

# **Native Hawaiians: The Forgotten in Legal Education**

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## ABSTRACT

Law school admission data results demonstrate significant continuing education and professional barriers encountered by Native Hawaiians. Heavy reliance on standardized admission testing and formulaic admissions standards regrettably deny legal education to an entire race and culture. Institutions vested with the obligation and opportunity to educate are urged to recognize the failings of current admission standards and to move towards a fair and just process to enable Native Hawaiian to pursue higher learning in the face of the historic disparities and disenfranchisement that they've suffered.

## ABOUT THE AUTHOR

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## INTRODUCTION

Recent court rulings in California are reinforcing opinions that standardized test scores, conceived as equalizers to fairly evaluate students based on generalized content on exams, are broadly biased and not indicative of intellectual abilities or predictive of educational success.<sup>1</sup> Standardized tests are increasingly under fire as institutionalized barriers and exclusionary against minorities.<sup>2</sup> Indeed, harm and education exclusion based on standardized test scores to particular minorities is staggering. Despite quotas and affirmative action policies, the lack of diversity in legal education and the profession have been called a “well-established fact.”<sup>3</sup> This is particularly true in large law firms, where the lack of diversity has been called self-inflicted and the “product of an antiquated and homogenized notion of who qualifies as ‘Big Law material.’”<sup>4</sup> Furthermore, minority law students are disproportionately underrepresented at law schools with fewer scholarships, lower pass rates of the bar exam, and fewer graduated heading into legal jobs.<sup>5</sup> This demonstrates sad and perhaps unintended reality that despite progressive efforts to improve minority representation, there is a surprisingly long way to go.

The United States Census Bureau estimates roughly 1.3 million Native Hawaiians or Pacific Islanders (NHPI) are residing in the United States.<sup>6</sup> Of this population of more than a million Islanders, only three (3) have secured admission to America’s top 10 law schools according to US News and World Reports<sup>7</sup> in the past three (3) years: one to the University of California, Berkeley,<sup>8</sup> one to Harvard University,<sup>9</sup> and one to the University of Virginia.<sup>10</sup>

1. See Teresa Watanabe, *UC Must Immediately Drop Use of the SAT and ACT for Admissions and Scholarships, Judge Rules*, L.A. TIMES (Sept. 1, 2020), <https://www.latimes.com/california/story/2020-09-01/uc-may-not-use-the-sat-or-act-for-admissions-scholarship-decisions-for-now-judge-rules>.

2. See Robert L. Green & Robert J. Griffore, *The Impact of Standardized Testing on Minority Students*, J. NEGRO EDUC. 238 (1980).

3. See Lauren Walker et al., *Analyzing Pathways to the J.D. with National Student Clearinghouse Data* ACCESSLEX INSTITUTE (Jan. 25, 2021), <https://www.accesslex.org/analyzing-pathways-to-the-jd>.

4. See Zack Needles, *Law.com Trendspotter: Big Law Doesn’t Have a Pipeline Problem. It Has an Elitism Problem*, LAW.COM (Feb. 15, 2021), <https://www.law.com/2021/02/15/law-com-trendspotter-big-law-doesnt-have-a-pipeline-problem-it-has-an-elitism-problem>.

5. See Karen Sloan, *Want to Hire Minority Lawyers? Look Beyond the T-14 Law Schools*, LAW.COM (Feb. 1, 2021), <https://www.law.com/2021/02/01/want-to-hire-minority-lawyers-look-beyond-the-t-14-law-schools>.

6. U.S. Census Bureau, *American Community Survey Table S0201: 1 Year Estimates Selected Population Profiles* (2015).

7. Stephanie Francis Ward, *US News Releases Its 2020 Law School Rankings*, ABA J., (March 12, 2019), <https://www.abajournal.com/web/article/little-movement-among-u.s.-news-world-reports-top-20-law-schools>.

8. UNIV. CAL. BERKELEY, CALIFORNIA-BERKELEY, UNIVERSITY OF - 2019 STANDARD 509 INFORMATION REPORT 2 (2019).

9. HARVARD UNIV., HARVARD UNIVERSITY - 2019 STANDARD 509 INFORMATION REPORT 2 (2019).

10. UNIV. VA., VIRGINIA UNIVERSITY OF - 2019 STANDARD 509 INFORMATION REPORT 2

The telling admission figures disclosed by the American Bar Association (ABA), while mandated for accredited law schools, are not driving change for native Hawaiians. Significantly, the ABA’s Diversity and Inclusion Center strives to “eliminating bias and enhancing inclusion in the Association, legal profession, and justice system.”<sup>11</sup> The Council for Diversity in the Educational Pipeline, also a subgroup of the ABA, has the public mission to “increase diversity, equity, and inclusion in the educational pipeline to the legal profession.”<sup>12</sup> The 509 Information Reports, which compel law school disclose data in several categories, covering admissions, tuition and living costs, financial aid, class and faculty demographics, employment outcomes, bar passage, and more.<sup>13</sup> Consequently, the reports serve as a telling metric for evaluating where ABA-approved schools are in terms of meeting the important ABA goals of diversity and inclusion. The following graph is a conglomeration of data taken from the ABA annual 509 reports regarding the enrollment of Native Hawaiians in law schools. The dearth of Native Hawaiian admissions is disturbing and warrants a reexamination of admission policies and practices with regard to Native Hawaiian admissions.

