–12 (noting that the legal field is disproportionately white); *Law School Enrollment by Race & Ethnicity (2018)*, ENJURIS, <http://www.enjuris.com/students/law-school-race-2018.html> [https://perma.cc/V3A9-UMPJ] (last visited May 1, 2020). Moreover, Black and Latinx students leave law school at higher rates than law students of other races. Kylie Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students Disproportionately Represented in Attrition Figures*, ACCESSLEX (Sept. 18, 2018), <http://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures> [https://perma.cc/R9NS-BLV9].

22. *Compare Statistics: 2019 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, *supra* note 21 (noting 4,852 Hispanic men, women, and other enrolled in law school in 2019 out of 38,283 total), with *Quick Facts*, *supra* note 17.

23. *Compare Statistics: 2019 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, *supra* note 21 (noting 2,897 Black men, women, and other enrolled in law school in 2019 out of 38,283 total), with *Quick Facts*, *supra* note 17.

24. *Compare Statistics: 2019 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, *supra* note 21 (noting 2,399 Asian men, women, and other enrolled in law school in 2019 out of 38,283 total), with *Quick Facts*, *supra* note 17.

profession.²⁵ On average, 70–80% of admission decisions rest on LSAT scores and undergraduate grade point averages.²⁶

Unfortunately, LSAT scores reveal significant disparities by race. The average LSAT score is 153 for whites and Asians, 146 for Latinxs, and 142 for Blacks.²⁷ The entrance examination differences may help to explain the disparity in application acceptances by race, which result in higher offers of admissions for whites than for Blacks.²⁸ For example, from 2016 to 2017, 49% of Black applicants received no offers of admission, and 72% of these applicants received LSAT scores below 150.²⁹ In addition, research reveals that Blacks with scores between 135 and 149 on the LSAT were admitted at lower rates than whites; 55% of Blacks compared to 39% of whites within this score range received no offers of admission to a U.S. law school.³⁰

These racial disparities are even more troubling considering that law schools over rely on the LSAT in making admission decisions.³¹ According to the Law School Admission Council (LSAC), the nonprofit organization that administers the LSAT, this entrance examination should not be the sole determinant of law school admissions.³² Yet, despite this warning, “the LSAT has become a symbol deployed by law schools in the competition for prestige, status, and applications.”³³ The LSAT can be problematic because, despite being heavily relied upon in making admissions decisions, it is considered by many to be a modest predictive measure of law school success.³⁴ Its strongest correlation is with first-year grades, yet the LSAC has noted that the correlation between test scores and first-year grades varies from school to school.³⁵ There is even evidence that LSAT scores do not always correlate with ability. LSAT scores may be less predictive of law school performance for underrepresented students than for whites, and minorities who receive the appropriate academic supports tend to “outperform” their

25. See *infra* Section III for a discussion of the LSAT’s impacts on law school diversity.

26. Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission To Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 86 (2012) (arguing for a holistic review that deemphasizes the LSAT on the ground that the LSAT has a disparate impact on Blacks and Latinxs).

27. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 490 & n.3 (2019). The score range for the LSAT is 120–180. *LSAT Scoring*, LSAC, <http://www.lsac.org/lsat/taking-lsat/lsat-scoring> [<https://perma.cc/U7MH-UFYA>] (last visited May 1, 2020). The score range is 130–170 for the GRE. *How the Test Is Scored*, ETS: GRE, http://www.ets.org/gre/revised_general/scores/how/ [<https://perma.cc/9MGB-GVC9>] (last visited May 1, 2020). For more on these entrance examinations and the shift from the LSAT to the GRE, see Martin Pritikin, *Tipping Sacred Cows: Barriers to Entry in the Legal Field Begin to Fall*, 27 No. 6 WESTLAW J. PROF. LIABILITY, Nov. 21, 2017, at *2, 2017 WL 5598169.

