

2019

MILITARY LAW—REDEFINING CORROBORATION: THE HISTORY, INTENT, AND EFFECT OF CONGRESS'S DIRECTION TO CHANGE HOW CONFESSIONS ARE CORROBORATED IN MILITARY COURTS

Seth M. Engel

Follow this and additional works at: <https://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Seth M. Engel, *MILITARY LAW—REDEFINING CORROBORATION: THE HISTORY, INTENT, AND EFFECT OF CONGRESS'S DIRECTION TO CHANGE HOW CONFESSIONS ARE CORROBORATED IN MILITARY COURTS*, 41 W. New Eng. L. Rev. 219 (2019), <https://digitalcommons.law.wne.edu/lawreview/vol41/iss2/1>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

THE LSAT AND THE REPRODUCTION OF HIERARCHY

*Diane Curtis**

On the whole, admission to law school is not a very selective process, with roughly three-quarters of applicants gaining admission to one or more programs each year. As a result, the LSAT serves less a gate-keeping function than a sorting function, funneling applicants into a hierarchy of law schools based primarily on their LSAT score. In so doing, reliance on the LSAT in admissions reinforces existing inequities, with lower income and minority students disproportionately directed toward less selective schools with poorer post-graduate employment outcomes. Reliance on the LSAT in the award of “merit” scholarships further exacerbates this hierarchy, disproportionately burdening the low scorers with heavier educational debt burdens. This Article describes the mechanisms of this process and offers proposals for change.

INTRODUCTION

The first time I seriously questioned the validity of the Law School Admission Test (LSAT) was in 2008, nearly twenty years after I had aced the thing and after ten years of law practice and four years of working as a pre-law advisor at two different colleges. One of my best students ever—a woman who had worked for over twenty years as a paralegal and gone back to school to finish her undergraduate degree—could not even crack 150, a score just below the national median.¹ In an undergraduate

* Director of Pre-Law Advising and Senior Lecturer in Political Science at the University of Massachusetts Amherst. This paper benefited from the feedback offered by several people, including Sherry Mason, Jerry Organ, Bill Childs, Alissa Leonard, and others. I am grateful for their contributions to what I intend as a conversation-starter, not a comprehensive review of the use of the LSAT in admissions processes. Any errors or omissions are of course my own.

1. Memorandum from Lisa Anthony, Senior Research Assoc., LSAC, to LSAT Score Recipients (June 20, 2017), <https://www.lsac.org/sites/default/files/legacy/docs/default-source/data-%28lsac-resources%29-docs/lsat-score-distribution.pdf> [https://perma.cc/VRX6-WV93]. In this memorandum, LSAC provides score distributions and percentiles for four testing years—2014 through 2017. *Id.*

legal research and writing course, this student consistently produced memos and papers with the kind of sophisticated, complex, thorough, and well-reasoned analyses that I would have been happy to see from a second- or third-year law student. She was clearly so capable of comprehensive, high-level legal work, that I wrote in my recommendation that I would “stake my career” on her becoming a “standout” in law school. Indeed, she ended up graduating fifth in her class from Western New England University School of Law, garnering several competitive awards along the way. Naturally, she passed the bar on her first try and has since had a successful legal career.

Was she an outlier?² How could her LSAT performance have failed so dramatically to predict her performance in law school? She almost decided not to go to law school as a result of her abysmal test score. How many other would-be attorneys have given up on their law school dreams because they could not crack this test?³ And why had it taken me so long to doubt the validity of this gate-keeping mechanism?

Let’s back up a bit. Here is a secret not well assimilated in American culture and barely better grasped within American legal culture: law school is really not that selective, and it is not that hard to become a lawyer. In recent years, roughly three-quarters of applicants have been admitted to one or more law schools, and for at least the last twenty-five years, the percentage of admitted applicants has not dropped below fifty percent.⁴ Almost all of those successful applicants matriculate somewhere (i.e., at one of the over 200 law schools accredited by the American Bar

2. Anecdotally, I can attest that while this student was the first I encountered who was very capable academically but struggled with the LSAT, she was far from the last. I see a substantial minority of applicants every year with the same general profile: a strong undergraduate record coupled with only mediocre LSAT performance, despite significant test-specific study and practice. As I edited this paper, one of my counterparts at another large institution reported to the pre-law advisor listserv on a similar case: a student with a 4.0 grade point average (GPA) who, despite excellent practice habits and diagnostic tests, scored less than the median on his actual LSAT.

3. Almost every applicant I have advised who scored below the median on the LSAT, regardless of all other factors in their application package, has questioned whether he or she should change career paths as a result.

4. This information is contained in the annual U.S. National Decision Profiles released by LSAC. These reports dated 1992–93 through 2017–18 were compiled by the Author and are on file with the Law Review. LSAC, U.S. NATIONAL DECISION PROFILES 1992–93 APPLICATION YEAR SUMMARY to LSAC, U.S. NATIONAL DECISION PROFILES 2017–18 APPLICATION YEAR SUMMARY. The most selective year during that period was the 2003–04 application year, when the number of law school applicants peaked at 100,604, and 55.6% were nonetheless admitted to one or more law schools. *See* LSAC, U.S. NATIONAL DECISION PROFILES 2003–04 APPLICATION YEAR SUMMARY.

Association (ABA)),⁵ almost all law students finish their degrees, and a smaller, but still substantial majority of those degree-holders eventually pass the bar and are admitted to practice.⁶

The obvious comparison is medical school, where the undergraduate gatekeeping mechanisms to apply are onerous,⁷ and far fewer than half of applicants are accepted each year.⁸ We often speak of these two professions as though they are on equal footing, held in the highest esteem, and the most desirable options for our best and brightest. But that ignores the vast differences between the two, of which I'll name just a few: doctors require extraordinarily high levels of scientific knowledge and practical skills, a minimum of seven years of post-undergraduate education and training (and often much more), and a strong base in the sciences prior to that specialized training; and the daily work of their profession is often concerned with literal life and death situations.⁹ Lawyers in the United States, on the other hand, need only three years of professional education and training (and many in the profession argue that this is one year too many),¹⁰ require no specific undergraduate educational prerequisites (other than a four-year degree),¹¹ and only a very few ever deal with true

5. *Id.* In the 2017–18 application year, 86.8% of admitted applicants matriculated at a law school. See LSAC, U.S. NATIONAL DECISION PROFILES 2017-2018 APPLICATION YEAR SUMMARY (2019) [hereinafter 2017-2018 APPLICATION YEAR SUMMARY].

6. Jerry Organ, *Updated Analysis of Law School Attrition Data—2018*, TAXPROF BLOG (Jan. 16, 2018), http://taxprof.typepad.com/taxprof_blog/2018/01/updated-analysis-of-attrition-data-2018.html [https://perma.cc/9LUP-7PTZ] (reporting non-transfer attrition rates of 5.8–7.3% since 2011); NATIONAL CONFERENCE OF BAR EXAMINERS, *2017 Statistics*, B. EXAMINER 9, 14–17 (2018), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F218> (reporting seventy-five percent national pass rate for July first-time BAR exam takers from ABA-approved law schools).

7. In addition to the Medical College Admission Test (MCAT), prospective medical students must complete roughly sixty credits of science courses in college, engage in two or more health-related internships, and obtain recommendations from both professors and a designated pre-med advisor. See, e.g., *Academic Preparation*, U. MASS. AMHERST: C. NAT. SCIENCES, <https://www.cns.umass.edu/advising/pre-med-pre-health/academic-preparation> [https://perma.cc/C4PC-9S9V].

8. *Table A-7.2: Applicants, First-Time Applicants, Acceptees, and Matriculants to U.S. Medical Schools by Sex, 2009-2010 Through 2018-2019*, ASS'N AM. MED. COLLEGES (Nov. 9, 2018), https://www.aamc.org/download/492954/data/factstablea7_2.pdf [https://perma.cc/3AC8-SUEX].

