

BLACK LIVES MATTER: ON CHALLENGING THE SOUL OF LEGAL EDUCATION

*Phil Lord**

In 2020, the Black Lives Matter movement moved to the fore. Many Americans understood for the first time that racism persists in countless aspects of American society and that the legacy of our past is deep and structural. The legal academy, and higher education more broadly, responded by hiring more racialized scholars and making curricular changes. While I salute this effort, I argue that law schools chose to take the easiest path, instead of seizing the opportunity to question, and challenge, the structure and nature of legal education. I consider the structural characteristics of legal education that contribute to the exclusion of racialized and historically marginalized groups. I conclude that meaningfully advancing equity in our law schools, and responding to the Black Lives Matter movement, will remain hindered by the structure and nature of legal education—its soul. To truly challenge the legacy of racism, we will need to challenge the soul of legal education.

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I. INTRODUCTION

2020 was a momentous year. It saw the tensions which have always defined American society laid bare, taken on, grappled with. 2020 acted as a reminder of how far we have come, and of how much still lies ahead. It reminded us that progress, however we conceive of it, is neither easy nor linear, and that we will always carry the burden of our past as we move

* Assistant Professor, Bora Laskin Faculty of Law, Lakehead University. J.D. (McGill, Dean's List), B.C.L. (McGill, Dean's List), LL.M. (McGill), FCI Arb. I wish to acknowledge my privileged position. As a cisgender settler male with a disability, I have benefitted from the structures I criticize in this piece. I am grateful to Carleton University for generous financial support.

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forward. These tensions and liminal transformations are encapsulated in the rise of the Black Lives Matter movement.

The Black Lives Matter movement finds its genesis much before 2020, ostensibly in 2013 when policeperson George Zimmerman was acquitted of murder charges for the events which led to the death of teenager Trayvon Martin.¹ The movement remained a part of the political conversation through 2020.² At first a response to the racialized use of force by police, the movement quickly positioned itself as a key interlocutor in conversations on the persistence and structural nature of racism in contemporary American society.³ In 2020, further acts of racialized violence brought these issues to the attention of farther corners of American society. Many Americans understood them for the first time—and began asking for change.⁴

As a key locus in forging individual and collective identities, higher education bore its share of the blame. Leaders in higher education, and law schools, reacted by quickly “increasing capacity”⁵ regarding critical legal studies, racialization, and other issues related to equity-seeking groups.⁶

I argue that this response, while laudable, is insufficient. Part I provides context for law schools’ response to the Black Lives Matter movement. It details how the movement came to the fore in 2020 and describes the long-standing lack of diversity that has defined the legal profession. Part II details how higher education, and law schools more specifically, responded to the Black Lives Matter movement. Part III criticizes this response. It considers the structural characteristics of legal education that contribute to the exclusion of racialized and historically marginalized groups. It concludes that meaningfully advancing equity in our law schools, and responding to the Black Lives Matter movement, will remain hindered by the structure and nature of legal education—its soul. The solutions adopted by law schools, while laudable, were the easiest path forward. These solutions limited their response to superficial change and came at the expense of a deeper effort to question, and challenge, the structure and nature of legal education. To truly

1. Jose A. Del Real et al., *How the Black Lives Matter Movement Went Mainstream*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html; Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, THE GUARDIAN (July 19, 2015), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement>; E.J. Sobo et al., *More Than a Teachable Moment: Black Lives Matter*, 27 ANTHROPOLOGY & MED. 243, 243–48 (2020), <https://doi.org/10.1080/13648470.2020.1783054>.

2. Del Real et al., *supra* note 1.

3. *Id.*; Sobo et al., *supra* note 1.

4. *See infra* Part II.A (describing how many Americans began advocating for change after the deaths of George Floyd and Breonna Taylor).

5. *See, e.g.,* McGill University Faculty of Law: Assistant Professor Position, MENDELEY, <https://www.mendeley.com/careers/job/assistant-professor-791724> (last visited Oct. 22, 2021).

6. *See infra* Part III (describing how law schools responded to the Black Lives Matter movement).

challenge the legacy of racism, we will need to challenge the soul of legal education.

II. 2020 IN CONTEXT

A. *Black Lives Matter Comes to the Fore*

2020 saw the Black Lives Matter movement come to the fore. Through 2020, the movement had been, as mentioned, a key interlocutor in conversations on the persistence and structural nature of racism in contemporary American society.⁷ In 2020, however, the movement gained significant prominence—and its stances emerged as a part of the mainstream.⁸ Many Americans became aware of the persistence and structural nature of racialized violence for the first time, and an unprecedented segment of the population actively engaged in protests.⁹ The vast majority of Americans now believe that racism and discrimination are significant problems that need to be addressed.¹⁰

The genesis of this shift in public opinion, and corresponding public outcry, is ostensibly two events of racialized violence which led to the deaths of George Floyd and Breonna Taylor. On May 25, 2020, a convenience store clerk called the police alleging that Floyd had sought to buy cigarettes with a counterfeit \$20 bill.¹¹ Floyd was choked by the knee of a police officer.¹² The police officer did not remove his knee for at least eight minutes, even after Floyd lost consciousness and an ambulance had arrived.¹³ These events, memorialized through video evidence, quickly spread through social media and led to widespread calls for action.¹⁴ Some two months before, white

7. See Del Real et al., *supra* note 1; Sobo et al., *supra* note 1.

8. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>. The authors undertake a detailed analysis of the statistics regarding the number of Americans who participated in protests and the shift in public opinion regarding racialized violence. They also position the protests in relative magnitude and appeal. See also Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> (discussing the twenty-six-point shift (from 50% to 76%) between 2015 and 2020 in the percentage of Americans who consider racism and discrimination a “big problem”).

9. Buchanan et al., *supra* note 8; Cohn & Quealy, *supra* note 8.

10. Cohn & Quealy, *supra* note 8.

11. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (undertaking a detailed analysis of the video evidence regarding the events that led to Floyd’s death).

12. *Id.*

13. *Id.*

14. Erika D. Smith, *2020 Was the Year America Embraced Black Lives Matter as a Movement, Not Just a Moment*, L.A. TIMES (Dec. 16, 2020), <https://www.latimes.com/california/story/2020-12-16/black-lives-matter-protests-george-floyd-coronavirus-covid-2020>; Jenna Wortham, *A ‘Glorious Poetic Rage’*,

plainclothes police officers forcefully entered Breonna Taylor’s home pursuant to a warrant.¹⁵ Police suspected that Taylor’s home had been used by her prior spouse in drug transactions.¹⁶ Taylor and her new spouse were in bed, sleeping.¹⁷ Her spouse took his gun, ostensibly not knowing the individuals were policepersons.¹⁸ Multiple shots were fired, and Taylor was pronounced dead at the scene.¹⁹ The events that led to the deaths of George Floyd and Breonna Taylor made many Americans understand for the first time that racialized violence persists—and often unpunished.²⁰ The long-standing statistics on the greater risks that racialized Americans face made their way into the collective psyche through these concrete situations and images.²¹

In response to these events, an unprecedented number of Americans began actively advocating for change.²² Millions quickly shared their outrage on social media.²³ A historical proportion of Americans engaged in protests.²⁴ Over a two-week period, each state and the District of Columbia saw at least one protest.²⁵ Up to 10% of Americans participated in these protests just in June of 2020—significantly more than participated in civil rights marches.²⁶ Research shows political protests aimed at unseating governments generally succeed when 3.5% of the population engages in protests.²⁷ More

N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/sunday-review/black-lives-matter-protests-floyd.html>.

15. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See Buchanan et al., *supra* note 8; Cohn & Quealy, *supra* note 8; Smith, *supra* note 14; Wortham, *supra* note 14. Wortham notes: “[After Floyd’s death,] more than eight million tweets tagged with #BlackLivesMatter were posted on [Twitter]. By comparison, on Dec. 4, 2014, nearly five months after Eric Garner died at the hands of a police officer on Staten Island, the number of tweets tagged with #BlackLivesMatter peaked at 146,000.” Wortham, *supra* note 14; see also Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (June 9, 2020), <https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> (noting the disparate ratio of fatal shootings by police to secured convictions); German Lopez, *Police Officers Are Prosecuted for Murder in Less than 2 Percent of Fatal Shootings*, VOX (Dec. 14, 2020), <https://www.vox.com/21497089/police-prosecutions-black-lives-matter-breonna-taylor-george-floyd>. Both articles refer to Professor Philip M. Stinson’s (unpublished) dataset on police prosecutions, the most comprehensive such data set.

21. See Frank Edwards et al., *Risk of Being Killed by Police Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16794 (2019); Stephen A. Schwartz, *Police Brutality and Racism in America*, 16 EXPLORE 280, 281 (2020).

22. Wortham, *supra* note 14.

23. *Id.*

24. Buchanan et al., *supra* note 8.

25. Del Real et al., *supra* note 1.

26. Buchanan et al., *supra* note 8. Although this is not acknowledged by the scholars cited in the piece, it is worth acknowledging that the risk inherent to participating in civil rights marches was arguably more significant than the risk inherent to participating in Black Lives Matter protests.

27. Erica Chenoweth, *Questions, Answers, and Some Cautionary Updates Regarding the 3.5% Rule*,

importantly, an unusually broad and diverse segment of the population engaged in these protests, including Americans in rural and majority-white counties.²⁸ Support for the Black Lives Matter movement quickly shifted twenty-six points, to 76%.²⁹ This shift, in magnitude and timeline, has no recorded analog in recent history.³⁰ It is not (fully) explained by what political scientists call the thermostatic effect—the expected shift in public opinion toward political positions supported by out-of-power parties.³¹ Perhaps in part as a result of inappropriate comments by then-United States President Donald Trump on incidents of violence and looting during Black Lives Matter protests,³² the movement also drew support from leaders across the political spectrum.³³

The police officer, Derek Chauvin, was subsequently charged.³⁴ He was incarcerated both before his trial and while awaiting sentencing, and in June 2021, he was sentenced to twenty-two years in prison.³⁵ The judge cited two aggravating factors: the fact that Chauvin acted in a cruel manner, and that he “had abused his authority as an officer of the law.”³⁶ While it is rare for officers to be convicted of murder, even with video evidence, Chauvin’s sentence is equivalent to the average sentence for police officers in murder cases.³⁷

Another incident of racialized violence attracted media coverage and public outcry during the trial of Chauvin.³⁸ Some ten miles away from the courthouse, twenty-year-old Daunte Wright was shot dead by a female police

CARR CTR. 1 (Apr. 2020), https://carrcenter.hks.harvard.edu/files/cchr/files/CCDP_005.pdf.