28. Anderson, *supra* note 2, at 1014; William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 207–08 (2001).

29. Taylor, *supra* note 27, at 496.

30. *Id.* at 496–97.

31. Anderson, *supra* note 2, at 1012–14.

32. *LSAT Fairness Procedures*, LSAC, <http://www.lsac.org/about/lsac-policies/lsat-fairness-procedures> [<https://perma.cc/JDL9-8FME>] (last visited May 1, 2020).

33. Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41, 46 (2006).

34. *Id.* at 55.

35. *Id.* at 54–56.

numbers once admitted to a law school.³⁶ According to the LSAC, “relatively modest differences in scores do not matter,” and as much as a ten point difference in scores may have no effect on predicting law school success.³⁷

A study by researcher William Kidder found that for “law school applicants with essentially the same performance in college, students of color encounter a substantial performance difference on the LSAT compared to their White classmates.”³⁸ The widest gaps in performance were found among Black and Latinx students.³⁹ Several studies, including one conducted at Brigham Young University’s J. Reuben Clark Law School, have supported the conclusion that measures other than the LSAT may be as, if not more, effective in predicting overall success in law school.⁴⁰ Another study, conducted at the University of Michigan Law School, found that neither GPAs nor LSAT scores were particularly useful in measuring post-law school success.⁴¹

The disparities in the percentages of Black and Latinx students in law school and the higher costs associated with lower entrance examination scores should be *prima facie* evidence that the test should not be the gatekeeper for the profession.⁴² Professors Phoebe Haddon and Deborah Post aptly noted that “[t]he reality is that test results on the LSAT continue to correlate with race, gender, and class.”⁴³ However, the reason for the gap remains unclear.⁴⁴

Moreover, it is difficult to divorce the LSAT from the history of standardized tests in the United States as a means of exclusion based in discrimination and prejudice.⁴⁵ The LSAT, originally developed in the mid-to-late 1940s for the elite law schools at Harvard, Yale, and Columbia universities,⁴⁶ may be ill-suited to developing student bodies that more accurately reflect current demographics. The impact of the LSAT on race was

36. See Lustbader, *supra* note 26, at 101–02.

37. Haddon & Post, *supra* note 33, at 56 (footnote omitted).

38. William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CALIF. L. REV. 1055, 1058 (2001).

39. *Id.*

40. Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN’S L. REV. 153, 159–60 (2006) (noting the result of the Brigham Young University’s J. Reuben Clark Law School study finding a greater predictive effect of the GPA on law school performance over three years).

41. Kristen Holmquist et al., *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 572 (2014) (“In fact, the authors of a longitudinal study of three generations of students of color admitted to University of Michigan Law School noted that ‘LSAT scores and [undergraduate GPA] scores . . . seem to have no relationship to success after law school, whether success is measured by earned income, career satisfaction or service contributions.’” (omission in original) (quoting David L. Chambers et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395, 401 (2000))).

42. See Haddon & Post, *supra* note 33, at 91–92.

43. *Id.* at 77.

44. *Id.* at 77–78.

45. See *id.* at 78.

46. See *Mission and History*, LSAC, <http://www.lsac.org/about/mission-history> [https://perma.cc/JZH3-MCLQ] (last visited May 1, 2020).

unlikely part of the drafters' thought process in originating the test.⁴⁷ In fact, although the LSAC formed a committee to broaden access to law school in the 1950s, LSAT test centers were not even desegregated until more than fifteen years after the test was first conceived.⁴⁸

Although the LSAT was drafted with an eye to measure reading and reasoning skills,⁴⁹ it is not clear that the test successfully measures the skills necessary to succeed in the profession. In addition, it may underperform with regard to measuring the kinds of skills lawyers historically identify as important to success.⁵⁰ It may be difficult to integrate the heavy reliance that law schools place on the LSAT with the LSAC's stated goal of providing "open access to legal education so that one day the profession can truly reflect the diversity of society and thereby move ever closer to the promise of equal justice for all."⁵¹

