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REPRESENTATION IN REPRESENTATION: HOW THE PATH TO END RACIAL INJUSTICE BEGINS WITH THE LEGAL ACADEMY¹

KIA H. VERNON²

INTRODUCTION

Joseph Garcia³ knows first-hand about the struggles facing young men of color. As a young man growing up in a predominately black neighborhood, he experienced constant harassment by police and was accustomed to being followed around in stores.⁴ Before he attended law school, he viewed the justice system as a fallacy for people that looked like him.⁵ He recalls thinking, “How are we supposed to get justice when the system is crooked and

1. This article was initially started after a discussion in my Spanish for Lawyers class during the 2018-2019 academic year. Although I began the article in earnest, the concept that diversity in the profession was important seemed glaringly obvious. As a result, I abandoned the article and began to work on other scholarship. However, the deaths of Breonna Taylor, Ahmaud Arbery, George Floyd, and so many other unarmed people of color at the hands of police, as well as the subsequent protests of racial injustice, police brutality, and systemic racism in the United States, confirm that this discourse is more important than ever before.

2. Assistant Dean of Academic Success and Associate Professor at North Carolina Central University School of Law, where she teaches Contracts I, Contracts II, Spanish for Lawyers, and Academic Success courses and workshops. She would like to thank her students, who motivate her to be a better teacher and person every day, and, in particular, Olivia S. Williams, for her invaluable research assistance, support, and encouragement.

3. Joseph Garcia is a 2019 graduate of North Carolina Central University School of Law. As a Mexican American, he identifies as a person of color. At the time of his interview, Joseph Garcia was in the process of studying for the 2019 bar exam. He is now a licensed attorney practicing in Durham, North Carolina.

4. Interview by Olivia Williams with Joseph Garcia, in Durham, N.C. (June 14, 2019).

5. *Id.*

corrupt?”⁶ His experiences with racism fueled his desire to become an attorney; however, the path to becoming one was difficult as he did not know how to even begin the process.⁷ “I had no idea who to talk to [in order] to get into law school; I didn’t even know you had to take the LSAT to apply.”⁸ Unfortunately, Garcia had to learn about the process on his own; he did not have any friends or relatives that he could ask for help.⁹ In fact, at the time, he did not even know anyone that looked like him that was an attorney.¹⁰

Sadly, Garcia’s story is not unique. Maria Cook,¹¹ a first-generation college graduate who is now in her second year of law school, decided she wanted to be a lawyer after a life-altering event. When she was sixteen, her parents were facing foreclosure and she accompanied her father to court for the foreclosure hearing.¹² She interpreted for him and had an opportunity to speak to the judge on his behalf.¹³ The experience left an indelible impression on her.

I saw the way a lot of the people there, who were facing the same situation, were treated; they didn’t have anyone because they couldn’t afford anyone. And I really felt like there had to be someone who could stand up for them or someone to be there to give them a voice, because I felt I couldn’t help anybody else there; it was just me and my dad.¹⁴

From that moment, Cook knew she wanted to use her voice to help others; she resolved to work hard to do well in school so she would be able to get into law school.¹⁵ However, she also had no idea how to begin the process.¹⁶

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Maria Cook attends North Carolina Central University School of Law. She identifies as Chicana and, like the author, is committed to helping prospective and current students—especially minorities—to successfully navigate through the law school process. As a result, she and the author created a podcast, *How to Get Away with Law School*. The podcast is available on all major podcast platforms and currently has ten episodes.

12. *How to Get Away with Law School: Understanding the Law School Experience*, Kia Vernon and Maria Cook (June 4, 2020) (downloaded using iTunes).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

These experiences illustrate the legal profession conundrum. Minorities, who are often victims of racial injustice and are disproportionately affected by policies, procedures, and negative perceptions that result in their marginalization, view the legal profession as the conduit to bring about systemic change.¹⁷ However, their efforts to enter the legal profession are intricately—or even thwarted—due to the difficulty in accessing that system. It is indubitable that diversity in the legal profession matters, but how can we increase that diversity without addressing the issues that contribute to the lack thereof?

This Article will address the issues related to the lack of diversity in the legal profession and will examine the barriers minorities face in gaining entry into law school, and subsequently, the legal profession. Part I of this Article will provide demographical information regarding the number of minorities in the legal profession in the United States. Part II of this Article will address why diversity in the profession is critically important. Part III of this Article will examine some of the barriers that minorities face when attempting to become a member of the legal profession; and Part IV will provide recommendations to increase minority representation in law schools and ultimately, the bar.

PART I: THE LEGAL PROFESSION: #STILLSOWHITE

Over the past decade, the United States population has experienced considerable growth.¹⁸ With that growth, there has been a steady increase in the minority population. In 2009, approximately 78.31 percent of the population identified as White alone; 13.04 percent identified as Black or African American; and 4.93 percent identified as Asian.¹⁹ Approximately 16.40 percent of the population identified as Hispanic.²⁰ In 2019, approximately 76.32 percent

17. Each academic year, I ask my first-year students to introduce themselves to their classmates and share why they want to become a lawyer. Most of them share pivotal moments of personally being disenfranchised by the justice system or witnessing others who were victims of racial injustice, as the reason they decided to apply to law school.