9. See generally *Medical School 101*, ASS'N AM. MED. COLLEGES, <https://students-residents.aamc.org/choosing-medical-career/medical-school-101/> [https://perma.cc/JJD8-3YRY].

10. Richard L. Abel, “*You Never Want a Serious Crisis to Go to Waste.*” *Reflections on the Reform of Legal Education in the US, UK, and Australia*, 22 INT’L J. LEGAL PROF. 3, 12 (2015).

11. *Pre-Law: Preparing for Law School*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/pre_law/ [https://perma.cc/H876-WHM4].

life and death situations (although a much higher number confront daily threats to the liberty of their clients).

But only one of these professions is charged with the maintenance of our democratic institutions. Lawyers ensure that government institutions at all levels respect individuals' due process rights. Only lawyers can vindicate constitutional rights critical to citizenship, including equal protection of the laws and the right to vote. By and large, lawyers not only understand the constraints that guarantee the separation of powers in our constitutional structure but also are empowered to protect that structure when it is threatened by agents of one branch or another. And it is lawyers who draft, enforce, interpret, and apply the laws and regulations that carry out the constitutional mandates of governance at every level in our federal system.¹²

This seems like a pretty big deal—something we should take into account when we admit students to law school, train them, ensure their capacity for practice, and ultimately admit them to the practice of law. Our current system of gatekeeping mechanisms, however, falls short at many points along the path to lawyering. Others have dissected the failings of legal education,¹³ and the mismatch between bar exams and the practice of law.¹⁴ I want to focus on admission to law school, and in particular the reliance on the LSAT in the law school admissions process. My contention is that the reliance on the LSAT diminishes diversity, reinforces pernicious and anti-democratic hierarchies, and exacerbates financial inequities in the legal profession and among legal professionals. In addition, it offers nothing of value toward measuring the capacity of individuals to become the defenders of democratic institutions that our nation requires. On the contrary, reliance on the LSAT in law school admission and in awarding scholarships undermines the democratizing effectiveness of the legal profession as a whole, thereby weakening our most important institutions.

12. See, e.g., Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 350–52, 367 (2004) (describing lawyers' central roles in maintaining democracy); Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1604–07 (2009) (describing lawyers' unique role in ensuring that citizens can enforce rights and check institutional overreach under democratic rule of law).

13. See generally Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

14. See, e.g., *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446–48 (2002) (“Bar examinations . . . fail to adequately measure professional competence to practice law . . .”).

I know that is quite an allegation I am making against the use of a little old standardized test. So, before I take you down this road, let me be clear about what I am not doing. I am not questioning whether the LSAT does what its makers purport it to do: provide a modest correlation with grades in first year law school classes,¹⁵ and an even more modest correlation with performance on the bar exam three years later.¹⁶ By most or all accounts, these correlations appear accurate, and I am content to assume their validity for purposes of this Article.

Rather, my contentions are based on the: (1) lack of correlation between the LSAT and anything else relevant to the study or practice of law; (2) lack of correlation between first year grades with success in the practice of law generally, or effectiveness in the core democracy-supporting roles assigned uniquely to lawyers more specifically; (3) demonstrated correlation between LSAT performance and various indicators of socioeconomic status; and (4) overreliance by law school admissions officials on the LSAT in making admission and scholarship determinations. I am going to touch on each of these, but it is important to start with the last one so that the LSAT's real-world uses are clear.¹⁷

15. Lisa C. Anthony et al., *Predictive Validity of the LSAT: A National Summary of the 2013 and 2014 LSAT Correlation Studies (TR 16-01)*, LSAC (2016), <https://www.lsac.org/data-research/research/predictive-validity-lsat-national-summary-2013-and-2014-lsat-correlation> [<https://perma.cc/U8MJ-EHCP>]. *But see* Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205, 208–10 (2016) (critiquing univariate analyses of LSAT's predictive value and noting that it fails to control for "college quality, major, work experience," and other potentially relevant factors).

16. LSAC does not in fact make this claim, but outside observers do. *See, e.g., 2015 State of Legal Education: Key Findings*, LAW SCH. TRANSPARENCY (2015), <https://www.lawschooltransparency.com/reform/projects/investigations/2015/key-findings/> [<https://perma.cc/6AKB-228K>] ("[T]he LSAT is the best predictor before law school of whether a student will pass or fail the bar exam."); Susan M. Case, *Identifying and Helping At-Risk Students*, 80 B. EXAMINER 30, 31 (2011) ("[I]t is generally true that examinees who perform better on the LSAT perform better on the MBE than those who show a poor performance on the LSAT.").

17. My descriptions of the law school admission process are based in part on the substantial firsthand experience I have from the applicant side of the table: fifteen years as a pre-law advisor, primarily at a large public flagship university, as well as at a small pre-professional college, advising several thousand undergraduates and alumni regarding legal careers, legal education, and the law school application process. Prior to my pre-law advising experience, I practiced law for over nine years, after attending an elite law school. I have held adjunct teaching positions at a top-fifty law school, and at an unranked, non-selective regional one.

I. THE SORTING EFFECTS OF LSAT-BASED LAW SCHOOL ADMISSIONS

The LSAT is a multiple-choice test that assesses logical reasoning, analytical reasoning, and reading comprehension. It also includes an ungraded, timed writing sample. Half of the graded portion of the test contains examples of short, two-to-three-sentence arguments with questions regarding the structure and assumptions of those arguments. Another quarter of the test is commonly referred to as the “logic games” and requires test takers to infer logical relations based on limited facts. The final graded portion poses questions based on relatively long, complex passages.¹⁸ Raw scores for these four sections are scaled into a score between 120 and 180; the median score for all test takers is roughly 151–52, with twenty-fifth and seventy-fifth percentile scores of 144–45 and 158–59, respectively.¹⁹ Each section is allotted thirty-five minutes, and each multiple-choice section typically contains twenty-five to thirty questions.²⁰ The overall test administration typically takes four to four-and-a-half-hours.²¹

According to the Law School Admission Council (LSAC), which writes and administers the LSAT, the test is “designed specifically to assess key skills needed for success in law school, including reading comprehension, analytical reasoning, and logical reasoning.”²² LSAC does not make additional claims regarding what the test measures, and indeed, cautions law schools against certain misuses of the test outside the admissions context, such as the release of LSAT scores to employers (and,

18. One additional section is one of the three aforementioned categories but is not scored because it is an experimental question section, designed to test new questions. The writing sample is also not graded. *Types of LSAT Questions*, LSAC, <https://www.lsac.org/lsat/lsat-prep/types-1sat-questions> [<https://perma.cc/G7NX-K93T>].

19. Memorandum from Lisa Anthony, *supra* note 1.

20. *Types of LSAT Questions*, *supra* note 18.

21. It is worth noting here as well the overall costs of taking and preparing for the test. Currently, registration for a single sitting of the LSAT costs \$190. *LSAT Fees and Refunds*, LSAC, <https://www.lsac.org/lsat/taking-1sat/lsat-fees-refunds> [<https://perma.cc/J9CR-RBVL>]. Preparation for the LSAT ranges from the new (as of June 2018) free Khan Academy online course to commercial preparation courses which can cost as much as \$1,800. *See, e.g., LSAT Prep—In Person*, KAPLAN, <https://www.kaptest.com/lsat/courses/lsat-prep-in-person> [<https://perma.cc/UYF2-84BT>]; *Official LSAT Prep*, KHAN ACAD., <https://www.khanacademy.org/prep/lsat> [<https://perma.cc/Y7P7-HU8Q>].

These test-related costs are in addition to the costs of the rest of the application process: applicants must purchase LSAC’s Credential Assembly Service for \$195. *Credential Assembly Service (CAS)*, LSAC, <https://www.lsac.org/applying-law-school/jd-application-process/credential-assembly-service-cas> [<https://perma.cc/NMR6-V98D>]. Applicants must also pay \$45 to ensure each law school receives their individual LSAC Law School Report. *Law School Reports*, LSAC, <https://www.lsac.org/applying-law-school/jd-application-process/credential-assembly-service-cas/law-school-reports> [<https://perma.cc/AFV4-WEXU>].