Native Hawaiian Enrollment in Law Schools as of October 5th 2019 (ABA 509 Reports)				
	JD1	JD2	JD3	Total
UC Irvine	0	0	0	0
UCLA	0	0	0	0
UC Davis	0	0	0	0
UC Berkeley	0	0	1	1
Stanford	0	0	0	0
USC	0	0	0	0
Yale	0	0	0	0
Columbia	0	0	0	0
NYU	0	0	0	0
Georgetown	0	0	0	0
Chicago	0	0	0	0
Northwestern	0	0	0	0
Duke	0	0	0	0
Harvard	0	0	1	1
University of Virginia	0	0	1	1
Cornell	0	0	0	0
UT Austin	0	0	0	0
Duke	0	0	0	0
<b>TOTAL NATIVE HAWAIIAN ENROLLMENT</b>				<b>3</b>

Law schools have often been regarded as the least diverse white-collar profession.<sup>14</sup> The admittance of only three Native Hawaiians to the top (2019).

11. *Diversity and Inclusion*, ABA, <https://www.americanbar.org/topics/diversity> (last visited Feb. 22, 2021).

12. *Council for Diversity in the Educational Pipeline*, ABA, [https://www.americanbar.org/groups/diversity/diversity\\_pipeline](https://www.americanbar.org/groups/diversity/diversity_pipeline) (last visited Sept. 15, 2020).

13. *ABA Website Updates Data on Law School Admissions, Tuition and Other Matters*, ABA, (Dec. 12, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/12/aba-website-updates-data-on-law-school-admissions—tuition-and-o>.

14. See Jacqueline Bell, *Why Law Is the Least Diverse Profession*, Law 360 (May 17, 2016, 6:37 PM), <https://www.law360.com/articles/795764/why-law-is-the-least-diverse-profession>.

American law schools—from a population of 1.3 million—establishes a 0.0005 percent admissions rate and is sadly indicative of a firmly entrenched pattern and practice of exclusions against Native Hawaiians at elite United States institutions and law schools.

The lack of diversity and inclusion of Native Hawaiians is not an issue unique to law schools, but rather a wide-spread occurrence within the United States higher education system. The data shows that Native Hawaiians also had the lowest rates of admission from 2019–2020 to U.S. medical schools of any race or ethnicity.<sup>15</sup> Significantly, American Indian and Alaska Natives, another minority group that has struggled to achieve representation in the past, now enjoy equal admission rates to Whites and Asians.<sup>16</sup> Regrettably, the bridge to professional school for Native Hawaiians remains unacceptably absent. As such, intentional measures to pull down institutionalized barriers and expects such as standardized testing being the weightiest factor in admissions must be undertaken to remedy the long lingering difficulty in achieving fair representation for Native Hawaiians in higher education.

#### I. ABA REPORTS DETAIL THAT LACK OF DIVERSITY IN THE AMERICAN LEGAL PROFESSION STARTS WITH LAW SCHOOLS

The legal profession's status among the least diverse professions begins with law school.<sup>17</sup> The 509 Reports are a direct measurement of the ethnicities, genders, ages, and other descriptors of who attends specific law schools. However, not all schools are ABA-accredited and thus are not required to submit this type of information. As such, outside studies are necessary to create a comprehensive and an unbiased understanding on who law schools attract and matriculates. These studies should include the schools that are not ABA-accredited, but still provide similar points of data.

While it is important to note that the percentage of enrolled law scholars ought to mimic the proportion of the population, minorities have historically struggled to find adequate representation in law firms, which has been described as “overwhelming white and male despite efforts to recruit people of color from prestigious academic institutions.”<sup>18</sup> This continues to be a relevant issue as it was found that “the enrollment of Black, Indigenous and people of color (BIPOC) as a whole has decreased by small increments year-over-year, and continued to decline for the 4th consecutive year.”<sup>19</sup>

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15. See *2020 Facts: Applicant and Matriculants Data*, ASS'N AM. MED. C., tpls. A-8 & A-9 (Oct. 26, 2020), <https://www.aamc.org/data-reports/students-residents/interactive-data/2020-facts-applicants-and-matriculants-data>.

16. *Id.*

17. See Demetria Frank, *Social Inequity, Cultural Reform & Diversity in the Legal Profession*, 13 S. J. POL'Y & JUST. 25, 25 (2019).

18. See Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear ‘You Don’t Look Like a Lawyer’*, HARV. BUS. REV. (Aug. 7, 2019), <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer>.