As Professors Pamela Edwards and Ruth Colker separately noted, the LSAT is essentially a speed test that makes it difficult to use it as a predictive measure of professional effectiveness and may magnify racial disparities in test results.⁵² Edwards acknowledged that "[w]ithin the field of psychometrics, it is widely acknowledged that test-taking speed and reasoning ability are separate."⁵³ Moreover, speed tests can disadvantage applicants with disabilities, applicants of color, women, and older applicants who often run out of time and end up guessing at responses rather than taking time to reason out correct answers.⁵⁴ Professor William Henderson similarly found a racial impact on law school diversity by having a "time-pressured" examination.⁵⁵ Henderson concluded, "[T]his study found some preliminary evidence that the performance gap between White and minority students may be smaller on less time-pressured testing methods, including blind-graded, take-home exams."⁵⁶

Critics also have raised concerns that the cost of preparing for and taking the LSAT has an adverse effect.⁵⁷ Professor Michelle Anderson stated, "LSAT scores are deeply

47. See *id.* (providing that the LSAT was created to "promote fairness in law school admission by opening the door to all qualified candidates, regardless of their undergraduate institution or area of study").

48. *Id.*

49. See *id.*

50. Edwards, *supra* note 40, at 158 ("These skills include the ability to read and comprehend complex texts with accuracy and insight, to organize and manage information, to think critically, and to analyze and evaluate the reasoning and arguments of others. However, the LSAT does not consider other attributes that a successful law student should have, 'such as motivation, perseverance, listening or speaking skills, or writing ability.'" (footnote omitted)).

51. *Mission and History*, *supra* note 46.

52. Ruth Colker, *Test Validity: Faster Is Not Necessarily Better*, 49 SETON HALL L. REV. 679, 712 (2019); Edwards, *supra* note 40, at 163–64.

53. Edwards, *supra* note 40, at 160 (alteration in original) (quoting William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. REV. 975, 975 (2004)).

54. See Colker, *supra* note 52, at 689, 703–04.

55. Henderson, *supra* note 53, at 975–76.

56. *Id.* at 976.

57. E.g., William Malpica & Mauricio A. España, *Expanding Latino Participation in the Legal Profession: Strategies for Increasing Latino Law School Enrollments*, 30 FORDHAM URB. L.J. 1393, 1408–09 (2003).

entwined with privilege in our society. . . . LSAT scores might be impaired by a lack of privilege: lack of quality education, a range of life complexities, test anxiety, financial stresses, lack of confidence, and stereotype threat can all depress LSAT performance.”⁵⁸

The LSAT is a narrow measure of intelligence or aptitude for legal study. It does not measure the range of qualities and characteristics correlated with becoming a successful lawyer.⁵⁹ There are a range of abilities associated with flourishing as a lawyer, such as empathy, motivation, perseverance, character, creativity, problem-solving, and communication and listening skills, that the LSAT does not measure.⁶⁰ Nor are lawyers frequently faced with the need to develop responses to legal questions in hours, without having dedicated time to research and reflect on the issue. Most lawyers challenge the concept that their practice is equivalent to the kinds of multiple-choice questions that appear on entrance examinations.⁶¹ Others criticize the LSAT and other entrance examinations as viewing intelligence as primarily fixed and advocate for evaluative tools that are “designed according to multi-dimensional theories of intelligence.”⁶² An overemphasis on the LSAT relies on the assumption that intelligence is static and ignores the potential for learning.⁶³

There is evidence that the LSAT magnifies racial differences and therefore has a disparate impact on not only admissions but the cost of law school.⁶⁴ Lower scores can often mean smaller financial aid awards and higher debt burdens for Black and Latinx students.⁶⁵ Thus, so-called merit-based aid narrowly defines merit based on academic performance and scoring, which results in students with lower scores receiving less aid and effectively subsidizing the cost of tuition of higher scorers.⁶⁶ This “cost-shifting” has an underexamined racial impact on students.⁶⁷

Although LSAT scores play a sizeable role in law school diversity, other factors can affect admission rates. These factors can include the number of schools applied to and at what point in the admissions cycle a student submitted their applications.⁶⁸ Students who apply later in the process are less likely to be admitted.⁶⁹ This further impacts racial disparity because, on average, Blacks tend to complete their applications

58. Anderson, *supra* note 2, at 1012–13.

59. See Haddon & Post, *supra* note 33, at 57–58.

60. *Id.* at 60.