28. Buchanan et al., *supra* note 8.

29. Cohn & Quealy, *supra* note 8.

30. *Id.*

31. K. Elizabeth Coggins et al., *Beyond the Thermostat: A Theory of Public Opinion Change* (unpublished manuscript) (on file with the University of North Carolina at Charlotte), <https://pages.uncc.edu/mary-atkinson/wp-content/uploads/sites/619/2014/02/BeyondThermostat.pdf> (last visited Oct. 22, 2021). As an example, in the United States, this shift would favor the views supported by the Democratic Party during a Republican presidency on key political issues, such as gun control and abortion.

32. *Twitter Hides Trump’s ‘When the Looting Starts, the Shooting Starts’ Tweet for Glorifying Violence*, NAT’L POST (May 29, 2020), <https://nationalpost.com/news/world/twitter-hides-trumps-when-the-looting-starts-the-shooting-starts-tweet-for-glorifying-violence>; Michael Wines, *‘Looting’ Comment from Trump Dates Back to Racial Unrest of the 1960s*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/looting-starts-shooting-starts.html>.

33. Del Real et al., *supra* note 1.

34. See Tim Arango, *Derek Chauvin is Sentenced to 22 and a Half Years for Murder of George Floyd*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/derek-chauvin-22-and-a-half-years-george-floyd.html>.

35. *Id.*

36. See *id.*

37. *Id.*; Mark Berman, *How Derek Chauvin Became the Rare Police Officer Convicted of Murder*, WASH. POST (Apr. 20, 2021, 9:53 PM), <https://www.washingtonpost.com/nation/2021/04/20/chauvin-police-officer/>.

38. *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>.

officer during a routine traffic stop.³⁹ According to the police, he was pulled over due to expired registration tags.⁴⁰ The police officer then found a warrant for his arrest and sought to detain him.⁴¹ Per the body camera footage, as Wright stepped into his car, the officer yelled “taser” before shooting him in the chest and stating: “I just shot him.”⁴² Police Chief Tim Gannon believes she meant to use her taser gun but accidentally shot him instead.⁴³ According to Wright’s mother, whom he was speaking to when he got pulled over, he believed he was being pulled over because he had “air fresheners hanging from his rearview mirror.”⁴⁴ Wright’s death resulted in a four-day protest outside the Brooklyn Police Department in Minnesota, with several incidents of violence and looting.⁴⁵ The officer was subsequently arrested and charged with manslaughter.⁴⁶

B. Diversity and Equity in the Legal Profession

Needless to say, the rise of the Black Lives Matter movement also echoed in the legal academy. As discussed in the next section, although many aspects of contemporary American society were (or would be) questioned and challenged in the wake of the Black Lives Matter movement, the legal academy—and higher education more generally—proactively sought to respond by acknowledging the underrepresentation of racialized and marginalized groups in faculty positions and by making swift and significant adjustments in their recruitment processes.

Although it may more generally be wise to proactively respond to and show support for the Black Lives Matter movement—before it brings scrutiny and potential outcry, the legal academy was likely acutely aware of the singularly persistent lack of diversity in the legal profession. The change in public opinion brought about by the Black Lives Matter movement would undoubtedly eventually bring more robust and pressing calls for lasting, structural change.

According to statistics from the American Bar Association, only 4.6% of U.S. lawyers were African-American in 2008.⁴⁷ This percentage had grown to approximately 5.5% of the profession in 2018.⁴⁸ African-Americans

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Household Data Annual Averages, Lawyers*, A.B.A. 210 (Aug. 5, 2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/cpsaat11.pdf.

48. Philip Lee, *IILP Review 2019–2020: The State of Diversity and Inclusion in the Legal*

remain significantly underrepresented in the legal profession: as of 2010—when the last U.S. census was conducted—some 13% of Americans were African-American.⁴⁹

Other equity-seeking groups similarly remain underrepresented. Also in 2010, 13% of Americans were Hispanic or Latino,⁵⁰ and 5.6% were Asian-American.⁵¹ From 2010 to 2018, the percentage of attorneys identifying as Asian-American grew from 4.3% to 4.9%.⁵² The percentage of attorneys identifying as Hispanic or Latino grew from 3.4% to 6.1%.⁵³ In 2010, 18.7% of Americans identified as persons with disabilities.⁵⁴ From 2016 to 2020, the percentage of attorneys who identify as persons with disabilities grew from 0.38% to 0.88%.⁵⁵ This figure means that, in 2020, the National Association for Law Placement found only 602 attorneys with disabilities in the United States.⁵⁶

The number of minority law students entering the legal profession increased from 7% to 8% between 2010 and 2014.⁵⁷ While the number of students entering the profession has grown, attrition has increased as well, with about half of lawyers of color leaving within their first three years of employment at major law firms.⁵⁸

Profession, INST. FOR INCLUSION IN THE LEGAL PRO. 13, 18, https://theilp.wildapricot.org/resources/Documents/ILP_2019_FINAL_web.pdf (last visited Oct. 22, 2021) (describing the demographics of the profession); see also *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf (last visited Oct. 22, 2021) (showing the ten-year growth in the number of African-American lawyers).

49. Sonya Rastogi et al., *The Black Population: 2010*, 2010 CENSUS BRIEFS (Sept. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

50. Sharon R. Ennis et al., *The Hispanic Population: 2010*, 2010 CENSUS BRIEFS (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

51. Elizabeth M. Hoeffel et al., *The Asian Population: 2010*, 2010 CENSUS BRIEFS (Mar. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf>.

52. Lee, *supra* note 48, at 18; see also A.B.A., *supra* note 48, at 4 (showing the ten-year growth in the number of Asian-American attorneys).

53. Lee, *supra* note 48, at 18; see also A.B.A., *supra* note 48, at 4 (showing the ten-year growth in the number of Hispanic/Latino attorneys).

54. Matthew W. Brault, *Americans with Disabilities: 2010*, CENSUS BRIEFS 4 (July 2012), <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf>.

55. See *2016 Report on Diversity in U.S. Law Firms*, NALP 16 (Jan. 2017), <https://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf>; *2020 Report on Diversity in U.S. Law Firms*, NALP 30 (Feb. 2021), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf.

56. NALP, *supra* note 55, at 30. The data also shows significant pay gaps. See, e.g., Jeffrey A. Lowe, *2016 Partner Compensation Survey*, MAJOR, LINDSEY & AFRICA 9 (2016), <https://law.yale.edu/sites/default/files/area/departments/cdo/document/2016-partner-compensation-survey-web.pdf> (finding that African-American (catalogued as “Black”) partners at U.S. law firms earn \$797,000 on average, while Caucasian (catalogued as “White”) partners earn \$876,000 on average). The same exercise cannot be conducted with members of the LGBT+ community, as the United States census does not include data on the number of individuals who identify as part of the community.

57. A.B.A., *supra* note 48.

58. Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 874 (2018).

The lack of diversity in the upper echelons of the legal profession had long drawn intensifying criticism from members of the profession, especially in-house counsel at large companies.⁵⁹ These in-house legal departments are usually more diverse than prominent law firms and are their main clients.⁶⁰ A survey of articles from the popular blog, *Above the Law*, dedicated to issues facing the legal profession, demonstrates the growing discontent in the legal profession with persistently homogeneous partner classes and underrepresentation of minority groups.⁶¹ More recently, some remarked that several prominent firms simply stopped issuing press releases with the names and pictures of their newly elected partners, arguably because doing so would have drawn attention to their homogeneity.⁶²

In 2019, many in the legal profession criticized Paul, Weiss, Rifkind, Wharton & Garrison LLP's partner class.⁶³ Of the twelve attorneys, eleven

59. Ruiqi Chen, *Companies Want Lawyer Diversity, But Firms Lack Set Standard*, BLOOMBERG L. (Feb. 12, 2021, 12:00 PM), <https://news.bloomberglaw.com/business-and-practice/companies-want-lawyer-diversity-but-no-set-standard-for-firms>.

60. *Id.*

61. Kathryn Rubino, *Helping Biglaw Get Serious About Diversity*, ABOVE THE L. (Feb. 26, 2021, 1:44 PM), <https://abovethelaw.com/2021/02/helping-biglaw-get-serious-about-diversity/>; Joe Patrice, *Yale Law Journal's Diversity Problems . . . Just as Bad as the Last Time We Checked In*, ABOVE THE L. (Feb. 19, 2021, 12:45 PM), <https://abovethelaw.com/2021/02/yale-law-journals-diversity-problems-just-as-bad-as-the-last-time-we-checked-in/>; Staci Zaretsky, *Black Biglaw Partner isn't Buying into the Latest In-House BS on Law Firm Diversity*, ABOVE THE L. (Jan. 30, 2019, 3:42 PM), <https://abovethelaw.com/2019/01/black-biglaw-partner-isnt-buying-into-the-latest-in-house-bs-on-law-firm-diversity/>; Christine A. Rodriguez, *Should We Leave the Issue of Diversity in the Hands Of Biglaw?*, ABOVE THE L. (Nov. 10, 2017, 2:00 PM), <https://abovethelaw.com/2017/11/should-we-leave-the-issue-of-diversity-in-the-hands-of-biglaw/>; Renwei Chung, *For the Legal Profession, Diversity Dies Without Inclusion*, ABOVE THE L. (Mar. 3, 2017, 3:44 PM), <https://abovethelaw.com/2017/03/for-the-legal-profession-diversity-dies-without-inclusion/>; Renwei Chung, *Implicit Bias: The Silent Killer of Diversity in the Legal Profession*, ABOVE THE L. (Feb. 6, 2015, 11:02 AM), <https://abovethelaw.com/2015/02/implicit-bias-the-silent-killer-of-diversity-in-the-legal-profession/>; Staci Zaretsky, *Top Biglaw Firm Celebrates Inclusiveness with New Partner Class That's 75 Percent Diverse*, ABOVE THE L. (Feb. 22, 2021, 1:13 PM), <https://abovethelaw.com/2021/02/top-biglaw-firm-celebrates-inclusiveness-with-new-partner-class-thats-75-percent-diverse/>; David Lat, *Sullivan & Cromwell's New Partners: Impressive, Yes; Diverse, Not So Much*, ABOVE THE L. (Nov. 22, 2016, 12:51 PM), <https://abovethelaw.com/2016/11/sullivan-cromwells-new-partners-impressive-yes-diverse-not-so-much/>; David Lat, *Cleary Gottlieb's New Partner Class: Where Are the Women?*, ABOVE THE L. (Nov. 8, 2016, 6:43 PM), <https://abovethelaw.com/2016/11/cleary-gottliebs-new-partner-class-where-are-the-women/2/>.