18. The estimated total population in the United States in 2010 was 309,321,666. The estimated total population in the United States in 2019 was 328,239,523, an increase of 18,917,857. National Population by Characteristics: 2010-2019, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html>.

19. *Id.*

20. *Id.* For the purposes of this article, only minority data for the three largest minority groups were analyzed. This allowed a direct comparison with minority data for employed persons as provided by the U.S. Bureau of Labor Statistics.

of the population identified as White alone; 13.42 percent identified as Black or African American; and 5.94 percent identified as Asian.²¹ Approximately 18.45 percent of the population identified as Hispanic.²²

As the number of minorities in the United States has increased, so has the number of minority lawyers. In 2009, the total number of employed lawyers in the United States was 1,040,000.²³ 4.3 percent of the employed lawyers were Black or African American; 3.4 percent were Hispanic; and 3.4 percent were Asian American.²⁴ In 2019, the total number of employed lawyers in the United States was 1,240,000.²⁵ 5.9 percent of the employed lawyers were Black or African American; 5.8 percent were Hispanic; and 5.7 percent were Asian American.²⁶ However, despite the gains in the number of minority lawyers, “the legal profession remains one of the least diverse of all professions in the [United States].”²⁷ One author sums it up best: “Lawyers have a special obligation to promote justice and serve the community, but our profession is one of the whitest, most male-dominated in existence.”²⁸

The statistics evidence a greater issue: the number of minority lawyers is vastly disproportionate to the overall minority population. While recent data reflects that minorities represent approximately 34.37 percent of the

21. *Id.*

22. *Id.*

23. U.S. Bureau of Labor Statistics, *Characteristics of the Employed, Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino Ethnicity*, U.S. DEP’T OF LABOR, <https://www.bls.gov/cps/aa2010/cpsaat11.pdf>.

24. *Id.*

25. *Id.* <https://www.bls.gov/cps/cpsaat11.pdf>.

26. *Id.*

27. Phillip Lee, *The State of Diversity and Inclusion in the Legal Profession: The Demographics of the Profession*, Institute of Inclusion in the Legal Profession Review 2019-20 (January 2019) 13. “Aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs. In 2018, minority representation among lawyers was 16.5 %, compared to 24.9% among financial managers, 29.6% among accountants and auditors, 44.6% among software developers, 34.8% among physicians and surgeons, and 27.8% within the management and professional labor force as a whole.” *Id.* At 15.

28. Liane Jackson, *America’s Tipping Point*, 106 ABA J. 9, 10 (2020).

overall population in the United States, only 17.4 percent of lawyers are minorities.²⁹ Conversely, although Whites represent 76.32 percent of the population in the United States, 86.6 percent of lawyers are White.³⁰ The disparity is even more egregious when comparing the rate of incarceration of Blacks and Whites. According to Pew Research Center, despite a 34 percent decrease in incarceration rates among Blacks since 2006, Blacks were still incarcerated at a rate of five times more than Whites at the end of 2018.³¹

PART II: WHY REPRESENTATION IN REPRESENTATION IS SO IMPORTANT

The stories shared by Garcia and Cook illustrate just one of the many reasons why diversity in the legal profession matters. As Garcia articulates, an attorney who has lived through similar experiences has an innate ability to identify with and understand the issues that are specific to certain communities.

No one is going to represent our communities better than we do. We have a personal stake in representing people that look like us because we understand our issues better than anyone else. I am not saying someone else wouldn't be able to represent our communities, but who else could better represent the interest of people who grew up on the same streets with constant drive-bys, or in poverty, or grew up in these communities where you were underprivileged? You understand what these communities need best and there is a sense of willingness and trust with people that look like you to help out your community.³²

Although attorneys can attempt to understand their clients' issues, there are some experiences that they can never comprehend because they have never lived them. Garcia knows firsthand the struggles young men of color face. He knows the reality of young men living in urbanized communities, on welfare, and in single parent homes because it was his reality growing up.³³

29. U.S. Census Bureau, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html> and U.S. Bureau of Labor Statistics, <https://www.bls.gov/cps/cpsaat11.pdf>. The total number of minorities and minority lawyers was derived from aggregating the data from the categories included above.

30. *Id.* Some Hispanics/Latinxs may identify as white and Hispanic/Latinx. Thus, they could be included in both the white and minority percentages.

31. John Gramlich, *Black Imprisonment Rate in the U.S. has Fallen by a Third Since 2006*, PEW RES. CTR., (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

32. Garcia, *supra* note 4.

33. *Id.*

While many cannot fathom that young men of color are targeted solely because of the color of their skin, Garcia can because he has been a victim of police harassment.³⁴ As a result, he is able to provide more effective representation than an attorney who has not lived through the same experiences.³⁵

However, for both Garcia and Cook, the issue is not only a matter of having representation who looks like you or can empathize with you; it is essential to have someone who speaks the same language as you. As native Spanish speakers, having an attorney that can communicate with you is critical.³⁶ While there are rules and regulations regarding the use of interpreters in federal³⁷ and state courts,³⁸ the use of an interpreter does not guarantee that a client will receive equal access to justice.³⁹ If there is an issue with interpretation during a trial, an attorney's failure to timely object will affect the client's ability to be successful on appeal.⁴⁰ Attorneys who are not proficient in the language are in a precarious position, because they are unable to

34. *Id.*

35. *Id.*

36. See, Jayesh M. Rathod, *The Transformative Potential of Attorney Bilingualism*, 46 U. MICH. J. L. REFORM 863 (2013), (“Successful lawyering hinges upon effective comprehension and communication, which greater sensitivity to nuance can only improve. In particular, the ability to discern whether a client (or another interlocutor) is experiencing a communication difficulty is especially valuable. Because of power differentials, cultural difference, and/or language ability, LEP clients often may be reluctant to admit such a difficulty.”) *Id.* At 880-881.