61. See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 372–73 (2003); *cf. id.* at 368 (discussing a disconnect between the bar testing “test-taking skills, rather than the law or lawyering skills” (footnote omitted)).

62. Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1280 (2011).

63. See Haddon & Post, *supra* note 33, at 55, 57–58.

64. See Holmquist et al., *supra* note 41, at 568–69; Kidder, *supra* note 38, at 1081–82.

65. Diane Curtis, *The LSAT and the Reproduction of Hierarchy*, 41 W. NEW ENG. L. REV. 307, 322–24 (2019) (noting that law schools rely heavily on LSAT scores in providing scholarships and so students with lower scores pay the most for their legal education); Aaron N. Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & EDUC. 41, 74 (2018).

66. Curtis, *supra* note 65, at 322–24; Taylor, *supra* note 27, at 501–02.

67. Taylor, *supra* note 27, at 501–02.

68. David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1864 (2005).

69. Taylor, *supra* note 27, at 497.

later in the law school admission cycle.⁷⁰ Other factors include whether students have access to capable prelaw advisors and the cost of applying to law school, application fees, and LSAT testing and preparation fees.⁷¹

Law schools are increasingly moving to accepting the GRE in place of the LSAT.⁷² However, the GRE faces many of the same criticisms as the LSAT and has failed to achieve significant racial diversity in graduate studies.⁷³ The disparity in scores by race among LSAT test takers is also found in GRE scores.⁷⁴ Whites tend to score nearly twenty-five percentile points higher than Blacks.⁷⁵ The test has also faced criticisms of its predictive value similar to those directed at the LSAT.⁷⁶ In fact, Professors Casey Miller and Keivan Stassun raised concerns that the GRE is a “strong driver of the continuing under-representation of women and minorities in graduate school.”⁷⁷ Professor Colker also highlighted the lack of evidence that the GRE will foster diversity and may, in fact, increase the costs of applying since students are likely to take both tests, thereby increasing the cost of applying to law school.⁷⁸ Similarly, until recently when increasing concerns about standardized testing led to an increase in colleges making entrance examinations optional, the college admissions process was becoming increasingly more expensive as high school students prepared for, registered, and took *both* the SAT and the ACT to improve their chances of admission.⁷⁹

III. ACCESS SCHOOLS, DEEMPHASIZING THE LSAT, AND DIVERSITY

The disparities in law school and lawyer demographics alone present a persuasive argument for a shift in thinking about how to assess who has access to legal education

70. Chambers, *supra* note 68, at 1863–64.

71. Taylor, *supra* note 27, at 498–99.

72. Escajeda, *supra* note 6, at 710–13; Nolan, *supra* note 6, at 22; Stephanie Francis Ward, *Under Examination*, ABA J., Feb. 2018, at 68, 68.

73. See, e.g., Aaron Taylor, *The GRE Is No Diversity Tool*, NAT'L JURIST (June 7, 2016, 9:19 AM), <http://www.nationaljurist.com/national-jurist-magazine/gre-no-diversity-tool> [<https://perma.cc/7TBB-M6EJ>].

74. *Id.*

75. *Id.*

76. E.g., Wendy M. Williams, *Consequences of How We Define and Assess Intelligence*, 2 PSYCHOL. PUB. POL'Y & L. 506, 518, 522 (1996) (“[W]e found that the GRE is best at predicting grades earned in the semesters immediately following admission. Thus, in general, when we select students for admission and financial aid awards based on high GRE scores, we are selecting students most likely to do well in course work but not necessarily more likely to do well in research and teaching than applicants with lower GRE scores.”).