22. *What is the LSAT?*, LSAC, <https://www.lsac.org/jd/lsat/about-the-1sat>.

implicitly, the use of the LSAT by employers in making hiring decisions).²³ LSAC further recommends against relying solely on LSAT scores in admission decisions, against relying excessively on small score distinctions, and against using cut-off scores (minimum scores below which no applicants will be admitted).²⁴ The LSAC does not, however, explicitly caution against the use of LSAT scores in allocating scholarships to applicants.

Law school admissions officials generally claim to use the LSAT as just one factor in a more holistic review of law school applications.²⁵ Admissions requirements at most law schools also include the undergraduate transcript (and records of any graduate work previously undertaken), a personal statement, resume, letters of recommendation from professors and others, questions regarding character and fitness, optional essays, and addenda in response to additional optional prompts or application concerns.²⁶ But there is no real dispute that the LSAT plays the largest role in all of these, with undergraduate GPA being a close second.²⁷

23. See *Cautionary Policies Concerning LSAT Scores and Related Services*, LSAC (July 2014), https://www.lsac.org/sites/default/files/media/lsat-score-cautionary-policies_0.pdf [https://perma.cc/7PY3-S5AA] [hereinafter *Cautionary Policies*].

24. *LSAT Fairness Procedures*, LSAC, <https://www.lsac.org/about/lsac-policies/lsat-fairness-procedures> [https://perma.cc/L5K9-MJR6].

25. See, e.g., *Applicants*, NYU L., <http://www.law.nyu.edu/jdadmissions/applicants> [https://perma.cc/XNR7-B2S4] (“The Committee on Admissions makes decisions after considering all the information in an application.”); *BU School of Law Admissions*, B.U. SCH. L., <http://www.bu.edu/law/admissions/> [https://perma.cc/N4QP-FVCQ] (“Through a holistic admissions process, BU Law seeks to enroll annually a class of students characterized by extraordinary academic achievements and diverse life experiences.”).

26. *JD Application Requirements*, LSAC, <https://www.lsac.org/applying-law-school/jd-application-process/jd-application-requirements> [https://perma.cc/RL4J-ZDJY]; see, e.g., *Applying to Law School: Overview*, UMASS AMHERST PRE-LAW ADVISING OFF., <http://prelaw.umass.edu/topics/category/overview> [https://perma.cc/4MZB-T9BJ]; see also *Application Requirements for Top Law Schools (2018-19)*, 7SAGE ADMISSIONS, <https://7sage.com/admissions/lesson/application-requirements-for-top-schools/> [https://perma.cc/SD9W-4337].

27. Marks & Moss, *supra* note 15, at 211 (“LSAT is by far the dominant admissions factor, even compared to [Undergraduate GPA], the other main academic predictor.”); see also Bernard A. Burk et al., *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. (forthcoming 2019) (manuscript at 36–37) (on file with review) (detailing lengths many law schools have gone to over the last several years to preserve their LSAT/GPA profile, even at the cost of declining tuition revenue).

Indeed, the American Bar Association, in its accrediting role, requires the use of a “valid and reliable admission test,” defaulting to the use of the LSAT in the absence of a law school’s showing that another test is as “valid and reliable.” STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019, Standard 503 (AM. BAR ASS’N 2018).

The process generally plays out in two parts: first, a grouping of applications by LSAT and GPA; and second, a review of the rest of each application in the context of that assigned group. Each law school has a historical and target range of LSAT scores and undergraduate GPAs which it seeks to maintain or improve upon. Under ABA Law School Certification Standard 509, these ranges are published publicly, with each school listing its twenty-fifth, fiftieth, and seventy-fifth percentiles for each measure.²⁸ Law schools have an interest in maintaining this range because it is an indicator of selectivity, which factors into both the inherent attractiveness of the school and the most popular rankings of law schools.²⁹ Should a school slip in the rankings or in the perception of its selectivity, it will become less attractive to the subsequent year's applicants, which could force the school to become still less numerically selective. This is the downward spiral of admissions and marketing death, which all schools seek to avoid.³⁰

Within each grouping of applicants, admissions officials review materials with a different question in mind. Those applicants on the high end, whose numerical credentials would help raise the school's median range, are the "presumptive admits." Review of such applications is geared toward affirming that the applicant's overall portfolio matches the academic potential suggested by the numbers. For those at the low end, the "presumptive denies," application review is focused on determining whether the candidate possesses greater academic capacity than the numerical indicia would indicate, as well as the kind of outstanding qualities that would rebut the presumption against their admission, notwithstanding the hit to the school's target range that their numerical criteria would represent. And finally, the middle range of applicants are

28. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2018–2019, Standard 509.

29. For example, the fiftieth percentile or median score and GPA are used by *U.S. News and World Report* for their annual ranking of law schools; combined, they represent 22.5% of a school's rank. See Robert Morse & Kenneth Hines, *Methodology: 2019 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 19, 2018, 9:30 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>; see also William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 163–65 (2006) (citation omitted) (“[Ninety percent] of the overall differences in ranks among schools can be explained solely by the median LSAT score of their entering classes.”).

30. The LSAT is also useful as a consistent measure of applicant quality. While undergrad GPA is variable depending on an applicant's major and its perceived difficulty, as well as grading practices within a given department and/or institution, the LSAT is specifically calibrated to be consistent across test sittings over a period of years.

given the most truly holistic review, with a number of so-called “soft” factors determining whether they will be admitted.³¹

It’s generally acknowledged that in each case, the numerical criteria are primary. Indeed, the ABA’s certification standards for law schools require the use of the LSAT or another test in admissions decisions.³² Less often discussed is the fact that applicants deemed unqualified at one school will, in most cases, be accepted elsewhere. The median range³³ of admitted LSAT scores varies considerably across law schools. For example, Yale Law School—one of the most selective schools—cites a median LSAT range of 170–76, with a fiftieth percentile of 173.³⁴ This range represents scores above the ninety-seventh percentile of all test takers.³⁵ On the less selective end, Western Michigan University’s Cooley Law School’s median range is 139–47,³⁶ roughly the eleventh through thirty-third percentile of all test takers.³⁷ Assuming that almost all applicants to Yale (and other highly selective law schools) score above the median of 151, or even the seventy-fifth percentile of 158, a great many other schools will also accept them, and in almost all cases, the applicant will attend another school, and so on down the chain of selectivity.³⁸ On the other hand, students deemed numerically unacceptable to Cooley’s admissions office—and there are not many of them, given a twenty-fifth percentile score that represents only the

31. The undergraduate GPA and LSAT are often grouped into an “index” for purposes of this categorization of applications. See, e.g., *Your Law School Admissions Index*, PRINCETON REV., <https://www.princetonreview.com/law-school-advice/admissions-index> [<https://perma.cc/PME3-4CFR>].

32. See STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2018–2019, Standards 501, 503 (AM. BAR ASS’N 2018).

33. By “median range,” I am referring to the middle fifty percent of admitted applicants—from the twenty-fifth percentile to the seventy-fifth percentile. This is apparently not a phrase that admissions officials often use. Interview with Alissa Leonard, Assistant Dean for Admissions and Financial Aid, Bos. Univ. Law Sch. (Oct. 8, 2018).

34. YALE UNIV., 2018 STANDARD 509 INFORMATION REPORT 1 (2018), <https://law.yale.edu/system/files/area/departement/academic-affairs/documents/509-2018.pdf> [<https://perma.cc/X7VJ-H483>].

35. See Memorandum from Lisa Anthony, *supra* note 1.

36. See W. MICH. UNIV., 2018 STANDARD 509 INFORMATION REPORT 1 (2018), <https://www.cooley.edu/sites/default/files/media/docs/2018%20ABA%20Standard%20509%20Report.pdf> [<https://perma.cc/8VLT-2AX7>].