62. Joe Patrice, *If A Biglaw Firm Falls in the Woods and No One Issues a Press Release About its Lack of Diversity...*, ABOVE THE L. (Feb. 20, 2019, 10:47 AM), <https://abovethelaw.com/2019/02/sullivan-if-a-biglaw-firm-falls-in-the-woods-and-no-one-issues-a-press-release-about-its-lack-of-diversity/?rf=1>.

63. Joe Patrice, *Paul Weiss Press Release Captures Everything Broken About Biglaw in One Image*, ABOVE THE L. (Dec. 11, 2018, 12:16 PM), <https://abovethelaw.com/2018/12/paul-weiss-press-release-captures-everything-broken-about-biglaw-in-one-image/?rf=1>; Mark A. Cohen, *The Paul Weiss Class of 2018: A Broader View of Big Law Partnership and Priorities*, FORBES (Feb. 7, 2019), <https://www.forbes.com/sites/markcohen1/2019/02/07/the-paul-weiss-class-of-2018-a-broader-view-of-big-law-partnership-and-priorities/?sh=5a5264351a8c>. *The New York Times* notes, in a parenthetical comment, "One of the new partners is a white male from Spain but identifies as Hispanic, the firm said." Noam Scheiber & John Eligon, *Elite Law Firm's All-White Partner Class Stirs Debate on Diversity*, N.Y. TIMES (Jan. 27, 2019),

are men, and all are white.⁶⁴ Paul Weiss was then the third most profitable law firm in the United States.⁶⁵ Significantly, Paul Weiss' partner class drew, ostensibly for the first time, more widespread media coverage.⁶⁶ Outlets such as *Forbes*⁶⁷ and the *New York Times*⁶⁸ decried the lack of diversity in Paul Weiss' partner class and the legal profession more broadly.⁶⁹ These outlets also brought these issues to the attention of broader segments of the American people.⁷⁰

The lack of diversity in the legal profession is admittedly a complex and nuanced issue.⁷¹ No one voluntarily seeks to create a climate that is less welcoming to racialized and marginalized groups. Graduating classes of American law schools, and the classes of incoming first-year associates of prominent law firms, are generally representative of the American population—at least in gender and minority group representation—although not in socioeconomic diversity.⁷² But from the moment these associates are hired to the moment some get elected to the partnership, a confluence of issues filter out most candidates from diverse and racialized backgrounds.⁷³ I have previously argued that the principal such issue is the myopic and narrow focus on profits-per-equity-partner as a measure of law firm performance.⁷⁴ In discussing the fall of Canadian law firm, Heenan Blaikie, a prominent and prestigious firm known for its lower profitability that collapsed in 2014, I noted:

[The business model of law firms] is, indeed, a very simple business model, but also one with few levers one can pull to impact profitability. Lawyers can increase their hourly rates. If clients balk at the increases, their main

<https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html>.

64. Patrice, *supra* note 63; Cohen, *supra* note 63; Scheiber & Eligon, *supra* note 63.

65. *The 2019 Global 100: Ranked by Profits Per Equity Partner*, THE AM. LAW. (Sept. 24, 2019, 5:49 A.M.), <https://www.law.com/americanlawyer/2019/09/24/the-2019-global-100-ranked-by-profits-per-equity-partner/>.

66. Cohen, *supra* note 63.

67. *Id.*

68. Scheiber & Eligon, *supra* note 63.

69. *Id.*; Cohen, *supra* note 63.

70. Scheiber & Eligon, *supra* note 63; Cohen, *supra* note 63.

71. See *infra* Part IV (discussing socioeconomic diversity); Jeannette Espinoza, *The Chilling Effect of the #MeToo Movement on Promotion of Female Law Associates: The Case for Sponsorships*, in IILP REVIEW 2019–2020: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PRO. 107, https://theiilp.wildapricot.org/resources/Documents/IILP_2019_FINAL_web.pdf (last visited Oct. 22, 2021); Faisal Bhabha, *Towards a Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 90–92 (2015); Deborah Jones Merritt & Kyle McEntee, *Gender Equity in Law School Enrollment: An Elusive Goal*, 69 J. LEGAL EDUC. 102 (2019); A.B.A., *supra* note 48.

72. See *infra* Part IV (on how law schools' focus on prestige harms equity-seeking groups); Espinoza, *supra* note 71, at 107; Bhabha, *supra* note 71, at 90–92; Merritt & McEntee, *supra* note 71.

73. Cohen, *supra* note 63; Rubino, *supra* note 61; Rhode, *supra* note 58.

74. Phil Lord, *Structural Change or Collective Amnesia?*, 57 ALTA. L. REV. 1053, 1055 (2020) (citations omitted); see also Cohen, *supra* note 63.

remaining options are to work more billable hours (thereby increasing revenue) or reduce fixed costs to increase profitability. It is a business model which seems intrinsically unfit to create the happiness which defined Heenan Blaikie. Partners, who share the firm's profits, are incentivised to work associates, who are paid fixed salaries, harder. Partners are also incentivised to work more billable hours. Recognizing the firm's paralegals and assistants, through higher wages or benefits, reduces their income.⁷⁵

The focus on profits-per-equity-partner, in a business where billable hours are the sole "product," means everyone is incentivized to work long hours.⁷⁶ That is especially true given the ever-stronger "lateral" hiring market for prominent law firm partners. Less profitable (or less profit-focused) firms are constantly at risk of losing their key partners to other, more profitable firms.⁷⁷ The impact of this incentive is particularly acute for women and racialized and marginalized groups, who bear a disproportionate burden of household, childcare, and other responsibilities in their personal lives.⁷⁸ However, the issues causing the lack of diversity in the legal profession are deeper and more complex.⁷⁹ Research shows male, white, and privileged partners are more likely to bond with individuals who look like them and share similar backgrounds.⁸⁰ This may distort the reliability of the categorization of some

75. Lord, *supra* note 74, at 1055.

76. *Id.*; see Cohen, *supra* note 63.

77. Lord, *supra* note 74, at 1056 ("Law firm profitability may be a misnomer. It hides the characteristic short-term outlook which defines law firms. While mistrust undoubtedly fueled a justifiable anxiety about the future at Heenan Blaikie, the reaction of the firm's partners to a yearly drop in profitability uncovers their limited horizon. Why did a one year, relatively minor drop in profitability make some partners want to jump ship? The main focus of law firm partners seems to be their income for the current year. Any decrease is cause to take recruiters' calls. Law firm partners seem to be less invested in their firm's future than owners of traditional businesses. They seem to view the firm as a platform upon which to build their practice, without being invested in its future growth. [. . .] Even a one-year drop in yearly profits can mean partner defections and lower resources which the firm can dedicate to attracting top talent."); see also Cohen, *supra* note 63 (discussing the lack of diversity in the legal profession).

78. See generally Phil Lord, *Work, Family and Identity*, in HANDBOOK OF RESEARCH ON REMOTE WORK AND WORKER WELL-BEING IN THE POST-COVID-19 ERA (manuscript at 7–8) (Daniel Wheatley, Irene Hardill & Sarah Buglass eds., 2021) (forthcoming), SSRN, papers.ssrn.com/sol3/papers.cfm?abstract_id=3700548 (last visited Oct. 22, 2021); Phil Lord, *The Social Perils and Promise of Remote Work*, 4 J. BEHAV. ECON. FOR POL'Y 63 (2020); see also Renwei Chung, *High Minority Attrition Rates Continue to Plague Large Law Firms*, ABOVE THE L. (Mar. 11, 2016, 1:47 PM), <https://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/> ("The hiring of African-American attorneys and law students has declined as their attrition has increased, resulting in law firms employing fewer black lawyers than they did eight years ago.").

79. See Scheiber & Eligon, *supra* note 63; U.S. EQUAL EMP. OPPORTUNITY COMM'N, DIVERSITY IN L. FIRMS 27, <https://www.eeoc.gov/special-report/diversity-law-firms> (last visited Oct. 22, 2021); Christine M. Riordan, *Diversity is Useless Without Inclusivity*, HARV. BUS. REV. (June 5, 2014), <https://hbr.org/2014/06/diversity-is-useless-without-inclusivity>; Sylvia Ann Hewlett, *Cracking the Code That Stalls People of Color*, HARV. BUS. REV. (Jan. 22, 2014), <https://hbr.org/2014/01/cracking-the-code-that-stalls-multicultural-professionals>.