19. *New Report: Percentages of BIPOC Enrollees in U.S. Law Schools*, GLOBE NEWSWIRE (Sept. 9, 2020, 8:00 AM), <https://www.globenewswire.com/news-release/2020/09/09/2090883/0>

In a 2020 examination of Juris Doctor enrollment data from 1999 to 2019, California Supreme Court Justice and former Associate Dean and Professor of Law at the University of California, Berkeley School of Law, Godwin Liu opined that it was “unclear to what extent the changing diversity of law students will translate into greater diversity in the legal profession.”<sup>20</sup> While admirable, the nationwide movement towards diversity championed by the ABA is not securing desired results. Current practices are failing to achieve desired outcomes and fall short of advancing progressive educational values. Indeed, “Women, African American students, and Hispanic students are disproportionately enrolled in lower-ranked schools with lower rates of bar passage and post-graduation employment.”<sup>21</sup> Without material adjustments in admission practices and attention to increasing bar passage or post-graduation employment, law graduates from minority or disadvantaged backgrounds are often left with limited relevant and positive outcomes. This comes in spite of their concerted efforts and years of investing time and precious limited resources in the journey to securing a legal education.

When law schools and firms actively practice diversity, the effects are felt throughout the student body and institution. This even includes the composition of the faculty, as it is believed that the greater the diversity within a law faculty, the higher the quality of the legal education for the students and the better the law school.<sup>22</sup> The findings about the impact of minority participation in the student body and faculty are profound and instructive, as many ideas and aspirations regarding the quality of legal education rely heavily on rankings from U.S. News & World Reports or other similar mediums.<sup>23</sup> The Law School Admission Council (LSAC) says that when diversity in the legal field occurs, it “increases the likelihood of access for people from an increasingly diverse population . . . enables individuals from a wide range of backgrounds to add their perspectives to the greater legal community,” and “[d]iversity of age, geographic region, socioeconomic status, and nationality also add to a richer experience in the law school classroom for all students.”<sup>24</sup>

The financial aspect of law is a significant limitation in achieving diversity in the profession. UCLA law professor Richard Sander, in examining the structure and effects of law school admissions policies, found that only five percent of all law school students are from families with socioeconomic status

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en/New-Report-Percentages-of-BIPOC-Enrollees-in-U-S-Law-Schools.html.

20. Miranda Li, Phillip Yao & Goodwin Liu, *Who's Going to Law School? Trends in Law School Enrollment Since the Great Recession*, 54 U.C. DAVIS L. REV. (forthcoming Dec. 2020) (manuscript at 1), <https://ssrn.com/abstract=3559213>.

21. *Id.*

22. See Kevin R. Frank, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1556–66 (2011).

23. *Id.* at 1572–77.

24. See *Diversity in Law School* The Law School Admission Council (Accessed Feb. 23, 2021), <https://www.lsac.org/discover-law/diversity-law-school#:~:text=Access%20to%20justice%20is%20essential,to%20the%20greater%20legal%20community>.

in the bottom half of the national distribution.<sup>25</sup> What is more frightening is when considering the top twenty law schools in the U.S., only 2 percent of students come from the bottom socioeconomic quarter of the population while over three-quarters of students come from the richest.<sup>26</sup> The startling figures about top law schools, chronically bereft of representation of disadvantaged students, is critically important in illustrating how exclusionary admission practices continue to perpetuate the fictional trek for “diversity” while actively employing financially straining recruitment criteria for students.

Before admittance to law school, applicants must take the LSAT exam and often must subscribe to the Credential Assembly Service, creating a nearly \$400 expense alone.<sup>27</sup> On top of this, test prep books for the LSAT exam start around \$50, prep courses often cost upwards of \$1,500, each school’s applications can cost \$75–85, and sending CAS reports are \$45 per school.<sup>28</sup> Data on Native Hawaiians’ economic standing indicates that the financial aspect of law school may have a significant impact on whether or not they choose to pursue a legal education. Non-Hispanic white households had a median income of \$65,845, while the average Native Hawaiian/Pacific Islander median household income was only \$60,734.<sup>29</sup> This income disparity was mirrored in studies on poverty levels. The White House Initiative on Asian Americans & Pacific Islanders (WHIAAPI) found that 18 percent of Native Hawaiians and Pacific Islanders were living below poverty, a substantial jump for the 12 percent national average for the U.S.<sup>30</sup> These figures demonstrate the financial struggles being experienced by the Native Hawaiian population and suggest that they may be related to the lack of admission and matriculation of Native Hawaiian law students.

## II. CALIFORNIA: PROGRESSIVE, BUT STILL FALLING SHORT

California is one of the most progressive states in the nation with regard to diversity and inclusion, but California schools unfortunately struggle to admit Native Hawaiians at rates comparable to their presence in the

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25. See Richard H. Sander, *Class in American Legal Education*, 88 DENV. UNIV. LAW REV., 631, 631–682 (2011).

26. See Richard D. Kahlenberg, *Achieving Better Diversity*, THE CENTURY FOUNDATION (Dec. 3, 2015), <https://tcf.org/content/report/achieving-better-diversity/?session=1>.

27. See *About the LSAT* THE PRINCETON REV. (Accessed Feb. 23, 2021), <https://www.princetonreview.com/law/lsat-information#:~:text=What%20fees%20are%20associated%20with,includes%20one%20free%20score%20report>.

28. See Rachel Margiewicz, *Law School Application Costs: An Expense Breakdown*, JD ADVISING, <https://www.jdadvising.com/law-school-application-costs-an-expense-breakdown/> (last visited Feb. 23, 2021).