37. See Memorandum from Lisa Anthony, *supra* note 1.

38. For this reason, the typical applicant follows the standard strategy of applying to “reach,” “likely,” and “safety” schools, as determined by matching the applicant’s LSAT score and GPA to the published median range of the target schools. On average, applicants apply to approximately six law schools. See 2017-2018 APPLICATION YEAR SUMMARY, *supra* note 5.

eleventh percentile of applicants nationwide—will likely find few alternatives.³⁹

In short, the more selective schools are not declaring a rejected candidate unfit for law school or the practice of law, only unsuitable for *their* law school. The overwhelming majority of those “rejected” candidates will go to a different law school and end up practicing law. Indeed, approximately seventy-nine percent of candidates with scores of 140 or above were accepted at one or more law schools in the most recent cycle of applicants.⁴⁰ The decisions by individual law schools are so largely premised on applicants’ LSAT scores that the median ranges remain roughly the same from year to year, and pre-law advisors are able to very accurately predict which applicants will get into which schools.⁴¹

II. SORTING LAW STUDENTS BY LSAT DOES NOT APPEAR TO CORRELATE WITH THE EDUCATIONAL RIGOR OF INSTITUTIONS

Accordingly, reliance on the LSAT in admissions is far more about sorting applicants into a hierarchy of legal education rather than declaring an applicant’s fitness for the practice of law.⁴² It does not so much determine *whether* a candidate will practice law, but *where*. This might make sense if the range of selectivity among law schools was indicative of a range of academic challenge—that the more selective schools were indeed more academically challenging than the less selective ones. In particular, given that the LSAT’s claimed predictive value is limited to performance in first-year classes, the more selective schools should be more academically challenging in those courses especially. In other words, it should be difficult or impossible for an applicant who scores in, for example, the low 160s—a score at which few if any applicants are admitted to the most selective ten or so schools—to succeed in those

39. Of the 4,200 applicants in 2017–2018 who scored 139 or below, only 465 (11%) were admitted to one or more ABA-approved law schools. *Id.*

40. *Id.*

41. This is true in the broad sense, but not on the margins; the outcome for an applicant whose LSAT and/or GPA is at or around the twenty-fifth percentile or lower for a particular school is much more difficult to predict. Moreover, since 2010, as application volume at almost all schools declined, so did the median ranges of LSAT scores accepted. Those changes were minimal at some schools, but substantial at others. See Bernie Burk et al., *How the Legal Academy Has Changed Since the Great Recession (Hint—It’s Probably a Lot More than You Think)*, FAC. LOUNGE (Sept. 26, 2018, 3:47 PM), <http://www.thefacultylounge.org/2018/09/how-the-legal-academy-has-changed-since-the-great-recession-hint-its-probably-a-lot-more-than-you-th.html#more> [https://perma.cc/EAQ6-N7SZ].

42. See William P. LaPiana, Prof., N.Y. Law Sch., Keynote Address at the 1998 LSAC Annual Meeting: A History of the Law School Admission Council and the LSAT 9–10 (May 28, 1998).

schools' first-year classes. But what indications do we have that this might be the case?

One hypothesis might be that the faculty are of a higher quality. The faculties at the more selective law schools boast a higher concentration of graduates of selective schools,⁴³ but nearly all schools have a substantial number of faculty with degrees from the most selective schools.⁴⁴ In some extreme instances, the majority of doctrinal faculty earned their degrees from their own law schools.⁴⁵ Scholarship productivity also seems to follow selectivity, with faculty at the more selective schools producing more scholarship.⁴⁶ This seems to be a clear difference between the highly selective schools and all others.

But of course, there is no necessary correlation between the pedigree or scholarly productivity of a school's faculty and the academic rigor of its first-year classes. There appears to be no data supporting the notion that faculty with prestigious degrees teach at a higher level, demand more of their students, or evince higher expectations in assessing their students' work. This evidence is lacking as between schools, but also within schools—at the same school, do those highly productive scholars who graduated from Harvard teach at a substantially higher level than teaching faculty with JDs from Western New England? That seems unlikely, and the reason offered would be that both types of professors are more likely to calibrate their teaching to the academic capacities of the student body.

Turning to that more student-centered question then, there is some anecdotal evidence that faculty at highly selective schools do teach at higher levels—however that may be measured—than faculty at less selective schools. In personal conversations, law professors who move from one school to another or spend a semester at a more or less selective school sometimes report that they have felt the need to recalibrate their

43. At Yale, for example, thirty-five of fifty-four doctrinal faculty received their juris doctorate degrees (JDs) from Yale, while another thirteen are graduates from Harvard Law School. *See Our Faculty*, YALE L. SCH., <https://law.yale.edu/faculty> (providing access to the profiles of each faculty member at Yale Law School).

44. For example, at Western New England University School of Law, nine of thirteen doctrinal faculty received their JDs from so-called T-14 law schools. *See Faculty*, W. NEW ENG. SCH. L., <https://www1.wne.edu/law/faculty-and-staff/faculty.cfm> (providing access to the profiles of each faculty member at Western New England University School of Law); *see also Top Producers of New Law Teachers, 2003–2007*, BRIAN LEITER'S L. SCH. RANKINGS (Mar. 19, 2008), http://www.leiterrankings.com/jobs/2008/job_teaching.shtml [<https://perma.cc/V7Y6-89TT>] (showing high concentration of law school origin of law faculty).

45. Yale, for example, has this distinction. *See Our Faculty*, *supra* note 43.

46. *See Top 70 Law Faculties in Scholarly Impact, 2007–2011*, BRIAN LEITER'S L. SCH. RANKINGS (July 2012), http://www.leiterrankings.com/new/2012_scholarlyimpact.shtml [<https://perma.cc/2WAX-6ADZ>].

teaching as a result. But any actual data on this point is so thin that it is impossible to find even those anecdotal reports written up anywhere—these are hallway and faculty lounge conversations, and largely based on the impressions of individual law teachers.⁴⁷

Moreover, the first-year curriculum across law schools is much more similar than it is different,⁴⁸ and, as noted above, largely taught by similarly trained faculty using similar, if not the same, casebooks. Do the faculty at less selective schools write and grade exams with such significantly lower levels of rigor that it would justify a thirty-point difference in the LSAT scores deemed acceptable at admission?

More concretely, would a student who scored in the seventy-fifth percentile on the LSAT (158) or even the eighty-fifth (162) or the ninetieth (164) percentile be less capable of first-year work at the Yale level than those who score in the ninety-seventh percentile and above? Are those same students significantly more likely to succeed at, say, Fordham Law, where the median range is 161–66?⁴⁹ Even LSAC does not claim that level of precision for its exam, asserting only that it measures the “key skills [essential] for success in law school,” not success in particular law schools.⁵⁰ This is, of course, a very difficult hypothesis to test, given the existing sorting regime: highly selective schools admit too few lower scorers to compare with.⁵¹

47. Further, it is not clear what teaching differences those anecdotes are referring to: covering less material? Assessing exams more generously? Our only cross-institution outcome measurement is the bar exam, which, as noted below, appears to correlate more with test-taking ability than with any substantive difference among law schools.

It is important to note here, too, the possible role of unconscious confirmation bias in assessing student ability: faculty who are graduates of elite institutions might harbor unconscious assumptions about the students at less selective schools. This might also play out with regard to the LSAT itself. After all, law faculty, who are overwhelmingly graduates of elite institutions themselves, by definition, performed very well on the LSAT. It is natural for them to assume that it was an accurate measure of their capabilities. I can confess to this bias myself, as noted in the anecdote at the beginning of this article. This is an underexplored area for further research in law school pedagogy.

48. See SULLIVAN ET AL., *supra* note 13, at 5.

49. FORDHAM UNIV., 2018 STANDARD 509 INFORMATION REPORT 1 (2018), https://www.fordham.edu/download/downloads/id/38/aba_required_disclosures.pdf.

50. *What is the LSAT?*, *supra* note 22.

51. The sample size (or *n*) of any outliers is almost certainly too small to yield any statistically significant data—much like my opening anecdote, it is perhaps interesting, but it is not evidence. Further complicating comparisons across institutions are different practices with regard to mandatory grading curves, allegedly greater grade inflation at higher ranked schools, and greater forced attrition at less selective schools. Each law school, however, does have its own institutional data—if pooled among similarly selective schools, analyzed, and shared, the outlier data might be large enough to provide meaningful information.