80. Scheiber & Eligon, *supra* note 63; U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 79; Riordan, *supra* note 79; Hewlett, *supra* note 79.

up-and-coming associates as business generators or effective client relationship nurturers.⁸¹ It also creates a mentorship gap, as partners invest less time in mentoring associates from diverse and racialized backgrounds and afford them fewer opportunities for client contact.⁸²

Law firms have arguably been complacent in addressing these issues.⁸³ They have put in place programs and initiatives to foster diversity.⁸⁴ However, they seem to have remained unfocussed on measurable outcomes.⁸⁵ They also seemed not to feel a sense of urgency. Paul Weiss at first reacted by highlighting that it was doing better than peer firms at fostering diversity.⁸⁶ The increasing media attention to the issue, coupled with growing pressure from in-house counsel at large companies—who, as mentioned, are key purchasers of sophisticated legal services, will likely make it much harder for firms not to focus on measurable outcomes and structural change.⁸⁷

In response to the Paul Weiss announcement, GCs for Law Firm Diversity released an open letter indicating its appreciation for the firms that have promoted diversity, while criticizing firms that have not directly invested in diversity practices.⁸⁸ The organization specifically criticized minority representation in partnership classes and stated its member companies' outside counsel spending will be directed towards “those law firms that manifest results with respect to diversity and inclusion.”⁸⁹ More recently, the Global General Counsel of Coca-Cola specifically decried the lack of focus on measurable outcomes, stating: “[W]e are no longer interested

81. See, e.g., Scheiber & Eligon, *supra* note 63; see also Christine Dobby, *At Bay Street's Top Law Firms, Pay and Power Gaps Are Well-Kept Secrets – But Women Are Struggling Toward Equity*, THE GLOBE & MAIL (Feb. 6, 2021), <https://www.theglobeandmail.com/business/article-power-gap-law/> (discussing racial and gender discrimination in the legal profession).

82. See Dobby, *supra* note 81; Scheiber & Eligon, *supra* note 63; Cohen, *supra* note 63; Chung, *supra* note 78.

83. See, e.g., *Diversity and Inclusion Leaders Moving Business Forward: How Innovative Executives Are Learning from the Coronavirus Pandemic and Addressing Long-Standing Racial Disparities*, MCDERMOTT WILL & EMERY LLP, <https://www.mwe.com/about/diversity-inclusion/> (last visited Oct. 22, 2021); *Diversity*, LATHAM & WATKINS LLP (last visited Oct. 22, 2021), <https://www.lw.com/AboutUs/Diversity>; *Diversity and Inclusion*, SIDLEY AUSTIN LLP, <https://www.sidley.com/en/diversitylanding> (last visited Oct. 22, 2021); *Diversity, Equity and Inclusion*, GOODWIN (last visited Oct. 22, 2021), <https://www.goodwinlaw.com/firm/diversity-and-inclusion>; Meghan Tribe, *Orrick Partners with Startup to Pilot Diverse Pipeline Program*, BLOOMBERG L. (Feb. 12, 2021), <https://news.bloomberglaw.com/us-law-week/orrick-partners-with-startup-to-pilot-diverse-pipeline-program>.

84. See MCDERMOTT, WILL & EMERY, *supra* note 83; LATHAM & WATKINS, *supra* note 83; SIDLEY AUSTIN LLP, *supra* note 83; GOODWIN, *supra* note 83; Tribe, *supra* note 83.

85. See MCDERMOTT, WILL & EMERY, *supra* note 83; LATHAM & WATKINS, *supra* note 83; SIDLEY AUSTIN LLP, *supra* note 83; GOODWIN, *supra* note 83; Tribe, *supra* note 83.

86. Christine Simmons, *Paul Weiss Vows To 'Do Better' After Partner Promotions Stir Diversity Debate*, N.Y.L.J. (Dec. 18, 2018), <https://www.law.com/newyorklawjournal/2018/12/18/paul-weiss-vows-to-do-better-after-partner-promotions-stir-diversity-debate/>; Dobby, *supra* note 81; Zaretsky, *supra* note 61.

87. Simmons, *supra* note 86; Dobby, *supra* note 81; Zaretsky, *supra* note 61.

88. Simmons, *supra* note 86.

89. *Id.*

in discussing motivations, programs, or excuses for little to no progress[—]it’s the results that we are demanding and will measure going forward.”⁹⁰ Coca-Cola issued specific guidelines aimed at ensuring measurable outcomes in law firm diversity.⁹¹ It updated its external counsel guidelines to require, among other things, that “at least 30% of each of billed associate and partner time [be] from diverse attorneys [. . . and] at least half [be] from Black attorneys.”⁹² Coca-Cola also provides stipulations that firms which do not meet the targets over time will be subject to a 30% reduction in fees.⁹³ After the decreased fees are implemented, absent adjustments, these firms will no longer be referred new matters.⁹⁴ These targets are just a starting point, as Coca-Cola intends to raise the targets for the proportion of billable hours billed by “diverse attorneys” to 50%.⁹⁵ Coca-Cola hopes that these guidelines will inspire other major companies to implement similar policies.⁹⁶

The deep changes in public perception brought about by the rise of the Black Lives Matter movement, and the increasing pressure for the legal profession to more tangibly commit to equity and inclusion, have naturally also put pressure on law schools to similarly commit to greater equity. Indeed, law schools train tomorrow’s lawyers. They determine the racial and socioeconomic composition of tomorrow’s legal profession. As noted above and further analyzed in Part III, below, graduating classes of American law schools have grown more representative of the racial composition of the broader population, yet they remain socioeconomically homogeneous.⁹⁷ Law schools also have an early opportunity to impact their students’ perception of

90. Bradley M. Gayton, *Commitment to Diversity, Belonging, and Outside Counsel Diversity*, COCA-COLA CO. (Jan. 27, 2021), <https://www.coca-colacompany.com/media-center/bradley-gayton-on-commitment-to-diversity>.

91. *Id.*

92. *Id.*

93. *Id.*

94. Debra Cassens Weiss, *Coca-Cola General Counsel Gets Tough with Law Firms that Fail to Meet Diversity Goals*, A.B.A. J. (Jan. 28, 2021, 12:39 PM), <https://www.abajournal.com/news/article/coca-cola-general-counsel-gets-tough-with-law-firms-that-fail-to-meet-diversity-goals>.

95. Gayton, *supra* note 90.

96. *Id.*

97. Bhabha, *supra* note 71, at 90–92; Merritt & McEntee, *supra* note 71; A.B.A., *supra* note 48. On socioeconomic diversity, see *infra* Part IV.

diversity and their commitment to furthering it.⁹⁸ They can fundamentally shape future lawyers' perception of the law and the legal profession.⁹⁹

Law schools have sought to respond to the Black Lives Matter movement, in part to help address the persistent homogeneity of the legal profession. The next section discusses how they have done so.

III. LAW SCHOOLS RESPOND TO THE BLACK LIVES MATTER MOVEMENT

In response to the Black Lives Matter movement, law schools have recognized the need to increase the representation of racialized and marginalized groups in their faculty ranks.¹⁰⁰ In 2020, like higher education

98. Phil Lord, *Cultivating Humility*, 55 L. TEACHER 1, 22 (forthcoming in 2021), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726628 ("Law professors occupy a unique position not only in legal education but also in the legal system. They are instrumental in training tomorrow's lawyers. They intervene at a time where students develop a basic conception of the law and what it means to be a lawyer. A conscious attempt by professors to show humility is not just a sound decision which catalyses a productive classroom dynamic. Neither is it just a partial antidote to the issues with the grading curve mentioned in the previous section. Showing humility invites students to do the same and redefines what is acceptable. It helps create a culture of vulnerability and (self-)awareness. As students go on to occupy leadership roles in the private sector and beyond, they are likely to promote and replicate the same culture of humility by showing vulnerability and inviting others to do the same."); Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 145–48 (2018); Bhabha, *supra* note 71, at 70–71 ("Despite the prevalence of factors beyond the control of legal educators, if the goal is to promote diversity in the legal profession, there is good reason to focus efforts on the law school. The law school is the first point of admission to the legal community. It is the site of immersion and instruction in legal reasoning, and the gateway to the profession. It is where one assimilates legal theory and doctrine, acquires aptitude, learns and engages in the production of legal knowledge, develops an idea about what a lawyer is, identifies professional options, and pursues job opportunities or prepares for solo practice. In fact, a great deal happens in law school that is both reflective of the world in which lawyers work, and determinative of how that world will look in the future."); Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, a Deeper Commitment*, 52 J. LEGAL EDUC. 491 (2002); Harold McDougall, *The Rebellious Law Professor: Combining Cause and Reflective Lawyering*, 65 J. LEGAL EDUC. 326 (2015).

99. Lord, *supra* note 98, at 22; Boles, *supra* note 98, at 145–48; Bhabha, *supra* note 71, at 70–71.

100. See generally Sarah Lawsky, *Spring Reported Entry Level Hiring Report 2020*, PRAWFSBLAWG (May 15, 2020, 12:00 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/05/spring-reported-entry-level-hiring-report-2020-1.html>; Brian Leiter, *Lateral Hires with Tenure or On Tenure-Track, 2020-21*, BRIAN LEITER'S L. SCH. REPS. (Aug. 13, 2021), [hereinafter *Lateral Hires*]; <https://leiterlawschool.typepad.com/leiter/2021/08/lateral-hires-with-tenure-or-on-tenure-track-2020-21.html>; *AALS Placement Bulletin*, AALS (Sept. 29, 2020), https://www.aals.org/wp-content/uploads/2020/09/PB_20-21_sep29_3-v3.pdf; see also Brian Leiter, *A Look at this Year's Lateral Moves by Race and Gender*, BRIAN LEITER'S L. SCH. REPS. (June 23, 2021) [hereinafter *Lateral Moves*], <https://leiterlawschool.typepad.com/leiter/2021/06/a-look-at-this-years-lateral-moves-by-race-and-gender.html> (noting: "Professor Orin Kerr (Berkeley) looked at the list of laterals this year and posted his findings on Twitter: There were 40 men on the laterals list, of whom 21 were 'people of color'; there were 53 women on the laterals list, of whom 23 were 'people of color.' Put differently: there were 49 white laterals (of whom 30 were women, and only 19 men); while there were 42 POC laterals (of whom 21 were men, and 23 were women)."); Anthony Gaughan, *Hiring Announcement: Drake Law School (Entry Level and Lateral)*, THE FAC. LOUNGE (Aug. 04, 2020, 3:03 AM), <https://www.thefacultyounge.org/2020/08/hiring-announcement-drake-law-school-entry-level-and-lateral.html> (noting that the university actively seeks applicants who represent the nation's diversity); Bridget Crawford, *Hiring Announcement: Florida A&M University College of Law Seeking*

institutions more broadly, many law schools designated open positions as positions for scholars focusing on critical legal studies, racialization, and other issues related to equity-seeking groups.¹⁰¹ Law schools ostensibly recognized the importance of academic research in advancing the issues which underlie the rise of the Black Lives Matter movement. This shift in hiring will likely also further curricular diversity, as these scholars teach courses on critical legal studies, racialization, and related issues. Law schools have also aggressively sought to hire scholars from equity-seeking groups in all research areas, i.e., in research areas unrelated to racialization.¹⁰² This was particularly acute in lateral hiring (the hiring of experienced law professors).¹⁰³ Law schools have further created administrative positions dedicated to the inclusion of law students from equity-seeking groups.¹⁰⁴