37. 28 U.S.C. §1827 provides for “the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.” 28 U.S.C. §1827(a).

38. Although there are no uniformed laws addressing the use of interpreters in state courts, in August 2010 the Department of Justice issued a letter to all state chief justices and court administrators “to provide greater clarity regarding the requirement that courts receiving federal financial assistance provide meaningful access for LEP individuals.” Letter from Thomas E. Perez, Assistant Att’y Gen., Civ. Rts. Div., Dep’t of Just., to C.J. and State Ct. Adm’rs (Aug. 16, 2010), https://www.lep.gov/sites/lep/files/resources/final_courts_ltr_081610.pdf. For an example of one state’s regulations regarding the use of interpreters, see, <https://www.nccourts.gov/programs/office-of-language-access-services>.

39. See, The Honorable Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Court Interpretation*, 7 HARV. LATINO L. REV. 1 (2004) (discussing cases involving issues with interpreters).

40. *Id.* at 7. If a timely objection is made during the proceedings, the standard of review on appeal is whether there was an abuse of discretion. If no objection is made, the standard of review on appeal is plain error, which is rarely overturned on appeal. *Id.*

raise issues with interpretation due to their inability to detect any errors. Further, the vast majority of cases are resolved outside of court.⁴¹ There are no uniform requirements for the appointment of a qualified interpreter in interactions outside of the courtroom.⁴² As a result, it is still common for attorneys to rely on noncertified interpreters, bilingual staff members, or even family members for language assistance during office consultations. Attorneys who do not speak the language will have no basis for ensuring that the interpretation is accurate. Thus, having attorneys who can understand their clients is crucial to providing effective representation.⁴³

In addition to language challenges, there are cultural differences that could affect how a client may be perceived in court.⁴⁴ A seemingly innocuous cultural mannerism can have a profound impact on how that person is perceived. For example, in some cultures averting your eyes when speaking to someone is considered rude.⁴⁵ However, studies reflect that people who avoid eye contact are perceived to be less credible.⁴⁶ The lack of credibility can have disastrous implications for a client, due to the attorney's failure to understand the client's or a witness' culture and counsel them accordingly,

41. American Bar Association, *How Courts Work* (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling/.

42. Title VI of the Civil Rights Act of 1964 provides that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, 42 U.S.C. §2000d et seq. (1964). Thus, any program or entity that receives federal funding is required to provide interpretive services under the Act. As most private law offices do not receive federal funding, attorneys are not required to provide these services. *In contrast, almost all health care offices receive federal funding either indirectly or indirectly, thus physicians are required to provide interpretive services for patients.* Anne W. Bishop, *Physicians Required to Provide Interpretive Services to Non-English Speaking Patients* LEXOLOGY (May 31, 2012), <https://www.lexology.com/library/detail.aspx?g=1dcd0d32-07df-4d51-af10-9c21331d0c70>.

43. *See also*, Bill Piatt, *Attorneys as Interpreters: A Return to Babble*, 20 N.M. L. REV. 1 (1990) (examining the role of bilingual attorneys in criminal cases).

44. Annette Wong, *A Matter of Competence: Lawyers, Courts and Failing to Translate Linguistic and Cultural Differences*, 21 S. CAL. REV. OF L. AND SOC. JUST. 431 (2012).

45. *Id.* At 436-37.

46. Wong *supra* note 44, at 436-37. *See also*, Tess M.S. Neal & Stanley L. Brodsky, *Expert Witness Credibility As A Function of Eye Contact Behavior and Gender*, 35 CRIM. JUST. AND BEHAV. 1515, 1516 (2008).

or provide cultural context to the judge or jury.⁴⁷ Attorneys who are of the same culture as their client are uniquely positioned to understand and anticipate these cultural issues.

Recent events further underscore why representation in the legal profession is crucial. As the nation grapples with civil unrest, after the horrendous killings of unarmed Blacks Americans by those who are sworn to protect them, there has been a renewed examination of the systemic racism that permeates almost every aspect of our society. Most of the discourse focuses on police brutality. In a column of the August/September issue of the ABA Law Journal, the author succinctly describes the reality that Blacks are confronted with every day: the system that was established to “serve and protect” all citizens does not, in fact, apply to all citizens.