Finally, as noted in a commentary to the ABA from several law school deans regarding possible elimination of the LSAT requirement from law school accreditation standards:

[E]ven when paired with Undergraduate GPA, the LSAT and GRE only explain about 19% of the variation in first-year grades according both to LSAC and [Educational Testing Service] studies. In other words, about 22% of those who are in the top third of standardized test scores, will end up in the bottom third of the class grades in the first year. And vice-versa—about 23% of those who are in the bottom third of standardized test scores will end up in the top third of the first-year class grades.⁵²

If the predictive value of the LSAT with regard to first year courses does not justify the sorting effect that reliance on the LSAT entails, what of the other claim in support of LSAT-based admission—correlation with eventual bar passage rates? Aggregate bar passage rates at schools with higher median LSATs are higher than those at the low end.⁵³ But it is generally acknowledged that law schools do little, if anything, to prepare students for the bar exam. Indeed, until 2004, ABA accreditation standards prohibited offering credits for courses focused on bar preparation.⁵⁴ Still today, nearly all prospective lawyers enroll in some kind of bar prep course post-graduation.⁵⁵ So, the basis for this correlation seems to have little, if anything, to do with the quality of the school attended, but rather something non-trivial to do with aptitude on standardized tests:⁵⁶ those who are good at taking such tests prior to law school are still good at it three years later. Indeed, the increase over the last twenty years of law school Academic Support Programs to support both student success and ultimate bar passage reflects the general

52. Marc L. Miller et al., Dean and Prof. of Law, Univ. Ariz., Standard 501 & 503 Comments (Apr. 2, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/s501_s503_mcrf.authcheckdam.pdf [<https://perma.cc/QL82-YFL8>]. Educational Testing Service (ETS) administers the Graduate Record Examination (GRE). *About the GRE*, POWERSCORE, https://www.powerscore.com/gre/help/gre_info.cfm [<https://perma.cc/A9HD-73YZ>].

53. This is not an LSAC claim, but a claim by Law School Transparency and others. LAW SCH. TRANSPARENCY, *supra* note 16.

54. David Frakt, *Some Thoughts on In-House Bar Prep Courses*, FAC. LOUNGE (Jan. 22, 2015, 11:08 PM), <http://www.thefacultylounge.org/2015/01/some-thoughts-on-in-house-bar-prep-courses.html> [<https://perma.cc/8EC2-WCE7>].

55. See Marc E. Steiner, *Cram Schooled*, 24 WIS. INT'L L.J. 377, 392 (2006).

56. See William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 977 (2004) [hereinafter *LSAT, Law School Exams, and Meritocracy*].

acknowledgment that traditional law school courses do not adequately prepare students for the bar exam.⁵⁷

Since there is no evidence that the traditional law school curriculum is related to their graduates' capacity to do well on the bar exam, nothing seems to justify sorting students *by school* based on likelihood of success on the bar exam (other than, of course, the more selective schools' interest in boasting higher bar exam passage rates). It also seems to obscure the basic fact that the law school curriculum, or the rigor of a particular law school's instruction, has little, if anything, to do with the capacity of its students to pass the bar.⁵⁸ Rather, the evidence suggests, and the reliance on the LSAT's predictive value regarding bar passage implies, that the capacity exists prior to the students' entry into law school and remains largely unchanged throughout. In short, the high LSAT scorers will likely pass the bar exam regardless of which law school they go to, while the very lowest scorers are more likely to fail the bar exam regardless of which law school they attend.⁵⁹

III. THE SORTING EFFECT REINFORCES EXISTING HIERARCHIES WITHIN THE PROFESSION

To recap: strong reliance on the LSAT for admissions has the primary effect of sorting students into schools based on their score, for reasons having little, if any, apparent correlation to the difficulty of a school's curriculum, thereby maintaining a hierarchy of schools as measured by commercial ranking services and other superficial public perceptions of quality. Reliance on the LSAT is above all about *maintaining hierarchy within* the profession, rather than acting as *a gatekeeper to* the profession.

This would be problematic enough, given the employment consequences of attending a more selective school rather than a less selective one. Employment rates at more selective schools are significantly better than those at less selective schools⁶⁰ and more

57. Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269, 285–88 (2011).

58. Steiner, *supra* note 55, at 384–88.

59. To take this a step further, if the LSAT's predictive value with regard to bar exam passage was so critical to the process, there would be a firm LSAT cut-off, below which no applicant would be admitted to any law school. This would, of course, require much more detailed data than is currently available publicly, including single school bar passage rates, which are regularly gathered by law schools but not released. And again, this is not a claim that LSAC makes for the LSAT, but an observed correlation by outside commentators. *Contra* LAW SCH. TRANSPARENCY, *supra* note 16.

60. For 2017 graduates ten months after graduation, 86.7% (529/610) of Harvard Law School graduates had full-time, long-term jobs requiring a JD, while the corresponding number

concentrated in the high-paying, high prestige arenas.⁶¹ On-campus recruitment efforts of the very large law firms are focused almost exclusively on the twenty most selective schools.⁶² This is not because firms have undertaken an exhaustive comparison between the skills of the graduates of elite schools and those of less selective schools. Rather, it is because the firms are presumptively relying on the sorting of candidates that law schools engage in at the time of admission—that is, sorting based primarily on the LSAT.⁶³ Offers of the more prestigious federal clerkships are directed to students at a few elite law schools.⁶⁴ And even the national and international non-governmental advocacy organizations, such as Human Rights Watch and the NAACP Legal Defense and Education Fund, seem to hire primarily from the most elite institutions.⁶⁵

Accordingly, high-paying and prestigious employment opportunities vary considerably based on the selectivity of the law school, with most graduates of non-elite schools finding work in state government, local small to mid-size law firms, and solo practice.⁶⁶ Certainly, many such graduates aspired to attain these lower-profile positions when they entered law school—based on my experience as a pre-law advisor, the very large law firms and national advocacy organizations are not as universally attractive as mainstream news accounts make them out to be. The point is that a student from one of the less selective schools who does aspire to

for Western New England was 42.6% (43/101). *Employment Outcomes: Individual School Summary Reports*, ABA SECTION LEGAL EDUC. & ADMISSIONS TO BAR, <http://www.abarequreddisclosures.org/EmploymentOutcomes.aspx> [hereinafter *Employment Outcomes*]. Use this tool by selecting the school, then the year, and then “generate report” to see a comparison of employment outcomes among law schools.

61. *See id.* For example, Harvard placed 324/610 graduates in very large law firms (being over 501 attorneys) and 97/610 graduates in federal clerkships, while Western New England placed no graduates in either employment setting. *Id.* Roughly two-thirds of all first-year positions at the very large law firms went to graduates of the twenty most selective law schools (i.e., those with the highest median LSATs for their entering class).

62. This stems from the Author reviewing the NALP Employer Directory Recruitment Information in September of 2018. There is some regional variation, but for the New York City-based large law firms, on campus recruitment tends to focus on the same twenty or so schools. *NALP Directory of Legal Employers*, NALP, <https://www.nalpdirectory.com/> [<https://perma.cc/28WA-3JPS>]. The NALP database allows the user to search the availability of on-campus interviews conducted by specific legal employers.

63. *See* William Henderson, *Talent Systems for Law Firms*, PD Q. 5, 8–9 (2017).

64. Half of all federal clerkships go to graduates of the so-called T-14 schools. *See Employment Outcomes*, *supra* note 60.

65. Employer-specific data on public interest placement is hard to come by, but the author’s review of staff lists at the NAACP Legal Defense Fund, Human Rights Watch, and other national public interest organizations reveal a high concentration of graduates from elite law schools.

66. *Employment Outcomes*, *supra* note 60.

work in a prestigious firm or organization will find it extraordinarily difficult to obtain such a position, no matter how excellent their law school grades and other credentials are.