77. Casey Miller & Keivan Stassun, *A Test That Fails*, 510 NATURE 303, 304 (2014); see also Colker, *supra* note 52, at 708–09 (noting that the GRE is math heavy which tends to weight in favor of male applicants from STEM fields).

78. Colker, *supra* note 52, at 709.

79. Tamar Lewin, *Testing, Testing*, N.Y. TIMES (Aug. 2, 2013), <http://www.nytimes.com/2013/08/04/education/edlife/more-students-are-taking-both-the-act-and-sat.html> [<https://perma.cc/63PA-RXEF>]; Valerie Strauss, *A Record Number of Colleges Drop SAT/ACT Admissions Requirement Amid Growing Disenchantment with Standardized Tests*, WASH. POST (Oct. 18, 2019, 2:30 PM), <http://www.washingtonpost.com/education/2019/10/18/record-number-colleges-drop-satact-admissions-requirement-amid-growing-disenchantment-with-standardized-tests/> [<https://perma.cc/P3AG-H4QP>]; Alina Tugend, *Record Number of Colleges Stop Requiring the SAT and ACT Amid Questions of Fairness*, PBS (Oct. 10, 2019, 3:07 PM), <http://www.pbs.org/newshour/education/record-number-of-colleges-stop-requiring-the-sat-and-act-amid-questions-of-fairness> [<https://perma.cc/FC4P-BYPZ>].

and the legal profession. These ongoing disparities suggest the need for restructuring admissions processes. “Access law schools,” which view providing wide access to legal education to students who traditionally underperform on law school entrance examinations as a core part of their mission, have a unique role to play in increasing diversity in the profession.⁸⁰ These access law schools can work to decouple the measure of law school quality from the entrance examination scores of its students.⁸¹ In fact, nearly all of the top ten law schools by race and ethnicity are not regularly listed among the *U.S. News & World Report* top ten law school rankings.⁸² Schools that deemphasize LSAT scores may provide greater access to the profession than schools that emphasize the LSAT, but this deemphasis may negatively impact their rankings,⁸³ which rely heavily on first-year student LSAT scores.⁸⁴ Notably, however, law school rankings have been criticized as an ineffective measure of law school quality on the ground that they are often manipulated in a number of ways—including the focus on first-year scores in rankings and law schools’ practices of actively recruiting and accepting transfer students after their first year to avoid their LSAT scores impacting their rankings.⁸⁵

“Access law school” is a broader concept than “open admission” programs that many law schools employ. Often open admission programs set aside seats for students with nontraditional backgrounds and scores as a means of creating a more inclusive profession.⁸⁶ While these programs are laudable, by definition they represent a portion of admissions rather than rethinking access to law schools holistically.⁸⁷ Moreover, these programs may impose a “tax” on students that require them to satisfy separate requirements than typically imposed on the rest of the student body.⁸⁸ Most importantly, these programs, as effective as they may be, have not resulted in a significant increase in diversity in the legal profession.⁸⁹

80. See, e.g., Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1182–83 (2008); Lustbader, *supra* note 26, at 76–77.

81. See Haddon & Post, *supra* note 33, at 69.

82. *Compare Law School Enrollment by Race & Ethnicity (2018)*, *supra* note 21, with *Best Law Schools*, U.S. NEWS & WORLD REP., <http://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/HWQ7-Z5GB>] (last visited May 1, 2020).

83. See Haddon & Post, *supra* note 33, at 56–57.

84. Robert Morse et al., *Methodology: 2021 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 16, 2020), <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<https://perma.cc/WFR8-E6NG>] (describing that median LSAT and GRE scores are weighted 12.5% in the measure of a school’s selectivity).

85. Leonard M. Baynes, *The LSAT*, U.S. News & World Report, and *Minority Admissions*, 80 *ST. JOHN’S L. REV.* 1, 4–5 (2006).