The hiring decisions of law schools in 2020 suggest that they will look to further enhance curricular diversity, with a focus on the issues related to equity-seeking groups. In doing so, they will build upon the existing shift toward greater curricular diversity since the genesis of the Black Lives Matter movement (around 2013).¹⁰⁵ Law schools have indeed broadened their offering of less doctrinal courses that adopt a broader range of theoretical perspectives, weaving in the experiences of marginalized groups and assessing the impact of the law in creating, preserving, and reinforcing dynamics of power and oppression—beyond critical legal studies. Many professors have also sought to integrate these perspectives in mandatory and more doctrinal courses.¹⁰⁶ This shift appears to have intensified leading up to and in 2020.¹⁰⁷

Director of Legal Research and Writing, THE FAC. LOUNGE (Jan. 12, 2021, 1:03 AM), <https://www.the-facultylounge.org/2021/01/hiring-announcement-florida-am-university-college-of-law-seeking-director-of-legal-research-and-writ.html>; Tim Zinnecker, *Hiring Announcement: University of Alabama School of Law*, THE FAC. LOUNGE (Nov. 9, 2020, 8:23 AM), <https://www.thefacultylounge.org/2020/11/hiring-announcement-university-of-alabama-school-of-law.html>; see also Harv. Univ., *Assistant Dean for Community Engagement, Equity, and Belonging*, INDEED (July 24, 2021), <https://www.indeed.com/viewjob?jk=bbe6c74ac7e500cb&tk=1fbinvlnet52d800&from=serp&vjs=3>; Univ. B.C., *Academic Advisor, Indigenous Students*, INDEED (July 17, 2021), <https://ca.indeed.com/viewjob?jk=860f65f0cc78f349&tk=1fbinp14ut5vc801&from=serp&vjs=3>; Univ. Minn., *Community Outreach and Program Coordinator – Law School*, INDEED (July 22, 2021), <https://www.indeed.com/viewjob?jk=a1f74b75a9f2e615&tk=1fbini kvjt531801&from=serp&vjs=3>.

101. Lawsby, *supra* note 100; *Lateral Hires*, *supra* note 100; AALS., *supra* note 100.

102. Lawsby, *supra* note 100; *Lateral Hires*, *supra* note 100; AALS., *supra* note 100.

103. *Lateral Hires*, *supra* note 100; *Lateral Moves*, *supra* note 100.

104. See, e.g., Harv. Univ., *supra* note 100; Univ. B.C., *supra* note 100; Univ. Minn., *supra* note 100.

105. Boles, *supra* note 98; Bhabha, *supra* note 71; McDougall, *supra* note 98; Reynoso & Amron, *supra* note 98, at 498-500; see generally Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016). For further discussion of the genesis of the Black Lives Matter movement, see Del Real et al., *supra* note 1; Day, *supra* note 1; and Sobo et al., *supra* note 1.

106. Boles, *supra* note 98; Bhabha, *supra* note 71; McDougall, *supra* note 98; Reynoso & Amron, *supra* note 98; Lee, *supra* note 105.

107. Boles, *supra* note 98; Bhabha, *supra* note 71; McDougall, *supra* note 98; Reynoso & Amron,

IV. THE STRUCTURE AND NATURE (SOUL) OF LEGAL EDUCATION

While I salute the commitment to equity which undoubtedly underlays the response of law schools to the Black Lives Matter movement, their response is insufficient. This results both from the superficial nature of the change law schools have committed to and from the deep and structural nature of the barriers to equity in legal education, which are explored in this section. As a result, to truly challenge the legacy of racism, we will need to challenge the nature and structure of legal education—its soul.

The legal profession is often concerned with (perceived) prestige and achievement. Professor Brian Tamanaha describes it as “an obsessively credential-focused profession.”¹⁰⁸ He adds: “Every Justice on the current Supreme Court attended top-five law schools (Harvard, Yale, Columbia), and Harvard and Yale together produce a substantial proportion of the law professors across the country.”¹⁰⁹ He notes that the top 250 corporate law firms disproportionately hire from the highest-ranked law schools.¹¹⁰ Empirical data also shows that partners at U.S. law firms disproportionately attended the highest-ranked law schools.¹¹¹

Legal education is analogously quite concerned with status and prestige. This is first true within law schools. Unlike other graduate programs and the undergraduate programs of the institutions which often house law schools, North American law schools almost all strictly adhere to a grading curve.¹¹² Grading curves are used in law schools to ensure a “forced distribution of grades so that relevant players can distinguish among students in the top,

supra note 98; Lee, *supra* note 105.

108. BRIAN TAMANAHA, FAILING LAW SCHOOLS 79 (2012); *see also* Lawrence S. Kreiger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 559, 589, 606 (2015); Rebecca L. Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyer’s Labor*, 66 AM. SOCIO. REV. 382 (2001).

109. TAMANAHA, *supra* note 108, at 79. Empirical data also shows that law professors disproportionately attended undergraduate institutions which lack socioeconomic diversity. Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813, 817 (2020) (“I find that law professors generally graduate from private colleges that serve the wealthiest strata of U.S. society and not more socioeconomically diverse public colleges. The median hire attended an institution in which 67% of the students come from the top income quintile and only a fraction of students come from the bottom three quintiles. Most professors come from privileged backgrounds, and those who do not are generally educated and socialized in this milieu before attending an elite law school. These early experiences are bound to acculturate professors and shape their interests and understandings of the legal system.”).

110. TAMANAHA, *supra* note 108, at 79; *see also* Victor Gold, *Reducing the Cost of Legal Education: The Profession Hangs Together or Hangs Separately*, 66 SYRACUSE L. REV. 497, 505 (2016).

111. Theodore P. Seto, *Where Do Partners Come From?*, 62 J. LEGAL EDUC. 242, 244–46 (2012).

112. Lord, *supra* note 98, at 2. Some law schools instead use expected averages: “Instead of dictating . . . how many students should receive each grade, they enforce an expected average. Professors may, for instance, be told that the expected average grade is a B and have discretion as to how grades are distributed to result in a B average.” *Id.* at 10–11. *See also* Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415, 419 (1994) (describing the varying uses of grading curves in schools depending on class size).

middle, and bottom of the class.”¹¹³ They also aim to allow for fairness in grading amongst course sections.¹¹⁴ A grading curve allows for a specific, limited range of each letter grade that can be attributed.¹¹⁵ The top letter grades (in the A range) are given extremely sparingly, and far more sparingly than in undergraduate programs. Students with near-perfect undergraduate grade point averages find it nearly impossible to achieve a similar grade point average in law school.¹¹⁶ The existence of the grading curve mainly results from the necessity to “sort” students for employment and other purposes.¹¹⁷ Law students are therefore assessed comparatively and ranked. They compete for status within the law school.

This focus on sorting and ranking can also be observed in the competition amongst law schools. As noted, the ranking of a law school significantly affects the employment prospects of its graduates, as well as the likelihood that they will attain prominent positions within the profession.¹¹⁸ A higher rank is also synonymous with a higher appeal to faculty and prospective students, as well as the ability to charge higher tuition.¹¹⁹ In the United States, the U.S. News ranking of law schools has an outsize impact on the decisions of faculty, deans, and applicants. The ranking is based on a number of indicators to “evaluate institutions on their successful placement of graduates, their faculty resources, the academic achievements of entering students, and opinions by law schools, lawyers and judges on overall program quality.”¹²⁰ The ranking indicators consist of a “quality assessment,” composed of a peer assessment score and an assessment score by lawyers and judges; “selectivity,” assessed as the median law school admission test (LSAT) and graduate record examination (GRE) scores, median undergraduate GPA, and acceptance rate; “placement success,” evaluated through employment rates for graduates ten months after graduation and at graduation, bar passage rates, average debt incurred obtaining a J.D. at graduation and percentage of graduates incurring debt; “faculty, law school

113. Colin Miller, *What is the Point of Law School Grading Curves If They're Not (More) Fixed?*, PRAWFSBLAWG (Sept. 21, 2011), <https://prawnsblawg.blogspot.com/prawnsblawg/2011/09/what-is-the-point-of-law-school-grading-curves-if-theyre-not-fixed.html>.

114. *Id.*; Lord, *supra* note 98, at 11–12.

115. Miller, *supra* note 113.

116. Lord, *supra* note 98, at 12.

117. *Id.* at 11, 16; Steven I. Friedland, *Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education*, 67 J. LEGAL EDUC. 592, 592 (2018); see TAMANAHA, *supra* note 108, at 79; Seto, *supra* note 111; Gold, *supra* note 110.

118. TAMANAHA, *supra* note 108, at 79; Seto, *supra* note 111; Gold, *supra* note 110, at 505; Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L. J. 941, 1014–15 (2014).

119. Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L. J. 229, 240, 265 (2006).