29. See *Profile: Native Hawaiians/Pacific Islanders*, U.S. DEP’T HEALTH HUM. SER. OFF. MINORITY HEALTH (Jan. 31, 2020), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=65#:~:text=27.6%20percent%20of%20Native%20Hawaiians,for%20non%2DHispanic%20white%20households>.

30. See *Fact Sheet: What You Should Know About Native Hawaiians and Pacific Islanders (NHPI’s)*, WHITE HOUSE INITIATIVE ON ASIAN AMERICANS & PACIFIC ISLANDERS (WHIAAPI).

population.<sup>31</sup> In alignment with their progressive values, the University of California Diversity Statement claims renewal of “commitment to the full realization of its historic promise to recognize and nurture merit, talent, and achievement by supporting diversity and equal opportunity in its education, services, and administration, as well as research and creative activity. The University particularly acknowledges the acute need to remove barriers to the recruitment, retention, and advancement of talented students, faculty, and staff from historically excluded populations who are currently underrepresented.”<sup>32</sup> The University of California law schools, while considered among the largest and best statewide university system in the country, fail in the admissions of disadvantaged Native Hawaiians.

<b>J.D Enrollment as of October 5th 2019 (ABA 509 Reports) -- UCI, UCLA, UC Davis, UC Berkeley</b>				
	<b>JD1</b>	<b>JD2</b>	<b>JD3</b>	<b>Total</b>
Hispanics of any race	134	146	126	406
American Indian or Alaska Native	1	3	3	7
Asian	154	197	155	506
Black or African American	49	38	31	118
<b>Native Hawaiian or Other Pacific Islander</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>1</b>
Two or More Races	79	78	49	206
Total Minority	417	462	365	1244
White	524	533	482	1539
Nonresident Alien	47	50	53	150
Race and Ethnicity Unknown	38	49	52	139
<b>Total</b>	<b>1026</b>	<b>1094</b>	<b>952</b>	<b>3072</b>
<b>UCI, UCLA, UC Davis, UC Berkeley Individual Data</b>				
	<b>JD1</b>	<b>JD2</b>	<b>JD3</b>	<b>Total</b>
UC Irvine	0	0	0	0
UCLA	0	0	0	0
UC Davis	0	0	0	0
UC Berkeley	0	0	1	1

The cumulative data and information in the preceding table is taken from the compilation of the 2019 ABA 509 Reports of law schools within the University of California legal education system: UC Irvine, UCLA, UC Davis, and UC Berkeley.<sup>33</sup> California alone is home to at least 280,000 Native Hawaiians.<sup>34</sup> Of these, the data shows that only one has been admitted to UC law schools from 2017–2019. The data and admission stats reported to

31. See Adam McCann, *Most & Least Diverse States in America*, WALLETHUB (Sept. 9, 2020) <https://wallethub.com/edu/most-least-diverse-states-in-america/38262>.

32. See *Regents Policy 4400: Policy on University of California Diversity Statement*, UNIV. CAL. BD. REGENTS (2010).

33. UNIV. CAL. BERKELEY, *supra* note 8; UNIV. CAL. DAVIS, CALIFORNIA-DAVIS, UNIVERSITY OF - 2019 STANDARD 509 INFORMATION REPORT 2 (2020); UNIV. CAL. IRVINE, CALIFORNIA-IRVINE, UNIVERSITY OF - 2019 STANDARD 509 INFORMATION REPORT 2 (2019); UNIV. CAL. L.A., CALIFORNIA-LOS ANGELES, UNIVERSITY OF 2019 STANDARD 509 INFORMATION REPORT 2 (2019)

34. *2010 Census Shows More than Half of Native Hawaiians and Other Pacific Islanders Report Multiple Races*. U.S. CENSUS BUREAU NEWSROOM (May 8, 2012), [www.census.gov/newsroom/releases/archives/native\\_hawaiian/cb12-83.html](http://www.census.gov/newsroom/releases/archives/native_hawaiian/cb12-83.html).

the ABA shows that Hawaiians have an admissions rate of 0.00035 percent, demonstrating a pattern and practice of racial and ethnic exclusions within the University of California law schools.

The University of California Mission Statement identifies the distinctive mission of the University as “serv[ing] society as a center of higher learning, providing long-term societal benefits through transmitting advanced knowledge, discovering new knowledge, and functioning as an active work repository of organized knowledge. The obligation, more specifically, includes undergraduate education, graduate and professional education, research, and other kinds of public service, which are shaped and bound by the central pervasive mission of discovering and advancing knowledge.”<sup>35</sup>

UC law schools and others are seeking to alter the long and dark narrative of Hawaiians facing exclusion, discrimination, and lack of inclusion. Native Hawaiians may have lower scores in standardized tests and traditional grading as they are dependent on one of the worst education systems in the country and are plagued by many societal ills compromising the ability to secure a standard educational experience. Rather than perpetuating standardized testing and barriers to education, institutions should create holistic pathways to alleviate the historic and unfair disadvantages faced by an entire race and culture.<sup>36</sup> Institutions must acknowledge shortcomings in admission practices that have long excluded Native Hawaiians, and meaningfully enable a more holistic admissions and education process for Native Hawaiians that accounts for the educational, financial, and social aspects of their personal histories.