86. Jeffrey J. Minneti, *A Comprehensive Approach to Law School Access Admissions*, 18 *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 189, 215–16 (2018); see also Lustbader, *supra* note 26 at 128–29.

87. See, e.g., Eboni S. Nelson et al., *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 *IOWA L. REV.* 2187, 2198–99 (2017).

88. Lustbader, *supra* note 26, at 132 n.358 (discussing conditional acceptance programs); Minneti, *supra* note 86, at 219–27 (explaining a seven week intensive course access admission students must take in mid-June).

89. Lustbader, *supra* note 26, at 84–85.

It is possible to redefine excellence in legal education based on factors other than student grade point averages and LSAT scores.⁹⁰ As Professor George Critchlow noted, [I]t is time to think about “excellence” in terms of whether or not a school (1) admits students based on factors that show their ability to become effective lawyers or legal technicians; (2) makes law school affordable and attractive for a range of applicants by controlling tuition and allocating scholarships based on need as well as merit; and (3) benefits society by admitting and preparing public service-minded students for middle-class careers that address the needs of society’s underserved middle- and lower-income population.⁹¹

Excellence should also be defined by whether law school diversity reflects the changing demographics in the country.

It is also possible to look to other disciplines for effective means of predicting success in selecting organization participants. For example, Professor Kristen Holmquist and colleagues noted, “Personnel—or industrial—psychology has a long history of helping organizations create and implement hiring (or selection) procedures that both predict relevant job skills and avoid racially disparate results.”⁹² The varied proposals for a means of measuring the likelihood that a student is becomes a competent professional deserve increased attention and study.⁹³ Law school performance and bar passage should not rest on numerical indicators but should, instead, be seen as a reflection of law school pedagogy and use of resources during the three years students are enrolled. It is up to law schools to meet students where they are and to teach them what they need to know to be successful. If that is not happening, perhaps law schools need to change—not rely on cutoff scores.

Law schools should begin their admissions process with the premise that each school should reflect the diversity in the country. It should be incumbent on law schools to develop systems to achieve and ensure student success. Perhaps law schools should apply a process that ensures racial and academic diversity in admissions.⁹⁴ To achieve the kind of social justice Charles Hamilton Houston had in mind, diversity should be a requirement rather than a vague objective.⁹⁵ The law school accreditation process should require racial diversity similar to that of the U.S. Census. Moreover, it is possible to imagine requiring academic diversity by deemphasizing LSAT scores and the law school hierarchies that these scores create. This deemphasis can be accomplished by requiring every law school admit a percentage of students within each range of the distribution of LSAT scores. For example, no more than a certain percentage of students above a

90. Haddon & Post, *supra* note 33, at 45, 65 (“Law school administrators and law faculty are responsible for policies that determine who will attend law school.”); *id.* at 90–94 (arguing that law schools should stop equating excellence or merit on an entrance examinations that have limited predictive value and have a disparate impact).

91. George Critchlow, *Beyond Elitism: Legal Education for the Public Good*, 46 U. TOL. L. REV. 311, 317 (2015).

92. Holmquist et al., *supra* note 41, at 576.

93. *Id.* at 583–84; Lustbader, *supra* note 26, at 146–47.

94. *Cf.*, e.g., Winnie Hu, *In a Twist, Low Scores Would Earn Admission to Select Schools*, N.Y. TIMES (June 6, 2018), <http://www.nytimes.com/2018/06/06/nyregion/middle-school-admission-desegregation-nyc.html> [https://perma.cc/3NZ9-VSBJ] (reporting on a proposal to diversify middle schools by mandating admission of a percentage of students with lower test scores).