IV. LAW SCHOOL RELIANCE ON LSAT SCORES TO AWARD SCHOLARSHIPS EXACERBATES THE INEQUITIES OF THE LEGAL PROFESSION HIERARCHY

Law schools do not just rely on the LSAT scores to make admissions decisions. LSAT scores are also the primary determinant of so-called “merit-based” scholarships.⁶⁷ Over the last fifteen years or so, law schools have largely (but not entirely) shifted their need-based scholarship money to “merit-based,” using the available funds to attract students whose numerical assets will help boost or maintain a school’s target LSAT range (and therefore their ranking and attraction, as discussed previously).⁶⁸ Especially during the post-2010 years of rapidly decreasing application volume, aggressive use of scholarship funds to attract high scorers (high relative to an individual school’s median LSAT range) became the norm.⁶⁹ As a result, high-scoring applicants faced not just a greater number of admission offers, but far more opportunities for a tuition-free or heavily discounted legal education. And this is where the most pernicious aspects of the reliance on the LSAT come into focus.

Professor Jerry Organ of the University of St. Thomas School of Law in Minnesota has undertaken some preliminary research with regard to the impact of these scholarship practices on students of color and first-generation college students. Organ first looked at the range of tuition discounts and resulting net tuition paid for students by LSAT score. He found that the highest scorers and the lowest scorers are paying the most for tuition, albeit at different schools.⁷⁰ The highest scorers seem most willing to pay full tuition in exchange for the prestige of a highly selective institution.⁷¹ These decisions indicate how much prestige weighs in the decision-making for those who have choices to make: the students who have the numbers to get into the most selective schools are, or would be, offered not just admission but substantial or full scholarships from almost

67. Aaron N. Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J. L. & EDUC. 41, 72–73 (2018).

68. See discussion *supra*, Part II, pp. 10–11; Taylor, *supra* note 67, at 58. Some schools also use undergraduate GPA as a basis for merit decisions for similar reasons. *Id.* at 70.

69. Taylor, *supra* note 67, at 72. Seventy-nine percent of law school scholarships are merit-based. *Id.*

70. Jerome M. Organ, *Net Tuition Trends by LSAT Category from 2010 to 2014 with Thoughts on Variable Return on Investment*, 67 J. L. EDUC. 51, 71 (2017).

71. See *id.*

all other less selective schools. Many, if not most, nonetheless choose the elite schools because they perceive, rightly or wrongly, that the investment will pay off in the long run.⁷²

Students at the low end of the LSAT scoring range are receiving the least in scholarships and tuition discounts and are therefore paying the most for their legal education. Unlike the high scorers, the low scorers are not in a position to weigh multiple attractive scholarship offers, but rather are choosing the school at which they will pay full fare. In sum, a high percentage of low scorers are paying the most for the least prestigious law schools.⁷³ So the sorting effect the LSAT performs ensures that low scorers attend the schools with the worst reputations and employment statistics, and most often pay full price.

But it gets worse: those least selective schools enroll students of color and students from lower socioeconomic backgrounds at much higher rates than the more selective schools.⁷⁴ And those same students are awarded fewer scholarships than their white and higher socio-economic counterparts.⁷⁵ Reliance on the LSAT is sorting students into schools not just by score, but by race and class. And those students are paying the most for the lowest value degree (in terms of employment outcomes). The LSAT sorting effect ensures that those aspiring attorneys with the least means are the most likely to go into significant debt for a degree that is the least likely to provide sufficient added value to make that debt/investment worthwhile.⁷⁶

In short, reliance on the LSAT for admission and scholarship exacerbates inequities and reinforces the existing hierarchies within and outside of law world for no academically justifiable reasons. And while the LSAC recommends explicitly against using the LSAT in connection with employment decisions,⁷⁷ it makes no mention whatsoever about using the LSAT to make scholarship decisions.

72. See *id.* at 71–72 (stating that students with higher LSAT scores are paying more for their legal education but have the benefit of the highest bar passage rates and prestigious employment outcomes).

73. *Id.*

74. Jerome M. Organ, Prof. of Law and Co-Director of the Holloran Ctr. for Ethical Leadership in the Professions, Univ. St. Thomas Sch. of Law, Presentation at Northeast Association of Pre-Law Advisors (NAPLA) Conference, Some Thoughts on Conditional Scholarships and Net Tuition Trends Since 2010, Slides 15–16 (June 18, 2018) (on file with author).

75. See Taylor, *supra* note 67, at 74–75.

76. See *id.* at 80–81.

77. *Cautionary Policies*, *supra* note 23.

When we step forward from the admissions process through the law school doors, any possible justification for relying so heavily on the LSAT gets weaker. LSAT performance correlates with grades in first-year classes, most of which are still taught in the traditional mode, and assessed by a single examination at the end of the semester. However, that mode of instruction—the case method pioneered at Harvard over one hundred years ago—has long been criticized as inadequate, divorced from the realities of actual legal practice, and unnecessarily walling students off from the moral and policy concerns necessary to consider in the complex world that most lawyers face.⁷⁸ The semester-end high stakes summative assessments have similarly been criticized on a number of bases. In particular, the dependence of in-class tests on time-related test-taking skills which are unrelated to skills employed in legal practice,⁷⁹ and the lack of formative assessments that would support student learning, run counter to the recommendations of most pedagogical scholarship.⁸⁰

Accordingly, the LSAT is broadly predictive of success in a form of legal education that has itself been found questionable as appropriate preparation for law practice. Notably, LSAC's predictive validity studies do not make claims regarding performance in the second and third years of law school, where students are more likely to take courses neither taught in the traditional case method nor assessed by single end-of-term exams. And, of course, as noted earlier, even LSAC does not claim that the LSAT predicts success or even competency as an attorney.⁸¹

We have a relatively non-selective admissions process that nonetheless sorts students into different schools with different opportunities, requiring higher levels of financial investment for students attending schools with the fewest opportunities. Worse still, students of color and first-generation college students are disproportionately sorted into the latter. We're told this reliance is justified by the predictive value of the LSAT, but that predictive value relates only to first year classes, which embody a pedagogy that appears to be largely similar in form and rigor across all institutions (and therefore does not necessitate sorted students). And that same pedagogy of law school has come into serious question in terms of its capacity to prepare individuals for the practice of law, and to take the gate-keeping assessment for their profession—the bar

78. See SULLIVAN ET AL., *supra* note 13, at 188–91.

79. Time-related test taking skills are also necessary for the LSAT, which is at least in part responsible for the correlation between LSAT scores and first year grades. See *LSAT, Law School Exams, and Meritocracy*, *supra* note 56, at 980–81.

80. See SULLIVAN ET AL., *supra* note 13, at 188–91.

81. See sources cited *supra* notes 50–51 and accompanying text.

exam. The result is increased inequities in the profession serving no pedagogical imperatives.

V. PROPOSALS FOR CHANGE

Are there alternative admission processes that might avoid some of the more pernicious effects of the LSAT-based sorting effects? Absolutely—they range from removing the LSAT from law school admissions in favor of other tests or other types of admissions review, to further restricting its use outside the admissions context, especially with regard to scholarship awards. These are all realizable possibilities, given sufficient action on the part of members of the legal profession.

A. *Abandon the LSAT Altogether*

This past year, the ABA's Section of Legal Education put forth a proposal that would have eliminated the requirement that schools use the LSAT in the admissions process, albeit with some additional language that would have urged schools to keep the LSAT in place.⁸² Just before the scheduled vote in the House of Delegates, however, the Section withdrew the proposal. This last minute action appeared to be in response to objections from LSAC and some law school deans about the speed with which the change might happen, as well as some concerns from admissions officers that any replacement admission process would be even worse.⁸³ Notably, all of those commentators who opposed eliminating the LSAT conceded either that the weight accorded scores

82. *Council Adopts Proposal to Make Standardized Test Optional for Law Schools*, A.B.A. (May 14, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/council_adopts_propo.html [<https://perma.cc/S84J-F4GG>] (changing mandated use of reliable admissions test to rebuttable presumption in favor of such use).