### III. NATIVE HAWAIIANS: PLAGUED BY CHRONIC HEALTH HAZARDS, DISPROPORTIONATE INCARCERATION, HIGH RATES OF TEEN SUICIDE, AND DISPROPORTIONATE COVID-19 IMPACT

The financial challenges that face Native Hawaiians are only the tip of the iceberg when it comes to unique struggles of this population. They are plagued by chronic physical and mental health challenges, which often are related to the other, are incarcerated at a far greater rate than other races, experience frighteningly high rates of adolescent suicides, and most recently have been impacted disproportionately by the coronavirus pandemic.

In the profile created on Native Hawaiians/Pacific Islanders, the U.S. Department of Health and Human Services states, “it is significant to note

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35. *UC's Mission*, UNIV. CAL. OFF. PRESIDENT (quoting UNIV. CAL. OFF. PRESIDENT, UNIVERSITY OF CALIFORNIA ACADEMIC PLAN 5 (1974–78)), <https://www.ucop.edu/uc-mission>.

36. See Katherine Poythress, *Hawaii Students Score Lower Than Peers on SAT Honolulu CIVIL BEAT* (Sept. 14, 2011), <https://www.civilbeat.org/2011/09/12851-hawaii-students-score-lower-than-peers-on-sat/>; see also Ormond W. Hammond, Melly Wilson, and Corrin Barros, *Comparing the Achievement Patterns of Native Hawaiian and Non-Native Hawaiian Grade 8 Students in Reading and Math*, Nat. Ctr. for Educ. Evaluation and Regional Assistance – Inst. of Educ. Sci., (Dec. 2011). <https://files.eric.ed.gov/fulltext/ED530804.pdf>.

that in comparison to other ethnic groups, Native Hawaiians/Pacific Islanders have higher rates of smoking, alcohol consumption, and obesity. This group also has less access to cancer prevention and control programs. Leading causes of death among Native Hawaiians/Pacific Islanders are cancer, heart disease, stroke and diabetes. Other health conditions and risk factors that are prevalent among Native Hawaiians/Pacific Islanders are hepatitis B, HIV/AIDS, and tuberculosis. The tuberculosis rate is 38 times higher for Native Hawaiians/Pacific Islanders, with an incidence rate of 19.1, as compared to 0.5 for the white population.”<sup>37</sup>

During the Covid-19 pandemic, Native Hawaiians are particularly susceptible to the virus because of certain physical health factors specific to the population and Hawai'i is one of the nation's worst places for racial disparities among Covid-19 victims.<sup>38</sup>

The Centers for Disease Control (CDC) has compiled a list of traits that would make one at an increased risk of severe illness from Covid-19. Since this is a relatively new virus, it is not fully understood and as such the following should not be considered an exhaustive list. Nonetheless, the current list includes factors like obesity (defined as a body mass index [BMI] of 30 or higher), serious heart conditions (including heart failures, coronary artery disease, or cardiomyopathies), and type 2 diabetes mellitus.<sup>39</sup> Cardiovascular disease, diabetes, and obesity are key features of what is now referred to as the “cardiometabolic syndrome,” which disproportionately affects racial/ethnic minority populations, including Native Hawaiians.<sup>40</sup> Native Hawaiians have also been found to have a diabetes mortality rate that is 3-times higher than Whites.<sup>41</sup> In addition, the prevalence of overweight/obesity is measured at 82 percent, which is substantially higher than the national prevalence of 53 percent.<sup>42</sup> While studies have been undertaken to attempt to eliminate cardiometabolic health disparities, the vulnerability of this population has been

37. *Profile: Native Hawaiians/Pacific Islanders*, U.S. DEP'T HEALTH HUM. SERV. OFF. MINORITY HEALTH (Jan. 31, 2020), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=65>.

38. See Gina Mangieri, *Hawaii among nation's worst for COVID racial disparity*, KHON2 (July 8, 2020), <https://www.khon2.com/coronavirus/hawaii-among-nations-worst-for-covid-racial-disparity>.

39. *People with Certain Medical Conditions*, CTR. DISEASE CONTROL & PREVENTION, (Nov. 2, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html).

40. Marjorie K. Mau et al., *Cariometabolic Health Disparities in Native Hawaiians and Other Pacific Islanders*, 31 EPIDEMIOLOGIC REV. 113, 113 (2009).

41. Florentina R, Nguyen D, Huang T. In: 2001–2003 State of Hawaii by Ethnicity - Hawaiian Behavioral Risk Factor Surveillance System. Health HSDo, editor. Honolulu: 2004.

42. A. Grandinetti, Chang, H.K. Chang, R. Chen, et al., *Prevalence of overweight and central adiposity is associated with percentage of indigenous ancestry among native Hawaiians.*, INT. J. OBES. 23, 733–737 (1999). <https://doi.org/10.1038/sj.ijo.0800921>

highlighted during the coronavirus as critical health issues unique to their racial background are identified as high risk factors to Covid-19.