Stop to imagine a system of law enforcement where the police are rarely there to help you but instead are actively at war with you. What this means is living a life fraught with anxiety, if not terror because of having dark skin in America. Perhaps this particular police encounter isn’t your day to die, but it’s likely your moment to be disrespected, disbelieved, manhandled, arrested or otherwise abused. For Black Americans, having to live under the perennial threat of violence is abuse in itself.⁴⁸

The author further asserts that, “What’s needed now is the elimination of the contagion of bad police officers: the rogue officers, the bad apples who have inexorably tainted the rank and file of American police.”⁴⁹

One solution frequently proffered is to recruit more black police offers. However, as the author of a 2015 article⁵⁰ published in *The Guardian* asserts, “[T]he [United States] needs more Black lawyers even more than it needs

47. *Id.*

48. Jackson, *supra* note 28 at 10.

49. *Id.*

50. The article was written after the 2014 killing of another unarmed Black man, Michael Brown, by a Ferguson, Missouri police officer. In November 2014, a grand jury failed to indict the police officer. Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 42-43 (2018).

Black police.”⁵¹ The legal profession, the author notes, is much more subjective.⁵² Prosecutors have discretion to decide whether to bring charges, whether to offer a plea agreement, or whether to proceed to trial.⁵³ While prosecutors have the ability to exercise restraint when deciding whether to bring charges, that restraint “rarely extends to Black defendants.”⁵⁴ Collectively, the nation has watched this restraint over and over again after the high-profile police killings of John Crawford III, Michael Brown, Eric Garner, Tamir Rice and Walter Scott—all unarmed Black males.⁵⁵ In all of these cases, White prosecutors “appeared reluctant to vigorously pursue indictments, even when facts were highly disputed.”⁵⁶ Why are Whites afforded

51. Yolanda Young, *Why the US Needs Black Lawyers Even More than it Needs Black Police*, *GUARDIAN* (May 11, 2015, 2:45 PM), <https://www.theguardian.com/world/2015/may/11/why-the-us-needs-black-lawyers>. See also, Martina Cartwright & Thelma Harrison, *#Black Lawyers Matter: The Importance of Pro Bono Initiatives and Experiential Opportunities at Historically Black College and University Law Schools in Preparing a New Generation of Social Engineers*, 18 *FLA. COASTAL L. REV.* 315, 317-318 (2017) (explaining that the lack of minority prosecutors in the United States matters because of the influence that prosecutors have over the legal system “In order to effectuate change, an increase in African American prosecutors is crucial).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* The author cites a 2011 study by the New York district attorney’s office that found that Black defendants were 19% more likely than white defendants to be offered plea deals that involved jail or prison time. Black Americans who were charged with misdemeanor offenses or drug offenses were also much more likely to be held in jail or prison during their arraignment than whites.

more deference than Blacks?⁵⁷ The answer is simple: biases. Whether knowingly or unintentionally, the prosecutors who have the discretion to make these key decisions are doing so while harboring their own biases.⁵⁸

North Carolina Court of Appeals Judge Darren Jackson has spent a lot of time in court during his twenty-four years in practice and has witnessed this first-hand.⁵⁹

Whether it's the targeting or the discretion that goes into charging or how we treat people once they are charged, whether it's with bond or bail, appointment of lawyers, the money we invest in court-appointed attorneys...we're sending people to jail, versus alternative sentencing programs trying to get people back on the right track. You know, I have been struck more than once being in a courtroom and looking around and seeing nothing but people with black or brown skin sitting in the gallery.⁶⁰

Representative Robert Reives, II, a former assistant district attorney, agrees.⁶¹ While acknowledging the gains that have been made to increase the number of African American judges, he added, "That's good. But judges are

57. See, Ross Barkan (edited by Blair Chavis and Liane Jackson), *Deadly Force*, 106 ABA J. 9, 14 (2020) (discussing the high-profile killings of unarmed Black people). Civil rights attorney Ben Crump, represents the mother of Ahmaud Arbery, who was killed by two armed white men while he was jogging down the street. Cellphone video captured the two men in pursuit of Arbery. However, an arrest was not made until two and a half months later. Crump believed that there was sufficient probable cause "from day one." As Crump has seen before, "We know people in the minority communities are rested for far less probable cause."

58. *Id.* The author also notes that at the time of Michael Brown's killing, there were no black lawyers in Ferguson, Missouri even though the majority of its residents are Black American. A subsequent report on Ferguson linked a lack of legal representation with police misconduct.

59. Jeff Tiberii, Q&A with Dem. Reps. Jackson and Reives on Racial Inequalities in NC, North Carolina Public Radio, (June 11, 2020, 2:10 PM), <https://www.wunc.org/race-demographics/2020-06-11/q-a-dem-reps-jackson-and-reives-on-racial-inequalities-in-nc>. At the time of the interview, Judge Jackson was in private practice and serving in the North Carolina House of Representatives. In December 2020, he was appointed to the North Carolina Court Appeals by Governor Roy Cooper. See, Press Release, NC Governor Roy Cooper's Office, Governor Cooper Appoints Jackson to the Court of Appeals, (December 30, 2020), <https://governor.nc.gov/news/governor-cooper-appoints-rep-darren-jackson-court-appeals>.