95. *But see* ABA, DIVERSITY PLAN, *supra* note 12, at 1–2.

specific LSAT score and no more than a certain percentage below a specific LSAT score could be admitted to each law school. In this way, the distribution of LSAT scores would be similar across law schools. This would help prevent inflated rankings based on LSAT score reports and manipulation. Schools would be forced to be more creative and innovative about how to teach and support their students.⁹⁶

In a world in which law school prestige could no longer rest on LSAT scores, schools and their relative rankings would necessarily have to rely on other factors, such as diversity; relative improvement in student performance; clinic work, including how many clients are helped; the number of young school children assisted through pipeline and neighborhood programs; student publications; and graduation rates. If the quality of education is defined by its ability to transform and uplift,⁹⁷ measuring the quality of a school by its ability to develop skills and talents among a diverse group of law students with a wide range of academic abilities is essential. In addition, if law schools were evaluated based on their commitment to ensuring that their student body reflects the diversity of the communities in need of lawyers, the demographics of the legal profession would transform.⁹⁸ This Essay joins those that have called for a revamping of law school admissions that upends how excellence and merit are defined⁹⁹ and suggests it is time for a radical¹⁰⁰ rethinking of the emphasis on standardized testing to create diverse and inclusive law schools. Constance Baker Motley remarked, “When I went to law school, nobody heard of civil rights.”¹⁰¹ She later reflected that “[s]omething which we think is impossible now is not impossible in another decade.”¹⁰² Motley’s observation encouraging transformative thinking as a means of achieving justice lends support to the exploration of innovative and perhaps radical approaches to addressing intransigent problems. As one of the primary doorkeepers to the profession, it is time for law schools to adopt admissions policies that prioritize cultural diversity in granting entry into the law.¹⁰³

CONCLUSION

This Essay asserted that it is time for law schools to develop a transformative view of education, one that rejects the premise that prior opportunity and performance should

96. Lustbader, *supra* note 26, at 143–44.

97. David E. Van Zandt, *Merit at the Right Tail: Education and Elite Law School Admissions*, 64 TEX. L. REV. 1493, 1507–11 (1986) (book review) (“Although a person may not have achieved her potential in prior academic efforts, this does not mean that this potential will not blossom at some point in the future.”).

98. See Malpica & España, *supra* note 57, at 1394–95.

99. Critchlow, *supra* note 91, at 317–18; Haddon & Post, *supra* note 33, at 90–93.

100. Radical is defined as “relating to or affecting the fundamental nature of something” and “[a]dvocating or based on . . . complete political or social change.” *Radical*, LEXICO, <http://www.lexico.com/en/definition/radical> [<https://perma.cc/2DTW-BHAE>] (last visited May 1, 2020).

101. *Constance Baker Motley*, COLUMBIA250, http://c250.columbia.edu/c250_celebrates/remarkable_columbians/constance_motley.html [<https://perma.cc/BNE5-NB47>] (last visited May 1, 2020).

102. BRIAN LANKER, *I DREAM A WORLD: PORTRAITS OF BLACK WOMEN WHO CHANGED AMERICA* 65 (Barbara Summers ed., 1989).

103. See FRANZ KAFKA, *THE TRIAL* (David Wyllie trans., Project Gutenberg 2005) (1925) (ebook), <http://gutenberg.org/etext/7849> [<https://perma.cc/WY42-GQS6>] (describing a man who spends his life seeking entry into the law from its doorkeeper; when asked if he will be allowed to enter later, he is told, “That’s possible . . . but not now.”).

be the primary basis on which admission to law school is based. Prior efforts at diversification of the legal profession have not yet achieved their goal, which means that greater creativity and innovation are required. To reach the goal of a diverse profession, law schools should restrict or eliminate their reliance on standardized testing in admissions and focus instead on developing a racially and academically diverse student body. Settling for replicating past advantages and successes falls short of a goal of legal education as a means of achieving social justice and a focus on the lawyer as a social engineer. The qualities needed to train and develop the kinds of lawyers that focus on working for the common good cannot be measured wholly or even in part by standardized testing and, therefore, these entrance examinations should not be the primary basis for determining admissions to law school.