Congressional investigation has also found that NHPI students are disproportionately represented in negative social and physical statistics that were indicative of special educational needs. They also are known to suffer high rates of suicide,<sup>43</sup> incarceration,<sup>44</sup> homelessness,<sup>45</sup> and lack of education.<sup>46</sup>

Subsequently, the Hawaiian Education Act was formed to “supplement and expand programs and authorities in the area of education to further the purposes of this title; and encourage the maximum participation of Native Hawaiians in planning and management of Native Hawaiian education programs.”<sup>47</sup> In doing so, the Education Council was formed, consisting of 21 members.<sup>48</sup> Of these, 10 were ordered to be Native Hawaiians or Native Hawaiian education consumers.<sup>49</sup> The Act also established Native Hawaiian education island councils, identifying special needs of Native Hawaiian students with disabilities, forming educational, psychological and developmental activities designed to assist in students’ educational progress, and activities to enhance beginning reading and literacy in either the Hawaiian or English language among Native Hawaiian students in K-3<sup>rd</sup> grades.<sup>50</sup>

#### IV. HOPE ON THE HORIZON: LONG-OVERDUE REFORM IN THE HAWAIIAN SOCIAL AND CRIMINAL JUSTICE SYSTEM

In spite of these numerous challenges, there is some faint glimmer of hope on the horizon as hints of reform have begun emerging in the Hawaiian social and criminal justice systems. These reforms are long overdue, but fortunately new commissions are being formed that will strive to resolve the myriad of social justice problems facing Native Hawaiians today. The high rates of incarceration for Native Hawaiians are particularly challenging, as more people are locked away at a disproportionate rate. The high cost of living adds an additional challenge to the success of Native Hawaiians, as one must recall the previously mentioned income gap between Native Hawaiians and non-Hispanic whites. Although the problems are troubling, it is promising

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43. See Noelle Y.C. Yuen, Linda B. Nahulu, Earl S. Hishinuma, Robin H. Miyamoto, *Cultural Identification and Attempted Suicide in Native Hawaiian Adolescents*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, 360, 360–367 (2000).

44. See *Criminal Justice*, OFF. HAWAIIAN AFF. (Feb. 7, 2019), <https://www.oha.org/criminaljustice>.

45. See Christina Jedra, *Hawaii Is No Longer No. 1 For Homelessness. New York Is Worse*, HONOLULU CIVIL BEAT (Jan. 9, 2020), <https://www.civilbeat.org/2020/01/hawaii-is-no-longer-no-1-for-homelessness-new-york-is-worse>.

46. See Adam McCann, *2020’s States with the Best & Worst School Systems*, WALLETHUB (July 27, 2020), <https://wallethub.com/edu/e/states-with-the-best-schools/5335>.

47. See Native Hawaiian Education Act, 20 U.S.C. § 7511–7517 (2015), <http://www.nhec.org/about-nhec/the-native-hawaiian-education-act>.

48. *Id.*

49. *Id.*

50. *Id.*

to see government bodies at last taking notice of these generational issues by making reformation efforts.

In addressing crime rates, it is critical to look at the social context of the area. Hawai'i has the second highest rate of homelessness in the United States.<sup>51</sup> A quote from a former pa'ahoa, k ne, states "Hawaiians can't even afford their own land. All these homeless people, most of 'em is Hawaiians. And when they do build low income housing, they live on welfare . . . and they don't even come close to qualifying for land. It's b.s. Being homeless drive Native Hawaiians to do lots of criminal activities just to survive."<sup>52</sup>

The Office of Hawaiian Affairs discovered in 2018 that all jails in Hawai'i, except for the Women's Community Correctional Facility, were overcrowded and operating over capacity by at least 27 percent, and in more cases 50–85 percent.<sup>53</sup> This was far from being a one-time finding. By tracking the number of people incarcerated in state prisons per 100,000 people in the state from 1978–2015, the Prison Policy Initiative found that the rate of imprisonment in the state has grown dramatically in the last 40 years from 125 to 487 persons per 100,000.<sup>54</sup> The Prison Policy Initiative produces "cutting edge research to expose the broader harm of mass criminalization, and then sparks advocacy campaigns to create a more just society."<sup>55</sup> In fact, the incarceration rate within the state itself stands out in comparison to other countries: Hawai'i with 487 persons compared to the United Kingdom at 139 or the Netherlands at 59.<sup>56</sup> Not only does overcrowding have historical basis, it is also known that this overcrowding is composed primarily of Native Hawaiians. Data indicates that Native Hawaiians and Pacific Islanders are the majority of the prison and jail population in Hawai'i at 39 percent, a significant jump from the next highest sector of the population at 23 percent.<sup>57</sup>

Disproportional incarceration of Native Hawaiians is driving long overdue changes in the Hawaiian justice system with the creation of state prison oversight commission, which includes the Honorable Michael Town. Judge Town retired from the bench in 2010 after serving for more than 30 years as a trial judge, 14 of which was spent as a family court judge and 16 as a Circuit Court judge.<sup>58</sup> This commission was formed in 2019 to help fix

51. Jedra, *supra* note 45.

52. Off. Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System*, [https://www.oha.org/wp-content/uploads/2014/12/ir\\_final\\_web\\_rev.pdf](https://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf).