60. *Id.*

61. Interview with Representative Robert Reives, II, House Deputy Democratic Leader, North Carolina House of Representatives, in Cary, N.C. (June 16, 2020).

the very last line that a criminal defendant is going to face.”⁶² As Representative Reives points out, the crucial decisions are being made by prosecutors before they get to the judge.⁶³

Bias is not only seen in prosecutorial decisions. It permeates through the justice system and is reflected in the manner in which justice is ultimately dispensed. In a press conference to address the “intersection of justice and protests around the state [of North Carolina],” during her tenure as North Carolina Supreme Court Chief Justice, Chief Justice Cheri Beasley acknowledged the disparities that exist within the justice system due to judicial biases and the role that courts play in instituting necessary changes.⁶⁴ Citing a 2015 study commissioned by then North Carolina Supreme Court Chief Justice Mark Martin, she recognized that “African-Americans are more harshly treated, more severely punished, and are more likely to be presumed guilty.”⁶⁵ She called for a plan for “accountability in our courts” and for judges to be “trained to recognize [their] own biases.”⁶⁶ While training is indeed necessary, it is only the first step. The best way to address issues surrounding racism is to “have more Black faces in the room.”⁶⁷ The legal profession must acknowledge its role in facilitating systemic racism and work harder to increase minority representation in the profession, especially in these vital positions.

This diversity is instrumental to beginning to establish trust in the judicial system. As Chief Justice Beasley concedes, “Too many people believe that there are two kinds of justice. They believe it because that is their lived

62. *Id.*

63. *Id.*

64. Press Release, North Carolina Supreme Court Chief Justice Cheri Beasley, Chief Justice Cheri Beasley Addresses the Intersection of Justice and Protests Around the State (June 2, 2020) (on file with author).

65. *Id.*

66. *Id.* See also, Ashleigh Parker Dunston, *Justice Isn't Always Blind*, 6 N.C. STATE BAR J. 8 (2020) (sharing numerous examples of Black lawyers and lawyers of color encountering racism in the legal profession and advocating for a mandatory bias/diversity/inclusion CLE requirement “to be conducted on a semi-annual basis”).

67. Young, *supra* note 51 (sharing a sentiment expressed by Black prosecutors in a 2010 district attorney roundtable discussion: “As former National Black Prosecutors Association president Bruce Brown puts it: ‘When you have African Americans in the room making decisions, challenging decisions, folks are forced to look at the motives behind what they’re doing, an it’s not until all those motives are questioned that we make sure that our system is working, not only effectively, but also efficiently and fairly for everyone involved.’”).

experience—they have seen and felt the difference in their own lives.”⁶⁸ In what is perhaps the greatest tragedy, studies support that even the attorneys who are paid to represent Black clients do so while holding the same biases which results in Black clients receiving far less favorable outcomes than White clients.⁶⁹ It is therefore not surprising that Blacks and people of color do not trust the system, because they have either been failed or neglected by it.

Increasing representation in the legal profession serves an important function in attacking these biases: educating others. Representative Reives recalled a class discussion about racial profiling when he was in law school (at a predominantly white institution) over twenty-five years ago.⁷⁰ One of his white classmates emphatically stated, “If you haven’t done anything wrong, you don’t have any reason to have fear of the police.”⁷¹ He recalls being stunned at how naïve and uninformed the classmate was.⁷² However, what was more shocking was that many of his classmates felt the same way.⁷³ Although he was only twenty-two, he had already been pulled over by police five times in the six years he had been driving, and solely because of the color of his skin.⁷⁴ That moment in the classroom turned into a learning opportunity as he shared his own experiences and explained that for Black Americans, and people of color, interactions with the police are very different.⁷⁵

68. Beasley, *supra* note 64.

69. *Id.* See Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. OF EMPIRICAL LEGAL STUD. 393, 393–429 (2012) (examining the role of attorney bias in bankruptcy chapter selection and concluding that Black clients were counseled to file Chapter 13 at a higher rate than white clients, even after the clients expressed a preference for Chapter 7).

70. Reives, *supra* note 61.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* See also, Preston Mitchum, *Cops Pulling Over People to Hand Out Ice Cream is Dangerous, Not Funny*, THE ROOT (Aug. 2, 2016, 6:00 PM), <https://www.theroot.com/cops-pulling-over-people-to-hand-out-ice-cream-is-danger-1790856259> (commenting on how, in the aftermath of the July 2016 killing of Philando Castile, an African American who was fatally shot after being pulled over for a traffic stop, one police department’s response of spreading good will by pulling over citizens for violating “vehicle code 1793 for driving on a hot day without an ice cream cone” was tone-deaf describing the feeling that Black Americans and the relief, that they feel “every time they interact with police officers because we never know if we will leave that interaction alive.”).

This discourse will not occur in a homogeneous classroom, nor in a homogeneous profession. It is clear that the legal profession needs more diverse voices in the room.

Having more diverse voices in the room is perhaps the best way to further eliminate biases in the profession and attain a more just society. “Lawyers have a long tradition of supporting efforts to bring racial and social justice to this country.”⁷⁶

PART III: BARRIERS TO DIVERSIFYING THE PROFESSION

Tevin Frederick knew he wanted to be an attorney early in life.⁷⁷ His experiences in junior high school as a volunteer as a mock defense attorney in a local Teen Court Program enabled him to understand the impact of lawyers of color and to see first-hand how “if a child has someone to steer them in the right direction that it could drastically change their outlook on life.”⁷⁸ When he applied to law school in 2017, he knew the LSAT was an important consideration in law school admissions, but it was difficult trying to juggle gathering recommendations and writing personal statements while still trying to maintain a high GPA in his undergraduate courses.⁷⁹ Additionally, he did not have time to take an LSAT study prep course and studying on his own was a struggle because finding the time to devote to learning foreign concepts, such as logic games, was difficult.⁸⁰ As someone who had a history of not doing well on standardized tests such as the SAT and ACT, he focused on working hard to excel in other aspects of the application process.⁸¹

As Mr. Frederick’s story illustrates, one of the greatest barriers to increasing diversity in the legal profession is law school admissions requirements. The Council of the American Bar Association (ABA) Section on Legal Education and Admissions to the Bar accredits and approves “first-professional degree in law (J.D.) programs.”⁸² The Section of Legal Education and Admissions to the Bar promulgates and enforces standards governing

76. Blair Chavis et al., *Moment or Movement Lawyers Involved in Civil Rights Battles Reflect on Recent Demands for Racial Justice*, 106 A.B.A. J. 34, 35 (2020).