83. See Stephanie Francis Ward, *Plan to Drop Law School Entry Exam Requirement Withdrawn Before ABA House Vote*, A.B.A. J. (Aug. 6, 2018, 7:26 PM), http://www.abajournal.com/news/article/plan_to_drop_law_school_entry_exam_requirement_withdrawn_before_house_vote [<https://perma.cc/42SM-QLU9>].

varies by law school,⁸⁴ or that it fosters downward pressure on minority admissions,⁸⁵ or both.⁸⁶

It is to be expected that members of an inherently risk adverse profession such as law would be hesitant to accept the uncertainty of a period of experimentation and innovation with regard to law school admissions. After all, the form and content of legal education itself has changed little since Langdell pioneered the case method over one hundred years ago.⁸⁷

But we must be clear about what the law school admission officials and deans are weighing: an uncertain future of law admissions against the status quo. To suggest that avoiding uncertainty is preferable is to deny just how pernicious that status quo is. The legal profession is saying, in essence, that we are willing to accept imposing debt and underemployment burdens on the most vulnerable members of our profession, and the maintenance of a legal-education hierarchy that undermines the fundamental precepts of equality and opportunity our profession is charged with upholding and enforcing. It is as though we are saying, “Sorry, I know you’re drowning, but jumping off this diving board is a little scary for me.”

There is also justifiable fear that whatever might emerge from the elimination of an LSAT requirement—a test-optional regime, for example—would result in the admission and enrollment of still fewer students of color.⁸⁸ The LSAT and other standardized tests were initially created and adopted as a way to mitigate legacy admissions and racial and religious biases, and to afford admission officials an “objective” standard

84. See Letter from Kellye Testy, President and CEO, Law Sch. Admission Council, to Maureen A. O’Rourke, Council Chair, Council of the ABA Section of Legal Educ. & Admissions to the Bar 4 (Apr. 2, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/501_503_LSAC.authcheckdam.pdf [<https://perma.cc/88GU-8CDE>].

85. Letter from Cassandra Sneed Ogden, Chief Exec. Officer, Council on Legal Educ. Opportunities to Maureen O’Rourke, Chair, Council of the Section of Legal Educ. & Admissions to the Bar (Apr. 2, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/503_cleo.authcheckdam.pdf [<https://perma.cc/6JYN-NG6J>]; Letter from Minority Network to Council of the ABA Section of Legal Educ., & Admissions to the Bar (Mar. 28, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20180328_comment_s503_minority_network.authcheckdam.pdf [<https://perma.cc/GL26-U794>] [hereinafter Minority Network Letter].

86. Letter from Kellye Testy, *supra* note 84, at 4–5.

87. See SULLIVAN ET AL., *supra* note 13, at 47.

88. See Minority Network Letter, *supra* note 85.

on which to base decisions.⁸⁹ However well this may have initially worked in the mid-twentieth century, especially with regard to white men who were not of Anglo-Saxon or Protestant heritage, it is clearly not working now.⁹⁰ The persistent under-enrollment of students of color in American law schools, along with their consequent gross underrepresentation in the profession, should be of immense concern to all lawyers. How can the profession possibly claim any legitimacy in upholding our democratic institutions if we cannot even rectify our own inequities? Again, the status quo is unacceptable.

Moreover, admissions officers are not without tools in this dilemma. In *Grutter v. Bollinger*, the Supreme Court specifically upheld race-conscious admission practices in law schools.⁹¹ Over-reliance on the LSAT has proven ineffective in diversifying the legal profession,⁹² but its removal from the admissions (and rankings) calculus would remove a barrier to access that has impeded racial diversification in law school.⁹³

If law schools did abandon the LSAT, or at the very least reduced its primacy in the admission process, what would they replace it with? It is notable that law school deans and admissions officials, on the one hand, claim to review applications holistically, while on the other, express concern that they could not do so without the LSAT. Is LSAT-free holistic review unavailing for reasons not yet discussed above?

1. Admission by Lottery

For the sake of argument, let's say holistic review is for some reason unavailing.⁹⁴ In that case, my Modest Proposal would be to admit

89. See Letter from Kellye Testy, *supra* note 84, at 2–3.

90. Letter from Christopher P. Chapman, President & Chief Exec. Officer, AccessLex Inst., to Council of the ABA Section of Legal Educ. & Admissions to the Bar (Mar. 19, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20180319_comment_s501_s503_accesslex_institute.authcheckdam.pdf [<https://perma.cc/AGZ8-7DS4>] [hereinafter Chapman Letter]; Letter from Matthew H. Charity & Davida Finger, Co-Presidents Soc'y of Am. Law Teachers, to Maureen O'Rourke, Chair, Council of the ABA Section of Legal Educ. & Admissions to the Bar 5–6 (Mar. 31, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20180331_comment_s503_salt.authcheckdam.pdf [<https://perma.cc/54L8-BZG6>] [hereinafter SALT Letter].

91. *Grutter v. Bollinger*, 539 U.S. 306, 309–10 (2003).

92. See *id.* at 315–16.

93. See Chapman Letter, *supra* note 90; SALT Letter, *supra* note 90; Taylor, *supra* note 67, at 52.

94. A purely holistic review is of course possible; indeed, to think otherwise would be to demean the annual efforts of hundreds of admissions professionals and faculty admissions

applicants by lottery. After all, under the current processes, over three-quarters of applicants are admitted to one or more law schools already, and a similar percentage of those will go on to graduate and then pass the bar exam. We know there is some correlation between undergraduate GPA and both first-year performance and bar exam passage,⁹⁵ despite the range of majors, institutions, and grading patterns.⁹⁶ So set a cut off—say, a 2.5 or 3.0 GPA in college⁹⁷—and randomly admit the rest based on number of seats, expected yield, and scholarship availability. Would the eventual outcomes for the students be different?⁹⁸

2. Replace the LSAT with a Different Assessment

Assuming admission-by-lottery is not going to gain a large following among law school deans, then perhaps they will take more seriously the findings of the 2008 Shultz & Zedeck study, which examined the qualities lawyers themselves have identified as necessary for success in the profession, and develop tools to measure those qualities.⁹⁹ Shultz & Zedeck’s multi-year study identified twenty-six “effectiveness factors” for successful attorneys, including some of the usual suspects: analytical reasoning, researching the law, and writing, but also the ability “to [s]ee the [w]orld [t]hrough the [e]yes of [o]thers,” passion and engagement, integrity/honesty, and stress management.¹⁰⁰ The authors further

committees across the country. If they weren’t engaged in substantive reviews, well written algorithms could perform their work.

95. See Marks & Moss, *supra* note 15, at 218–19; see also LAW SCH. TRANSPARENCY, *supra* note 16.

96. See Marks & Moss, *supra* note 15, at 218–19.

97. In the most recent admission cycle, roughly seventy-five percent of applicants had GPAs of 3.0 or above. 2017-2018 APPLICATION YEAR SUMMARY, *supra* note 5.

98. Eventual outcomes for the law schools would of course be different, as the loss of pedigree might lead to various other foreseeable consequences, including a loss in alumni endowment, access to the express train to prestige jobs, and so on. It is unclear whether this would affect the most selective schools, as we have seen test-optional environments in college admission having little effect on prestige. SALT Letter, *supra* note 90, at 1–2.