53. *Id.*

54. See *Hawaii Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/HI.html> (last visited Aug. 28, 2020).

55. See *About*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/about.html>, (last visited Feb. 24, 2021).

56. *Hawaii Profile*, *supra* note 54.

57. *Id.*

58. See Yoohyun Jung, *Retired Judge Appointed To Prison Oversight Commission*, HONOLULU CIVIL BEAT (Sept. 6, 2019), <https://www.civilbeat.org/beat/retired-judge-appointed-to-prison-oversight-commission>.

Hawai'i's broken jails and prisons.<sup>59</sup> The disproportionately incarcerated are further harmed and disadvantaged as they lack Native Hawaiian counsel who are familiar with their history, language, culture, homelessness, mental health struggles, lack of education, and other conditions that are unique to the Native Hawaiian Experience. With incarceration rates disproportionately impacting Native Hawaiians, the state may well be incarcerating the very individuals who could have provided legal counsel.

On prison reform and the decades of apathy against the plight of the Native Hawaiians, Judge Town has said, "I'm tired of hearing the violin played while Rome is burning."<sup>60</sup> The phrase "Rome is burning" is often used to criticize the practice of apathetically occupying oneself with trifling matters and refusing to devote attention to priorities during times of crisis.<sup>61</sup> The presence of sympathetic policymakers like Town indicate that there is some hope for the creation of a stronger and safer future for Native Hawaiians. It also demonstrates the depth and danger of the Hawaiian criminal justice system: without immediate and effective change, people will die.

The Hawaiian incarceration rates are perhaps the most critical factor in why Native Hawaiians must be admitted to legal education in greater numbers. Native Hawaiian lawyers are in a unique position of advocacy because they are able to better understand the language, culture, customs, homelessness, and poverty factors that come together to make up the Native Hawaiian experience. However, if they are not admitted to law schools, the system continues to function against the NHPI population.

## V. LONG OVERDUE CHANGES NEEDED AT TOP-TIER UNIVERSITIES AND SCHOOLS: ERADICATION OF THE RACIALIZATION OF NATIVE HAWAIIANS IN STANDARDIZED TESTING AND ADMISSION PRACTICES

The California Legal Studies Journal summarized the issues with standardized testing across professional degrees when it declared "standardized testing, in particular, is a codified method of selection coated with fallacies of impartiality and equity, that seeks to treat those unable to afford the luxuries of private tutoring and prep courses with the same attitude of those who engineered the social hierarchy."<sup>62</sup>

To attain admission to a graduate studies programs, students must submit standardized test and GPA scores. This can be the GRE, LSAT, MCAT,

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59. See Yoohyun Jung, *Hawaii Prison Oversight Commission: 'Maybe We've Been Forgotten'*, HONOLULU CIVIL BEAT (July 9, 2020), <https://www.civilbeat.org/2020/07/hawaii-prison-oversight-commission-maybe-weve-been-forgotten>.

60. See Kevin Dayton, *Inmates Are Released As COVID-19 Spreads Inside Hawaii's Largest Jail*, HONOLULU CIVIL BEAT (Aug. 20, 2020), <https://www.civilbeat.org/2020/08/inmates-are-released-as-covid-19-spreads-inside-hawaii-s-largest-jail>.

61. *Rome Is Burning*, YOUTH FRONTIERS (Oct. 30, 2014), <https://www.youthfrontiers.org/rome-is-burning>.

62. See Viktorya Saroyan, *How Standardized Testing Perpetuates Academic Gatekeeping*, 1 CAL LEGAL STUD. J. 7 (2020), <http://legalstudies.berkeley.edu/wp-content/uploads/2020/06/blsa-2020-1-2.pdf#page=7>.

GMAT, or others.<sup>63</sup> While these have been put into place as a generalized test for determining academic potential, they have also been discovered to be yet another means of excluding the NHPI population. Standardized tests, and especially the GRE are considered “heavily weighted sources of information in admission decisions for many departments.”<sup>64</sup> The LSAT has been called “the single most important component of your [law school] application.”<sup>65</sup>

It has been argued that the use of GRE scores in graduate admissions could be a strong driver behind the continual underrepresentation of women and minorities in graduate school.<sup>66</sup> Native Hawaiians in particular, struggle with feelings of inferiority, tokenism, and marginalization as one of the few students of their ethnic background in STEM degree programs.<sup>67</sup> This suggests that there may be a flaw in the process by which graduate school students are admitted, and notably who is not admitted through that process.

What is true in STEM fields mimics the legal field when it comes to standardized testing and representation. LSATs have been shown to be biased against minorities, which then translates to less overall diversity within the field as LSAT scores have such weight in determining admittance and thus overall ranking.<sup>68</sup>

Cal Law Review authors assert that “the LSAT mirrors and magnifies racial and ethnic differences in educational attainment.”<sup>69</sup> Consequently, expectations of LSAT and GPA scores must be relaxed for NHPI in recognition of unique exclusions in order to bypass this magnification of differences in educational attainment. For example, putting less weight on a few points difference on standardized testing results. It may not be necessary to do away with the exams altogether, but rather to recognize the personal contexts of test takers and making admissions decisions accordingly. Former LSAC president Philip D. Shelton said the LSAT is “good—but not *that* good” as predictor of future performance based on existing skill.<sup>70</sup> It is not suggested

63. GRE stands for Graduate Record Examination. LSAT: Law School Admission Test. MCAT: Medical College Admission Test. GMAT: Graduate Management Admission Test.