120. Robert Morse et al., *Methodology: 2022 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 29, 2021, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

and library resources,” assessed as average spending on instruction and library and supporting services and on all other items (including financial aid), student-faculty ratios, and strength of library services and operations.¹²¹ Using these criteria, U.S. News & World Report, which publishes the ranking, standardizes the data to find and compare every school’s mean and standard deviation with every other eligible school, resulting in the top school having a score of 100 and all other schools receiving a percentage of the top score.¹²² The schools are then ranked in descending order based on their scores.¹²³ Only law schools approved and accredited by the American Bar Association are eligible for ranking.¹²⁴ In his landmark monograph on these issues, *Failing Law Schools*, Professor Brian Tamanaha, who served as interim dean of the St. John’s University School of Law,¹²⁵ describes the rise of the ranking as follows:

[Journalist David] Segal explains: “The problem, as many professors have noted, is structural. A school that does not aggressively manage its ranking will founder.” When called to account for their conduct, legal educators point the finger at the *US News* ranking system. Once a few law schools began to use questionable techniques to squeeze up their score in the factors that went into the ranking, others risked being punished with a lower rank if they did not follow suit.

The rankings have law schools by the throat. No question. From 1990, when *US News* began to issue a systematic annual ranking, its influence over law schools has grown enormously. Deceptive reporting practices are just a part of its pervasive impact.

Multiple deans have resigned after a drop in rank. Schools have altered their admissions formula to maximize their ranking. The internal composition of the student body has changed in multiple ways at law schools as a result of the ranking. Schools have shifted scholarships away from financially needy students owing to the ranking. Tens of thousands of dollars are spent on promotional material by law schools hoping to improve their ranking. Faculties have formed committees and plotted strategies to chart a rise in the rankings. The fact that reputation among academics is the most heavily weighted factor in the ranking—25 percent of the score—turbocharged the market for lateral hires, boosting professor pay at the high end. The Government Accounting Office issued a report to Congress concluding that competition among law schools over the ranking is a major contributor to the increase in tuition.

Each spring, when the new annual ranking is announced, law professors and students across the nation apprehensively await their fate. A

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Brian Z. Tamanaha, WASH. UNIV. IN ST. LOUIS SCH. OF L., <https://law.wustl.edu/faculty-staff-directory/profile/brian-z-tamanaha/> (last visited Oct. 22, 2021).

few schools are elated at a jump, a few are dejected at an unexpected slide, and everyone else is relieved to have avoided a devastating fall—at least until next time around. Because schools are tightly bunched together in their raw scores, minor fluctuations have outsized consequences. On average, about two-thirds of law schools experience a change in rank from the previous year. This absurdly high rate puts every school on edge. Dropping a tier is especially dreaded, like going off a cliff.

The annual pronouncement of the surviving rump of a defunct magazine thus mercilessly lords over legal academia—an amazing state of affairs when you think about it. Colleges and other professional schools are subject to competing rankings so no single ranking system dominates to the same extent that law schools dance to the tune of *US News*.¹²⁶

Tamanaha's account is accurate. U.S. News & World Report appears to have no particular expertise in assessing law schools. In fact, there seems to be unanimity in the legal academy as to the fact that the ranking is deeply flawed.¹²⁷ Yet the ranking is ever-present in the minds—and behavior—of faculty and deans.¹²⁸

The legal academy is arguably as concerned with prestige as law schools more generally. As noted, law professors disproportionately studied at the several highest-ranked law schools.¹²⁹ (More recently, some have empirically shown how this acts as a continuing barrier to diversity in the legal academy.)¹³⁰ The law review submission process, through which professors publish their scholarship, is unique—and perhaps uniquely prestige-focused.¹³¹ Law reviews only accept submissions in the spring and the fall, although it is unclear as to exactly when.¹³² Professors submit simultaneously to dozens and sometimes hundreds of law reviews.¹³³ Law students select

126. TAMANAHA, *supra* note 108, at 78–79.

127. *Id.*; see Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMUL REV. 493, 493–94 (2007) (citing three dozen academic articles to that effect); Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13, 13 (2006) (the first issue of the 81st volume of the *Indiana Law Journal* is made up of articles presented at a symposium on the future of law school rankings); see generally Stake, *supra* note 119.

128. See also *The Legal Academy, Episode 15: Brian Leiter*, YOUTUBE (Aug. 31, 2020), at 32:56, https://www.youtube.com/watch?v=g1Gw6j5tF-Y&ab_channel=TheLegalAcademy (where prominent law professor Brian Leiter notes that American legal education is “run by U.S. News and World Report.”).

129. TAMANAHA, *supra* note 108, at 79; Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools?*, 68 J. LEGAL EDUC. 614 (2019); Lawsky, *supra* note 100.

130. Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 456–57 (2015); see generally Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943 (2015); see also Arewa et al., *supra* note 118, at 961 (describing challenges faced by certain factions of law school faculties).

131. Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1306 (2018).

132. Brian Galle, *The Law Review Submission Process: A Guide for (and by) the Perplexed*, MEDIUM (Aug. 12, 2016), <https://medium.com/whatever-source-derived/the-law-review-submission-process-a-guide-for-and-by-the-perplexed-9970a54f89aa>.

133. *Id.*; Friedman, *supra* note 131, at 1306; Michael D. Cicchini, *Law Review Publishing: Thoughts*

scholarly articles for publication, without peer review and without anonymizing manuscripts.¹³⁴ Upon acceptance, there is a very short window within which authors must accept or decline the offer¹³⁵ because, typically, authors will seek to use the offer to get another offer from a higher-ranked journal.¹³⁶ Authors often seek to make their submission stand out, for instance by carefully crafting their abstract, which is the first thing that law review editors read.¹³⁷ Once an author receives an offer from a law review, the author proceeds to send a request for expedited review to other, higher-ranked law reviews.¹³⁸ The author will contact the 20–50 higher-ranked law reviews.¹³⁹ If an offer is received, the same process is repeated.¹⁴⁰

The law review article acceptance process shows the singular importance of prestige, through ranking and sorting, to the legal academy. The actions and decisions of law professors are almost solely focused on a ranking of law schools that they spend a great deal of time criticizing.¹⁴¹ More importantly, they are based on a ranking of *law schools*, not law reviews.¹⁴² The methodology used by U.S. News & World Report to rank law schools largely relies on the selectivity of law schools and employment outcomes for law students.¹⁴³ These criteria are wholly unrelated to the quality of a law review and the scholarship it publishes. Even the comparatively more

on Mass Submissions, Expedited Review, and Potential Reform, 16 U.N.H. L. REV. 147, 151–52 (2017); Eric J. Segall, *The Law Review Follies*, 50 LOY. U. CHI. L.J. 385, 391–92 (2018).

134. Galle, *supra* note 132; Friedman, *supra* note 131, at 1305–06; Segall, *supra* note 133 at 391–92.

135. Galle, *supra* note 132; Cicchini, *supra* note 133, at 153. In 2011, several prominent law reviews had recognized the inevitable impact of this practice on the review process and committed to giving authors seven days to decide whether to accept an offer. See *Joint Letter on Exploding Offers*, STAN. L. REV. (Apr. 19, 2011), <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2011/11/joint-letter-on-exploding-offers.pdf>. The practice nonetheless remains prevalent. See Cicchini, *supra* note 133, at 163. For instance, the Columbia Law Review’s practice is: “If the *Review* makes an offer of publication for an Article, Essay, or Book Review following an expedited review, the author has only one hour from the time of actual notification in which to accept the offer.” *Submission Instructions*, COLUM. L. REV., <https://columbialawreview.org/submissions-instructions/> (last visited Oct. 22, 2021).

136. Cicchini, *supra* note 133, at 153.

137. Amanda Wong & Sarah Tran, *Tips for Getting Your Scholarly Paper Published*, WRITING CTR. AT GEO. UNIV. L. CTR., 2 (2016), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Tips-for-Getting-Your-Scholarly-Paper-Published-1.pdf>.

138. Galle, *supra* note 132; Friedman, *supra* note 131, at 1302, 1313–14; Cicchini, *supra* note 133, at 155; Segall, *supra* note 133, at 391–92.

139. Galle, *supra* note 132; Friedman, *supra* note 146, at 1329; Cicchini, *supra* note 133; Segall, *supra* note 133, at 391–92.

140. Galle, *supra* note 132; Friedman, *supra* note 131, at 1329; Cicchini, *supra* note 133, at 155; Segall, *supra* note 133, at 391–92.

141. See Seto, *supra* note 127, at 493–94; Stake, *supra* note 119, at 266.

142. One law professor elegantly remarked: “My favourite part about new US News rankings is seeing my prior scholarship become magically ‘better’ or ‘worse’ based on the later movement of the schools whose journals those papers were published in.” Michael Pollack (@michaelcpollack), TWITTER (Mar. 29, 2021, 10:22 PM), <https://twitter.com/michaelcpollack/status/1376736517943611396>.

143. Morse et al., *supra* note 120.

relevant peer assessment scores by law professors, judges, and lawyers¹⁴⁴ are arguably only remotely related to legal scholarship. Whatever these actors subjectively think of a law school, their assessment is arguably driven by the quality of instruction and of the scholarship published by the law school's faculty members, both of which have no obvious correlation with the scholarship selected by the law school's law students for publication in its law review. Nonetheless, faculty members afford unmatched importance to this ranking.

Somewhat ironically, there do exist more relevant rankings of law reviews, which focus on the impact of the scholarship published by a law review—through metrics such as judicial and peer citations.¹⁴⁵ However, given the impact of law review placement (and its perceived prestige) on career mobility, citations, promotion, tenure, and subsequent law review placement,¹⁴⁶ faculty members—especially junior ones—are consistently told to favor the U.S. News ranking when picking a venue for their scholarship.¹⁴⁷ The U.S. News ranking of law schools drives the behavior of law professors. Their decisions reinforce the status of the ranking in American legal education.