77. Telephone interview with Tevin Frederick (Mar. 7, 2021, 7:00 PM).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Preface*, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-preface.pdf.

law school programs.⁸³ Standard 501(b) provides, “A law school shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”⁸⁴ Interpretation 501-1 provides further guidance:

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.⁸⁵

Thus, in assessing a prospective student’s aptitude for success in law school, law schools consider the applicant’s undergraduate grade point average (GPA) and, for most law schools, performance on the LSAT.⁸⁶ The ABA also allows law schools to weigh extracurricular activities, work experience, and obstacles overcome when determining admission,⁸⁷ but undergraduate GPAs and LSAT scores are the indicators that are given the most credence, because they are seemingly objective and quantifiable.⁸⁸

83. *Id.*

84. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, ch. 5 Admissions and Student Services Standard No. 501(b), 31 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter5.pdf.

85. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, ch. 5 Admissions and Student Services Interpretation No. 501-1, 31 (2020).

86. While all ABA approved schools accept the LSAT to evaluate applicants, some law schools now also accept tests other than the LSAT. <https://www.lsac.org/lSAT> (see also, Mehran Ebadolahi, *Law Schools That Don’t Require the LSAT*, LSATMAX, <https://testmaxprep.com/blog/lSAT/law-schools-that-dont-require-lsat/>).

87. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, ch. 5 Admissions and Student Services Interpretation 501-2, 32 (2020). Sound admissions policies and practices may include consideration of admission test scores, undergraduate course of study and grade point average, extracurricular activities, work experience, performance in other graduate or professional programs, relevant demonstrated skills, and obstacles overcome.

88. The author currently serves on the Admissions Committee for NCCU School of Law, which uses a presumptive index based on the LSAT and undergraduate GPA in determining admission.

At first glance, heavily considering an applicant's LSAT score and undergraduate GPA appear reasonable and innocuous. However, a closer examination reveals that they contribute to the lack of diversity in law school, and thus, the profession. LSAT scores expose a huge gap in performance between White test-takers and Black and Hispanic test-takers. While the average score for Whites is 153, the average score for Hispanics is 146, and the average score for Blacks is 142.⁸⁹ The disparity on the LSAT is not surprising considering the well-documented performance gaps of these groups on other high-stakes, standardized tests.⁹⁰ Notwithstanding, the entity that administers the LSAT, the Law School Admissions Council (LSAC), defends its validity and produces correlation studies to support the efficacy of the test as a predictor of law school success.⁹¹ Independent research studies offer a contrasting conclusion that there is "no meaningful statistical relationships between test scores and academic performance for minority students, especially in law schools."⁹² Further, the LSAT it is not predictive of an individual's success on the bar exam.⁹³ In other words, it is not an appropriate indicator of an individual's competence to be a lawyer.⁹⁴

Additionally, relying heavily on an applicant's undergraduate GPA is also problematic. Studies indicate that Blacks and Hispanics are more likely

89. LSAC Technical Reports, *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007-2008 through 2013-14 Testing Years* (TR14-02), on file with author.

90. Wayne Au, *Meritocracy 2.0: High-Stakes, Standardized Testing as a Racial Project of Neoliberal Multiculturalism*. Educational Policy. 2016;30(1):39-62. doi:10.1177/0895904815614916 (provides a history of standardized testing and argues that it serves to further racial inequality in education). See also, Harvey Gilmore, *Standardized Testing and Race: A Reply to Professor Subotnik*, 13 SEATTLE J. FOR SOC. JUST. 1 (2014).

91. See, for example, LSAC Technical Reports, Summary of 2017, 2018, and 2019 LSAT Correlation Study Results. <https://www.lsac.org/data-research/research/summary-2017-2018-and-2019-lsat-correlation-study-results>

92. Dana N. Thompson Dorsey, *Accessing the Legal Playing Field: Examining the Race-Conscious Affirmative Action Legal Debate Through the Eyes of the Council of Legal Education Opportunity Program (CLEO)*, 16 TEX. WESLEYAN L. REV. 645, 647 (2010).

93. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 496 (2019).