99. See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 620 (2011).

100. *Id.* at 630. The entire list of twenty-six factors is:

Analysis and Reasoning[;] Creativity/Innovation[;] Problem Solving[;] Practical Judgment[;] Researching the Law[;] Fact Finding[;] Questioning and Interviewing[;] Influencing and Advocating[;] Writing[;] Speaking; Listening[;] Strategic Planning[;] Organizing and Managing One’s Own Work[;] Organizing and Managing Others (Staff/Colleagues)[;] Negotiation Skills[;] Able to See the World Through the Eyes of Others[;] Networking and Business Development[;] Providing Advice & Counsel & Building Relationships with Clients[;] Developing Relationships within the Legal Profession[;] Evaluation, Development, and

identified a number of promising personality assessments for measuring these qualities in applicants, and which show further potential for diminishing the adverse effects on diversity caused by overreliance on the LSAT.¹⁰¹ The member schools of LSAC could urge the council's testing experts to research and develop new assessment tools for these qualities that truly make the difference for success in the profession.¹⁰²

The Shultz & Zedeck study is thought-provoking in and of itself, but it also implicitly begs the legal academy and the legal profession to think more deeply about what qualities we really want or need. What are the core competencies needed not just by practitioners of law, but also by defenders of democracy—from the underpaid criminal defense attorney upholding due process on a case-by-case basis in an under-resourced and overrun local trial court, to future Supreme Court justices.¹⁰³ At the very least, we should be considering what attributes we are looking for in law school applicants that might make them apt to respect and advocate for the rule of law, and the core democratic principles of due process and equality. These should not just be additional considerations beyond the numerical ones, but some of the very factors assessed by an admissions test or test-free admissions process. The hierarchical effects of LSAT-based admissions and scholarships, which lead to a relatively rigidly stratified system of legal prestige, power, and income, work at cross purposes to those goals.

B. *Keep the LSAT but Ban Its Use in the Award of Scholarships*

The work of matching admissions (and education) more closely to the work of the actual professionals in our field is admittedly a long-term undertaking. In the shorter term, a relatively modest step can be taken immediately to great effect: ban the use of the LSAT in awarding merit scholarships. Better yet, require law schools to offer primarily, or only, need-based scholarships. It is unconscionable to continue the current system of making the lowest LSAT scorers subsidize the education of those who are better off. Those who arrive at law school with the least financial and social capital and attend the schools least likely to feed them into highly paid or powerful job streams, should not be bearing the lion's

Mentoring[;] Passion and Engagement[;] Diligence; Integrity/Honesty[;] Stress Management[;] Service[;] Community Involvement[;] and] Self Development.

Id.

101. *See id.* at 625–26.

102. *See* Rebecca C. Flanagan, *Do Med Schools Do It Better? Improving Law School Admissions by Adopting a Medical School Admissions Model*, 53 DUQ. L. REV. 75, 91–97, 98 (2015).

103. *See* Shultz & Zedeck, *supra* note 99, at 641.

share of tuition debt. At the most selective schools—the ones that do not need to offer financial incentives in order to draw rankings-improving high scorers—most or all of the scholarship aid is already need-based.¹⁰⁴ There is no reason (other than rankings-management) for other schools to refrain from doing the same.

Professor Aaron Taylor, the Executive Director of AccessLex Institute Center for Legal Education Excellence, has put forth a comprehensive proposal for reform which begins with redirecting “merit” away from purely numerical criteria and toward equitable criteria; his proposals would also include increasing funding for need-based scholarships and reforming student debt relief.¹⁰⁵ For example, Taylor proposes a merit-based system for both admissions and scholarships that would recognize achievement in the context of socioeconomic factors and other obstacles that have been overcome—privileging, for example, the award of scholarships to “students who come from low-wealth and low-income backgrounds, first-generation students, Pell grant recipients, and graduates of under-resourced colleges and universities.”¹⁰⁶ In short, admissions and scholarship could reward the true homerun hitters, rather than those who just trotted in from second or third base.

These are reasonable, concrete, and, for the most part, entirely realizable goals,¹⁰⁷ and law school admissions offices could (and should) take immediate steps towards them tomorrow. The ABA’s Section of Legal Education could require law schools to stop LSAT-based scholarships or set a minimum percentage of need-based scholarships. Even more immediately, LSAC’s cautionary policies could more explicitly recommend against the use of the LSAT in awarding scholarships.¹⁰⁸ Similarly, the LSAC Statement of Good Admission and Financial Aid Practices could be amended to address the use of the LSAT

104. See Taylor, *supra* note 67, at 102.

105. See *id.* at 97–106.

106. *Id.* at 101.

107. Taylor’s recommendations for more robust loan forgiveness are perhaps the least developed of his proposals. Moreover, the current loan forgiveness “system” is riddled with confusion and possibly even corruption. See Stacy Cowley, *28,000 Public Servants Sought Student Loan Forgiveness. 96 Got It.*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/business/student-loan-forgiveness.html> [<https://perma.cc/7Y2R-R75E>]; see also Ryann Liebenthal, *The Incredible, Rage-Inducing Inside Story of America’s Student Debt Machine*, MOTHER JONES (Sept./Oct. 2018), <https://www.motherjones.com/politics/2018/08/debt-student-loan-forgiveness-betsy-devos-education-department-fedloan/> [<https://perma.cc/E6ND-JVVM>] (detailing possible corruption in the federal loan forgiveness programs). Reform of this system appears distant at this time, and perhaps only realizable when the next financial bubble pop ushers in emergency changes.

108. Currently, LSAC only recommends vaguely against “use of the LSAT for other than admission” purposes. *Cautionary Policies*, *supra* note 23.

in awarding scholarships.¹⁰⁹ Neither of these LSAC guidance documents impose enforceable obligations upon law schools, but they nonetheless constitute standards that law schools largely follow.

VI. THE ROLE OF LAWYERS IN CHANGING THE ADMISSIONS PROCESS

Over thirty-five years ago, Duncan Kennedy famously outlined the hierarchy reproducing effects of legal education and the legal profession.¹¹⁰ Kennedy began his analysis, however, in the first-year classroom, and largely examined the practices of the elite law school in which he found himself.¹¹¹ What is clear is that the reproduction of hierarchy in legal education begins well before the first day of the 1L year and encompasses all law schools. It begins with admissions processes that have the effect of sorting prospective lawyers into different institutions largely based on specious criteria, and which disproportionately burden those with the fewest resulting opportunities with enormous debt. This leads inexorably to a segregated legal profession, where the wealthiest and most privileged are placed on the express train to still more wealth and privilege, while the least well off are stuffed into the crowded local, with many stops and starts, and fewer opportunities to advance. If our profession is to be the defender of an equitable democracy that we purport to be, we must address these inequities, sooner rather than later, before we lose all claim to moral and political legitimacy.

While my proposals regarding the use of the LSAT in granting admission and awarding scholarships may seem primarily directed at law school deans and admissions officers, my intended audience is the legal profession as a whole. We are all alumni of some law school, and many of us have ties to others. Roughly one third of us are members of the ABA, which, unlike other professional associations, is also charged by the Department of Education with accrediting the schools that train new members of our profession.¹¹²

109. The Statement currently recommends only that law schools “develop fair, coherent, and consistent policies in their scholarship awarding process.” *LSAC Statement of Good Admission and Financial Aid Practices*, LSAC 3 (March 2017), https://www.lsac.org/sites/default/files/media/statement-of-good-admission_0.pdf [<https://perma.cc/AB6B-Y52C>].

110. *See generally* Kennedy, *supra* note 13.

111. *Id.* at 73–74.

112. *Recognized Accrediting Agencies*, U.S. DEP’T EDUC., https://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html [<https://perma.cc/XP4Z-W8CJ>] (last modified Feb. 15, 2019); *see also* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., *The Law School Accreditation Process* 4 (2016), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf [<https://perma.cc/9MVJ-2YY4>].

We should all be taking an active role in ensuring those schools are meeting not just the highest standards of our profession, but aiming towards the highest aspirations promised by the special role of lawyers in maintaining U.S. institutions. ABA members should take an even greater role in the Section of Legal Education's accrediting function, and any proposed modifications of the Accreditation Standards. Law school alumni associations should be more involved in the admissions process at their alma maters, engaging in discussion with the deans, faculty, and admission offices about their shared interests in the gatekeeping mechanisms to the profession.

If we are the defenders of democracy, the profession charged with maintaining and reinforcing the infrastructure of our republic, then it is incumbent upon each of us to ensure that subsequent generations of American lawyers are representative of our entire citizenry and are trained in institutions that are themselves reflective of the equitable principles we seek to uphold.