64. See Nathan R. Kuncel, Deniz S. Ones & Sarah A. Hezlett, *A comprehensive meta analysis of the predictive validity of the Graduate Record Examinations: Implications for graduate student selection and performance*, PSYCHOL. BULL., 127:162–181 (2001).

65. See Joshua Craven, *How Important Is The LSAT?*, LAWSCHOOLI (June 28, 2013), <https://lawschooli.com/how-important-is-the-lsat>.

66. Casey Miller & Keivan Stassun, *A Test That Fails*, 510 NATURE 303, 303–304 (2014).

67. See Franklin S. Allaire, *Navigating Uncharted Waters: First-Generation Native Hawaiian College Students in STEM*, 21 J. OF COLL. STUDENT RETENTION: RES., THEORY & PRAC. 305, 305–25 (2017).

68. Paul F. Kirgis, *Race, Rankings, and the Part-Time Free Pass*, 54 J. LEGAL EDUC. 395, 395–405 (2004).

69. William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving ‘Elite’ College Students*, 89 CAL. L. REV. 1055, 1055–1124:1055 (2001).

70. Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN’S L. REV. 107, 107–149 (2006).

that there is motive to intentionally exclude NHPIs from a formal legal education, but the results of the relationship between LSAT examination scoring and law school admission rates are proven to be grossly unfair and inaccurate to Native Hawaiians.

#### VI. NATIVE HAWAIIAN INCLUSIVITY: INSTITUTIONS MUST ELIMINATE EXCLUSIONARY PRACTICES AND ENABLE A BETTER FUTURE FOR NATIVE HAWAIIANS

Harvard University has defined inclusive excellence as “[a] community that draws on the widest possible pool of talent to unify excellence and diversity. One that fully embraces individuals from varied backgrounds, cultures, races, identities, life experiences, perspectives, beliefs, and values.”<sup>71</sup> This standard is one that is admittedly difficult to attain. However, Harvard’s Office for Diversity, Inclusion & Belonging “facilitates the collective decision making and localized implementation process in our pursuit of sustainable inclusive excellence. These efforts, working with stakeholders and partners across the institution, will exponentially grow the impact of diversity, inclusion, and belonging (DIB) work across Harvard.”<sup>72</sup> Harvard’s actions are notable because they focus on material, tangible planning to instigate their goals and ensure their success. Although there is still significant progress to be made, Harvard’s status as one of the only top 10 law schools to admit Native Hawaiians/Pacific Islanders demonstrates progress towards their diversity aims. It is no longer enough to simply state that diversity is important to an institution, but rather to have measurable, visible progress towards meeting diversity and inclusivity goals.

It has been demonstrated that all scholars benefit from a diverse population, comprised of both students and faculty.<sup>73</sup> However, Native Hawaiian presence is still strikingly absent from higher education, as shown by the data from 509 Reports and Association of American Medical Colleges.<sup>74</sup> The President of NYU, President Andrew Hamilton, released a statement via university email to compel its recipients to “redouble our exertions to use them [reason, discourse, study, evidence, analysis] in the cause of addressing racism, xenophobia, violence, and hate to underscore social justice, human dignity, inclusion, and peace.”<sup>75</sup> This push for diversity has generated significant national conversation on the race dynamics in America recently, and

71. HARV. UNIV., *About*, HARV. DIVERSITY, INCLUSION & BELONGING, <https://dib.harvard.edu/about> (last visited Sept. 16, 2020).

72. HARV. UNIV., *Strategy*, HARV. DIVERSITY, INCLUSION & BELONGING, <https://dib.harvard.edu/about> (last visited Sept. 16, 2020).

73. *Id.*

74. *Id.*

75. Full quote: “But reason, discourse, study, evidence, analysis—those are our tools, and events like the killing of George Floyd should not cause us to set them aside, but instead to redouble our exertions to use them in the cause of addressing racism, xenophobia, violence, and hate to underscore social justice, human dignity, inclusion, and peace.” Andrew Hamilton, 2020.

continues to gain traction. Nonetheless, these talks have happened for years and the data spells out a disappointing narrative of lack of diversity and inclusion for Native Hawaiians within American higher education.

Unintentional harm against minorities will continue without change to the barriers encountered by Native Hawaiians seeking admission to top-tier institutions and professional schools. It is fair to and important state that no motives have been undertaken to intentionally exclude Native Hawaiians from top tier educational institutions and professional education at American institutions. However, the data and results are alarming and demonstrate a grossly unfair process denying educational opportunity to an entire race and culture. It is time institutions and universities acknowledge the existing barriers created by entrenched practices such as the heavy reliance on standardized testing that has proven to be biased and unfair, and to move towards a fair and just process to enable Native Hawaiian to pursue higher learning in the face of the historic disparities and disenfranchisement suffered by the Native Hawaiians.