94. *Id.*

to complete their undergraduate studies at for-profit institutions.⁹⁵ These institutions are less selective and less well-resourced than public and non-profit institutions.⁹⁶ Consequently, these institutions have “lower faculty salaries, lower retention for first-year students, and higher student-faculty ration.”⁹⁷ Other factors, such as the choice of major and college, further complicate using undergraduate GPAs to determine an individual’s potential to be successful in law school.⁹⁸

In theory, law schools can admit students with lower indicators. However, doing so puts them at a substantial risk of running afoul of ABA Standard 501. Interpretation 501-3 provides, “A law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with the Standard.”⁹⁹ This interpretation functions as a deterrent for law schools that would otherwise be willing to take a risk on students with low indicators, as doing so could result in a finding of noncompliance by the ABA.¹⁰⁰ As a result, law schools are not only discouraged from admitting students with lower indicators, but are often penalized by the ABA if they do.¹⁰¹ Moreover, it should come as no surprise that as a result of the flawed admissions requirements, 59.8% of law school matriculants in 2020 were White while only 7.7% were Black and 8.4% were Hispanic.¹⁰²

95. CJ Libassi, *The Neglected College Racial Gap: Racial Disparities Among College Completers*, CTR. FOR AM. PROGRESS, 1 (May 23, 2018, 9:39 AM), <https://www.americanprogress.org/issues/education-postsecondary/reports/2018/05/23/451186/neglected-college-race-gap-racial-disparities-among-college-completers/>.

96. Libassi, *supra* note 95, at *7.

97. Libassi, *supra* note 95, at *3.

98. See Klint W. Alexander, *The Law School Admissions Process More Competitive Than Ever*, 40 WYO. L. REV. 24, 25 (2017) (discussing the admissions process at the University of Wyoming College of Law School, where applicants who performed well in some majors deemed to be more rigorous are viewed more favorably than those who were deemed to have taken lighter loads at the undergraduate level).

99. ABA STANDARDS, *supra* note 84 at 32.

100. For a list of recent actions by the ABA due to noncompliance, see *Transparency at U.S. Law Schools*, DATA DASHBOARD, <https://data.lawschooltransparency.com/transparency/aba-compliance/>.

101. John Nussbaumer, *The Disturbing Correlation Between ABA Accreditation Review and the Declining African- American Law School Enrollment*, 80 ST. JOHN’S L. REV. 991, 996 (2006).

102. LSAC Reports, *Diversity in the U.S. Population and the Pipeline to Legal Careers* (Feb. 25, 2021),

Tevin Frederick's story is a valuable lesson in the dangers of law schools strictly adhering to standards that evaluate an individual's potential solely by examining indicators. Although he applied to three law schools, due to his low LSAT score, only one—North Carolina Central University School of Law—accepted him.¹⁰³ He is thankful the admissions committee saw beyond his scores and took a chance on him.¹⁰⁴ After graduating from the law school and passing the July 2020 bar, Frederick began working as an attorney/advisor in the United States Department of Transportation Honors Attorney Program in Washington, D.C.¹⁰⁵

For the few Blacks or Hispanics that can meet the admissions requirements and gain admittance into law school, the struggles are far from over. Another standardized test, the Bar Exam, is yet one more barrier to overcome in order to be able to practice law and thus, increase diversity in the profession. ABA Standard 301 provides that “[a] law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”¹⁰⁶ Standard 316 mandates “[a]t least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.”¹⁰⁷ Failure to meet this standard will result in the law school being found to be out of compliance, which could result in the school losing its accreditation.¹⁰⁸

<https://report.lsac.org/View.aspx?Report=DiversityPopulationandPipeline>.

103. Frederick, *supra* note 77. Since applying to law school in 2017, the ABA found the law school to be out of compliance with ABA Standard 501(b), due to its attrition rate. As a result, the law school agreed to change its admissions practices. Under the new policy, Attorney Frederick would not have gained admission to the law school.

104. *Id.*

105. *Id.*

106. Standard 301, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, at 17 (Am. Bar Ass'n 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf.

107. Standard 316, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, at 25 (Am. Bar Ass'n 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf.

108. See Law School Transparency Data, *supra* note 100.

The National Conference of Bar Examiners (NCBE) produces the licensing tests used by most U.S. jurisdictions (states and U.S. territories).¹⁰⁹ In this capacity, the NCBE is responsible for drafting and coordinating the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Examination (MPT).¹¹⁰ Currently, 40 of the 56 jurisdictions administer the Uniform Bar Examination (UBE), a 2-day examination which consists of the MPT, MEE, and MBE.¹¹¹ Of the remaining jurisdictions that do not administer the UBE, all but 2 jurisdictions administer the MBE.¹¹² The UBE provides uniformity in testing, but each jurisdiction establishes the minimum score required to be licensed in its jurisdiction.¹¹³ The result is anything but uniformed; although all applicants take the same test, an applicant can be deemed to have the requisite knowledge to practice law in one jurisdiction, but not another jurisdiction.¹¹⁴

An article by George Shepherd provides greater context on the bar exam and its racial implications.¹¹⁵ In examining the decrease of bar passage rates disproportionately affecting Blacks, he concluded that the bar exam excludes Blacks at a higher rate than Whites.¹¹⁶ Furthermore, Shephard argues that the exam itself fails to test an applicant's ability to practice law.¹¹⁷ Of particular concern was that as more Blacks began to pass the bar, many states—under the guise of preventing the overcrowding of the profession—raised minimum scores for bar passage, making it harder for applicants, especially Black applicants, to pass the bar.¹¹⁸

109. About Us, Nat'l Conf. of Bar Exam'rs, <https://www.ncbex.org/about/>.

110. *Id.*

111. Uniform Bar Examination, Nat'l Conf. of Bar Exam'rs, <https://www.ncbex.org/exams/ube/> (This list includes Indiana and Oklahoma, which will begin administering the UBE in July 2021, and Pennsylvania, which will begin administering the UBE in July 2022.).