The focus on prestige and ranking that pervades legal education and the legal academy is intrinsically hostile to equity-seeking groups. Indeed, law schools are driven to focus, and choose to focus,¹⁴⁸ on objectives other than increasing access for and better integrating equity-seeking groups. Instead, the objectives pursued by law schools tend to place further barriers upon the path of equity-seeking applicants and law students and solidify existing barriers and power dynamics.

As noted, law schools much focus—and need to focus—on their rank in the U.S. News ranking of law schools. The ranking largely relies on outcomes unrelated to diversity. More importantly, the ranking provides incentives for

144. *Id.*

145. The most prominent are the Washington & Lee Law Journal Rankings. See *W&L Law Journal Rankings*, WASH. & LEE SCH. OF L. (June 30, 2021), <https://managementtools4.wlu.edu/LawJournals/>; Cicchini, *supra* note 133.

146. Segall, *supra* note 133; Friedman, *supra* note 131; Arewa et al., *supra* note 118; Cicchini, *supra* note 133, at 161; Paul J. Heald & Ted Sichelman, *Ranking the Academic Impact of 100 American Law Schools*, 60 JURIMETRICS J. 1 (2019).

147. Galle, *supra* note 132; David Horton, *Law Review Placement and Other Rookie Questions*, PRAWFSBLAWG, (Oct. 5, 2010), <https://prawnsblawg.blogspot.com/prawnsblawg/2010/10/law-review-placement-and-other-rookie-questions.html>; Sarah Lawskey, *Submission Angsting Fall 2020*, PRAWFSBLAWG (July 25, 2020), <https://prawnsblawg.blogspot.com/prawnsblawg/2020/07/submission-angsting-fall-2020.html>; Sarah Lawskey, *Submission Angsting Spring 2021*, PRAWFSBLAWG (Jan. 29, 2021), <https://prawnsblawg.blogspot.com/prawnsblawg/2021/01/submission-angsting-spring-2021.html>. Some law schools even offer(ed) cash bonuses to professors who placed articles in top law reviews. Jacqueline Lipton, *Bounties for Prestigious Law Review Placements*, THE FAC. LOUNGE (Apr. 2, 2013), <https://www.thefacultyounge.org/2013/04/bounties-for-prestigious-law-review-placements.html>.

148. I draw inspiration here from TAMANAHA, *supra* note 108, at 79 (noting that law schools place the blame on the U.S. News ranking “as if a magazine was responsible for their conduct”).

schools to allocate resources and make decisions in ways that are detrimental to equity-seeking groups. I will more specifically discuss the criteria used by U.S. News under the “selectivity” and “faculty, law school and library resources” assessments, which jointly account for a third of the ranking.¹⁴⁹ I then consider the criteria of average debt incurred obtaining a J.D. at graduation and percentage of graduates incurring debt, which form part of the “placement success” assessment.¹⁵⁰ I discuss them separately, as they were added to the ranking formula very recently (for the 2022 ranking, published in March 2021).¹⁵¹

“Selectivity” is assessed through the median law school admission test (LSAT) and graduate record examination (GRE) scores, median undergraduate GPA, and acceptance rate of a law school.¹⁵² U.S. News & World Report considers that “selectivity is a proxy of student excellence.”¹⁵³ However, the assessment conducted by U.S. News & World Report adopts a very narrow conception of “excellence,” which relies solely on quantitative data. By using this data, U.S. News & World Report ignores the differing barriers which various groups face in accessing higher education. Prospective students from equity-seeking groups generally encounter greater barriers to performance on standardized tests, such as the LSAT and GRE; socioeconomic status has long been found to affect a candidate’s performance on standardized tests.¹⁵⁴ The same criticism can be made

149. Morse et al., *supra* note 120.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Aaron N. Taylor, *Robin Hood, In Reverse: How Law School Scholarships Compound Inequality*, 47 J. L. & EDUC. 41, 56 (2018); Michele Anglade, *Value, Rankings, and Reform*, 33 REV. LITIG. 905, 911–14 (2014); William P. LaPiana, *Merit and Diversity: The Origins of the Law School Admissions Test*, 48 ST. LOUIS U. L.J. 955, 955 (2004) (noting that the LSAT was not intended to play such a significant role in law school admissions); Gary Peller, *Legal Education and the Legitimation of Racial Power*, 65 J. LEGAL EDUC. 405, 410–11 (2015); Janice L. Austin, *Panel: LSAT, U.S. News and Minority Admissions*, 80 ST. JOHN’S L. REV. 289, 292–93 (2006); Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41, 62–63 (2006); 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, 107–08 (2006); *Higher Education: Issues Related to Law School Cost and Access*, U.S. GOV’T ACCOUNTABILITY OFF. 2 (Oct. 2009), <http://gao.gov/assets/300/297206.pdf>; Aaron N. Taylor & Chad Christensen, *2016 Annual Survey Results, Law School Scholarship Policies: Engines of Inequity*, LSSSE 9 (2017) <https://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE-2016-Annual-Report.pdf>; Bhabha, *supra* note 71, at 83; see Perry A. Zirkel, *Law School Scholarships: Hooded Robin’ of Non-Privileged Students*, 48 J. L. & EDUC. 239, 241 (2019); Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 439–40 (2013). Some have specifically noted the influence of *Gratz v. Bollinger*, where the Supreme Court struck down the University of Michigan’s admissions policy indiscriminately allocating a numerical advantage in its admissions formula to individuals from certain equity-seeking groups. *Gratz v. Bollinger*, 539 U.S. 244, 244–47 (2003). A paradigm of formal equality more broadly pervades certain aspects of American life; see, e.g., Janice L. Austin, *Panel: LSAT, U.S. News and Minority Admissions*, 80 ST. JOHN’S L. REV. 289, 293 (2006); Gold, *supra* note 110, at 508; Bhabha, *supra* note 71, 90–92.

regarding undergraduate GPAs. A narrow focus on this quantitative assessment of student performance is divorced from the experiences of the students whose performance GPAs measure, and from the differing barriers these students face.¹⁵⁵

Of course, one would not expect U.S. News & World Report to assess individual applicants or groups of applicants. Rankings inevitably involve assumptions and generalizations. The issue with U.S. News & World Report's view of "excellence" is not that it makes certain assumptions and generalizations. It is that these assumptions and generalizations are incorrect. The criteria do not solely measure academic excellence. They measure academic excellence, and ease of access to education, and socioeconomic status. These criteria favor those who are already privileged. They act as a further barrier to equity-seeking groups and solidify preexisting inequities.

As mentioned, law schools, in large part by necessity, afford a great deal of importance to their ranking. U.S. News & World Report creates a powerful and effective incentive for law schools to adopt an equally narrow conception of academic excellence. To preserve or improve their ranking, law schools need to admit students with high undergraduate GPAs and standardized test scores, with limited regard for the differing barriers faced by applicants from historically marginalized groups.¹⁵⁶ Such a focus skews the process in favor of those who are already privileged.¹⁵⁷ Law schools are also powerfully incentivized to dedicate their financial aid resources to this same group of students. There is extensive evidence that they do so.¹⁵⁸ Luring students with

Interesting insights can be gleaned from contrasting cases from the Canadian Supreme Court, as subsection 15(2) of the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, ch. 11) specifically shields affirmative action programs from a charge of "reverse discrimination." The Supreme Court of Canada explicitly referred to the intent of the legislator to avoid a framework of analysis similar to that of the United States; *See, e.g.*, *R. v. Kapp*, 2008 SCC 41 (Can.); *Alberta (Aboriginal Affs. & N. Dev.) v. Cunningham*, [2011] SCR 670, ¶ 41 (Can.). Of course, section 15 of Canada's Charter of Rights and Freedoms much postdates the equivalent constitutional provision in the United States. *See Guide to the Canadian Charter of Rights and Freedoms*, GOV'T OF CAN. <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> (last updated Aug. 6. 2020).

155. Haddon & Post, *supra* note 154, at 62–63, 73–74; *see*, Zirkel, *supra* note 154; Taylor, *supra* note 154, at 99–100; Anglade, *supra* note 154, at 911–14; Peller, *supra* note 154; Randall, *supra* note 154, at 139.

156. Taylor, *supra* note 154, at 50–57; Anglade, *supra* note 154, at 911–14; Peller, *supra* note 154, at 410–11; Haddon & Post, *supra* note 154, at 62–63, 73–74; Randall, *supra* note 154, at 139.

157. Taylor, *supra* note 154, at 50–51; Anglade, *supra* note 154, at 911–14; Peller, *supra* note 154, at 410–11; Haddon & Post, *supra* note 154, at 62–63, 73–74; Randall, *supra* note 154, at 139.

158. *See, e.g., id.*; Farran Powell, *Law Schools Shell Out Deep Tuition Discounts to Students*, U.S. NEWS (Nov. 20, 2017), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/paying/articles/2017-11-20/law-schools-shell-out-deep-tuition-discounts-to-students> (noting that the value of these scholarships is increasing); Zirkel, *supra* note 154, at 241; Taylor, *supra* note 154 at 71; Anglade, *supra* note 154, at 911–14; Rhode, *supra* note 154, at 439; Gold, *supra* note 110, at 505 (noting that "the students with the poorest job prospects [end up] subsidizing those with the best job prospects . . . [and] those who graduate with the most debt are those least able to pay"); David Yellen, *U.S. News and the*

high GPAs and standardized test scores away from a higher-ranked school with significant financial aid funding increases a law school's median student GPA and standardized test score—with a correlative impact on the school's score in the U.S. News ranking. Financial aid budgets are diverted away from students who need assistance toward privileged students with high GPAs and standardized test scores.