112. Multistate Bar Examination, Nat'l Conf. of Bar Exam'rs, <https://www.ncbex.org/exams/mbe/>.

113. *See* Uniform Bar Examination, *supra* note 111.

114. *See* Minimum Scores, Nat'l Conf. of Bar Exam'rs, <https://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (The minimum score ranges from 260-180.).

115. George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003).

116. *Id.* at 104.

117. *Id.*

118. *Id.* at 110. For example, in California, 83.7% of Whites passed the October 2020 Bar Examination on the first attempt, compared to 56% of Blacks and 66.3% of Hispanics taking the bar for the first time. For repeat bar takers, 46.3% of Whites

These barriers have essentially made diversifying the profession a difficult, if not impossible, feat. Through its standards and interpretations, the Section on Legal Education and Admissions to the Bar—the gatekeepers of the profession—are handicapping law schools to ensure that those who enter are predominantly white.

PART IV: SOLUTIONS

On June 15, 2020, in the wake of the killing of George Floyd, the ABA launched a new Racial Equity in the Justice System website to provide “resources for attorneys, the legal profession and the public on a wealth of issues addressing bias, racism and prejudice in the justice system and society.”¹¹⁹ Subsequently, in its 2020 Annual Meeting, the ABA House of Delegates adopted several new policies aimed at attacking racial injustice.¹²⁰ Among the 60 new policies adopted, there was Resolution 100B, urging governmental bodies to enact legislation banning discrimination on the basis of hair texture and encouraging implicit bias training, and Resolution 301B, supporting the establishment of a paid, national legal holiday on June 19—or Juneteenth—to commemorate the end of slavery.¹²¹ None of the resolutions addressed the ABA’s own responsibility for establishing policies and procedures that further promote and facilitate racial injustice.¹²²

It is obvious that there is a problem. The entity responsible for regulating the entry into the profession must stop placing the task of the resolution on others and must instead address the policies it has enacted which have contributed to the lack of diversity in the profession. The path to ending the discrimination begins with the legal academy. To have a diverse profession, law

passed the bar, compared to 37.7% of Blacks and 37.7% of Hispanics. State Bar of California, General Statistics Report October 2020 California Bar Examination, <http://www.calbar.ca.gov/Portals/0/documents/OCT2020-CBX-Statistics.pdf>. States are not required to release bar information regarding race and ethnicity.

119. American Bar Association, *ABA Launches New Racial Justice Resources Website* (June 15, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/racial-equity-in-the-justice-system/>.

120. American Bar Association, *ABA House Concludes Historic Meeting After Adopting Robust List of New Policies* (Aug. 14, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/08/aba-house-concludes-historic-meeting-after-adopting-robust-list-/>.

121. *Id.*

122. For a list of the adopted resolutions, visit https://www.americanbar.org/news/reporter_resources/annual-meeting-2020/house-of-delegates-resolutions/.

schools must admit diverse students. The current standards, interpretations, and enforcement procedures prevent the diversity that is critical to addressing the pervasive inequities and injustices that are present in the system it has sworn to promote and uphold.

One solution is to allow schools, especially those that were created for the purpose of increasing representation in the profession and have been dedicated to that mission, to establish an admissions process with lower indicators. Strict adherence to the standards and interpretations should be revisited in order to allow these law schools, who have a history of educating Blacks and students of color, to enable those populations to become practicing attorneys.

At a minimum, law school attrition rates should only factor in academic attrition to determine compliance. Currently, the ABA factors in all non-transfer attrition when determining compliance. Thus, individuals that withdraw due to non-academic factors, such as personal illness, financial difficulties, and family emergencies, are unfairly included in the attrition rate. Attrition based on non-academic factors is not relevant in assessing whether the law school is admitting students who are incapable of successfully completing law school and passing the bar, and instead unfairly affect programs that enroll a significant number of non-traditional law students who are more likely to withdraw due to non-academic reasons.

A closer examination of the metrics used to assess academic performance is also needed. Any metrics that produce a discriminatory result and leads to the exclusion of minorities in law school and the profession, should be eliminated. It is no longer acceptable for the ABA to only acknowledge the problem while ignoring its own contribution and furthering prolonging the problem. Law schools must be able to attract, admit, train, and graduate students who will contribute to the diversity of the profession. Instead of policing schools, the ABA should work with them to support and pay for programs that assist students from diverse backgrounds. As Liane Jackson stated,

Whether it's women in the ranks or people of color, it's been perpetually easier to shut the gate than crack the door open to diversity. Lip service and platitudes don't make you an ally. It takes honest introspection and self-assessment to determine whether you are actively part of the problem or part of the solution.¹²³

The ABA, as the gatekeeper, must understand that “silence is complicity and inaction is collusion.”¹²⁴ For us to benefit and improve the system, the

123. Jackson, *supra* note 28, at 10.

124. *Id.*

156 *NORTH CAROLINA CENTRAL LAW REVIEW* [Vol. 43:2:136

ABA must look at its own standards and interpretations and examine what it can do to achieve the diversity it has committed to promote.