The assessment of “Faculty, Law School and Library Resources” conducted by U.S. News & World Report similarly creates and preserves barriers to prospective students from equity-seeking groups. The assessment measures average spending on instruction and library and supporting services and on all other items (including financial aid), student-faculty ratios, and strength of library services and operations.¹⁵⁹ This criterion is ostensibly based on the assumptions that students benefit when law schools spend the tuition revenue they earn on things that improve the student experience. However, its design creates an incentive for law schools to simply spend *more*. And the best way to spend more is to make more money. Law schools are therefore incentivized to raise tuition in order to increase their spending on the categories measured by U.S. News & World Report.¹⁶⁰ Similarly, they are incentivized to hire more faculty members—instead of sessional lecturers—to teach law courses, in order to reduce their student-faculty ratio. Needless to say, this contributes to the increasing cost of legal education.¹⁶¹

The ever-increasing cost of legal education contributes to the exclusion of equity-seeking groups. Much like a focus on GPAs and standardized test scores, the cost of legal education favors the privileged and contributes to the exclusion of prospective students from historically marginalized groups. We have long known that, even with access to adequate borrowing, the high cost

Price of Legal Education, THE FAC. LOUNGE (Feb. 15, 2013), <https://www.thefacultylounge.org/2013/02/us-news-and-the-price-of-legal-education.html>; Taylor & Christensen, *supra* note 154, at 6; Bhabha, *supra* note 71, at 83.

159. *Id.*

160. Anglade, *supra* note 154, at 910; Rhode, *supra* note 154, at 439–40; Elizabeth Redden, *Report Calls for Changes to Law School Rankings, Accreditation*, INSIDE HIGHER EDUC. (Mar. 30, 2020), insidehighered.com/quicktakes/2020/03/30/report-calls-changes-law-school-rankings-accreditation; Yellen, *supra* note 158; A.J. Cisneros, *Understanding the Law School Tuition Crisis*, UC DAVIS NLG (2016), <https://www.nlg.org/wp-content/uploads/2016/03/Understanding-the-Law-School-Tuition-Crisis.pdf> (noting that “[a]verage public law school resident tuition in the 2011–12 year was \$23,214. Average private law school tuition was \$40,634. This is up significantly from 1985, the first year the American Bar Association (ABA) began collecting these figures. Adjusted for inflation, in 1985 resident law students at public schools on average paid \$4,360 a year for tuition. Their 1985 counterparts at private schools were paying on average \$16,358 (adjusted for inflation) a year for tuition.”); Gold, *supra* note 110, at 508; Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 196 (2012).

161. John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, 519–521, 525 (2002); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154; Cisneros, *supra* note 160; Gold, *supra* note 110, at 500; Campos, *supra* note 160, at 196; Paul Campos, *Has the Increased Cost of Law School Improved Legal Education?*, 5 WAKE FOREST L. REV. ONLINE 32, 33–35 (2015).

of legal education excludes students due to their socioeconomic status.¹⁶² That is especially true when, as noted above, law schools also divert their financial aid resources toward privileged students.

In its latest ranking of law schools, published in March 2021, U.S. News & World Report added new criteria of average debt incurred obtaining a J.D. at graduation and percentage of graduates incurring debt, cumulatively weighed at 5%.¹⁶³ These criteria form part of the “placement success” assessment.¹⁶⁴ My above comments regarding the cost of law school, and its impact on equity-seeking groups, apply to these criteria. As for its criteria of average spending and student-faculty ratios,¹⁶⁵ U.S. News & World Report ostensibly sought to address an important aspect of the law school experience: cost. Again, however, the criteria are poorly designed. They only measure the level of debt incurred by graduates. From a broader standpoint, debt is indeed a barrier to access to legal education, especially for equity-seeking groups.¹⁶⁶ However, by measuring only average debt and the percentage of graduates incurring debt, U.S. News & World Report is creating a perverse incentive for law schools to enroll wealthier students—who, as mentioned, are already both overrepresented in law schools and

162. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154; Taylor & Christensen, *supra* note 154; Bhabha, *supra* note 71, at 83; Sebert, *supra* note 161, at 422 (noting that 20% of law students did not take on debt in 2002); *Law School Costs*, L. SCH. TRANSPARENCY DATA DASHBOARD, <https://data.lawsc.hooltransparency.com/costs/debt/> (last visited Oct. 22, 2021) (noting that the percentage of law graduates who take on debt has shrunk from 84.4% to 72% between 2010 and 2020); Taylor, *supra* note 154, at 45–47 (providing information on access to higher education more broadly).

163. Morse et al., *supra* note 120. Also, in the 2021–2022 ranking cycle, U.S. News & World Report added criteria regarding diversity. However, after vocal and broad opposition from law schools (who get access to the ranking ahead of its release), the criteria were eliminated, and schools were re-ranked. See generally Karen Sloan, *US News Makes Last-Minute Changes to Law School Rankings, Fueling Criticism and Concern*, LAW.COM (Mar. 25, 2021), <https://www.law.com/2021/03/25/us-news-makes-last-minute-changes-to-law-school-rankings-fueling-criticism-and-concern/>; Marcilynn A. Burke et al., *Letter of Law Deans Regarding 2022 Diversity Rankings* (Mar. 24, 2021), <https://taxprof.typepad.com/files/deans-letter-to-us-news-032421.pdf>; *Dean Paul Caron Joins 161 Law School Deans in Letter That Causes U.S. News to Withdraw Flawed Diversity Ranking*, PEPP. (Mar. 26, 2021), <https://law.pepperdine.edu/surf-report/posts/dean-paul-caron-joins-161-law-school-deans-in-letter-that-causes-us-news-to-withdraw-flawed-diversity-ranking.htm>; Caroline Spiezio, *U.S. News Delays Law School Diversity Rankings after Deans' Uproar*, REUTERS (Mar. 25, 2021), <https://www.reuters.com/article/lawyer-education-diversity-idUSL1N2LO01L>. One of the key issues raised was that “multiethnic students” were not labelled as diverse students. See Sloan, *supra* note 163. These prospective changes to the ranking may suggest that U.S. News & World Report has understood the impact of its current criteria on equity-seeking groups. *Id.* However, given the poor design of the ranking criteria (including the prospective diversity criteria) and the persistence of U.S. News & World Report in using the same quantitative criteria over time, it appears unlikely that future rankings will adequately address the issues raised in this piece. *Id.*

164. Morse et al., *supra* note 120.

165. As noted, they form part of the assessment of “faculty, law school and library resources.” *Id.* Their initial purpose was ostensibly to incentivize law schools to spend the tuition revenue they earn on budget items that benefit students. See *id.*

166. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154; Taylor & Christensen, *supra* note 154; Bhabha, *supra* note 71, at 83; Sebert, *supra* note 161, at 422; L. SCH. TRANSPARENCY DATA DASHBOARD, *supra* note 162; Taylor, *supra* note 154, at 45–47, 63.

advantaged in the admissions and financial aid processes.¹⁶⁷ The simplest way for law schools to graduate law students with less debt is not to give greater scholarship funding (which U.S. News & World Report ostensibly wants to incentivize): it is simply to admit wealthier students who will graduate with little or no debt even without financial aid.¹⁶⁸ These new criteria will therefore likely solidify the existing barriers to access to legal education for equity-seeking groups.

As detailed in this section, legal education is, like the legal profession, concerned with prestige and status. This focus creates and solidifies barriers to the full participation of students and prospective students from historically marginalized groups. As mentioned in the previous section, law schools have responded to the Black Lives Matter movement by increasing faculty capacity in research areas that concern race and inequality and by making curricular adjustments. This response is laudable, and law schools should be commended for responding to a fundamental shift in American society. However, as this section has shown, this response is insufficient. It is insufficient because of the superficial nature of the change law schools have committed to, but more importantly because of the deep and structural nature of the barriers to equity and diversity in legal education.

V. CONCLUSION

The superficial changes made by law schools might give them a false sense of momentum, a sense that they have done their part to respond to the Black Lives Matter movement and its aftermath. That would be most detrimental. It would be detrimental because legal education has grown, and continues to grow, less inclusive. With increasing cost, competition, and pressure on law school faculty and administrators, law schools have become increasingly expensive, and their admissions policies have increasingly benefitted the privileged. And, prior to these changes, the wealthy and the privileged were already disproportionately represented in law schools and higher education more broadly.¹⁶⁹

167. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154; Taylor & Christensen, *supra* note 154; Bhabha, *supra* note 71, at 83; Sebert, *supra* note 161, at 422; L. SCH. TRANSPARENCY DATA DASHBOARD, *supra* note 162; Taylor, *supra* note 154, at 45–47, 63.

168. See *supra* note 162 and accompanying text (explaining how the data shows this is already happening); Sebert, *supra* note 161, at 422; L. SCH. TRANSPARENCY DATA DASHBOARD, *supra* note 162; Taylor, *supra* note 154, at 45–47, 63.

169. See, e.g., Taylor & Christensen, *supra* note 154; Bhabha, *supra* note 71, at 83; Taylor, *supra* note 154, at 45–47 (describing access to higher education more broadly), at 53 (noting that students from equity-seeking groups are less likely to attend higher-ranked colleges regardless of academic excellence and more likely to graduate from college with a greater debt load), at 63; Su Jin Jez, *The Differential Impact of Wealth Versus Income in the College-Going Process*, 55 RSCH. IN HIGHER EDUC. 710, 722–27 (2014); *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have->

Effectively responding to the Black Lives Matter movement and the fundamental ways in which it has changed American society requires more. Far more. First, it requires us, faculty members, to recognize that we have failed, by action and by omission, to create adequate access and opportunity for equity-seeking groups.¹⁷⁰ American legal education is hostile to those who have historically been marginalized and those who continue to be excluded from full participation in American society. American legal education is further driven and incentivized to solidify existing barriers to access for equity-seeking groups. Instead of challenging these incentives, we have let ourselves be driven by them.

To live up to this important moment, we must pause longer and look deeper. We must identify and challenge the persisting, structural barriers to inclusivity. We must face and challenge the soul of contemporary American legal education.

[more-students-from-the-top-1-percent-than-the-bottom-60.html](#) (arguably the most helpful aggregator of third-party data on socioeconomic diversity in undergraduate education).

170. If we are as smart as the data suggests, we can surely do better. See TAMANAHA, *supra* note 108, at 79; Segall & Feldman, *supra* note 129; Lawsky, *supra* note 100.