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## The Marginalization of Black Aspiring Lawyers

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# THE MARGINALIZATION OF BLACK ASPIRING LAWYERS

Aaron N. Taylor\*

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## INTRODUCTION

In his landmark book, *The Souls of Black Folks*, American sociologist, W.E.B. Du Bois, poses the question: “Why did God make me an outcast and a stranger in mine own house?”<sup>1</sup> The question pertained to the social and psychic conflicts facing Black Americans, nominally freed from enslavement, but hampered by an imposed second-class citizenship. Du Bois was describing a group of people living a marginalized existence, prevented from fully integrating into larger society and, therefore, unable to realize the full extent of their theoretical freedoms.

This paper argues that Black people who aspire to be lawyers endure marginalized existences, which span the law school admission process through the matriculation process and into the law school classroom. The

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<sup>1</sup> W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* 3 (A. C. McClurg & Co., 8th ed. 1903).

manner in which the Law School Admission Test (LSAT) drives the vetting of law school applications ensures that Black applicants face steep disadvantages in gaining admission. In the 2016-17 admission cycle, it took about 1,960 Black applicants to yield 1,000 offers of admission, compared to only 1,204 among White applicants and 1,333 overall.<sup>2</sup> These trends are explained in large part by racial and ethnic disparities in average LSAT scores. The average score for Black test-takers is 142—11 points lower than the average for White and Asian test-takers of 153.<sup>3</sup> Therefore, for large proportions of Black law school applicants—49 percent in 2016-17—their marginalization in the admission process ends in outright exclusion.<sup>4</sup>

This exclusion, however, is of questionable legitimacy. The LSAT is designed to be a partial predictor of first-year grades. But law schools commonly couch admission in the broader context of a student's potential as a lawyer—as they should. Law schools exist to produce successful lawyers and leaders. The first year of law school is merely one step, albeit one of inflated importance, on the path from layperson to lawyer. The fundamental goals of legal education are longer term; but the LSAT does not predict one's chances of attaining these goals well, surely not well enough to be the primary admission criterion.

For example, Texas Tech found that the LSAT explained a noteworthy, but limited, 13 percent of the variance in bar exam scores of its law graduates.<sup>5</sup> The University of Cincinnati found that, among its law graduates, the “LSAT score does not correlate with Ohio bar exam performance.”<sup>6</sup> Two professors from the University of California Berkeley found that the LSAT had very weak (or no) value in predicting lawyering skills among its law graduates.<sup>7</sup> In a letter seeking to correct inflated claims about the LSAT's power, the Law School Admissions Council stated that test scores were not

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<sup>2</sup> Compare LAW SCH. ADMISSION COUNCIL, U.S. NATIONAL DECISION PROFILES (2018) (listing admitted applicant stats by race and ethnicity) (on file with author), with *Applicants by Ethnic and Gender Group* (listing applicant stats by race and ethnicity) (on file with author).

<sup>3</sup> Latino/a test-takers score an average of 146. SUSAN P. DALESSANDRO, LISA C. ANTHONY & LYNDIA M. REESE, LAW SCH. ADMISSION COUNCIL, LSAT TECHNICAL REPORT SERIES: LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2005–2006 THROUGH 2011–2012 TESTING YEARS (2012), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.258.4820&rep=rep1&type=pdf>.

<sup>4</sup> LAW SCHOOL ADMISSION COUNCIL, *supra* note **Error! Bookmark not defined.**

<sup>5</sup> Katherine A. Austin et al., *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 766 (2017).

<sup>6</sup> Joel Chanvisanuruk, *The Import and Application of Detailed Bar Exam Score Reports in Tailoring Bar Preparation Outreach to Law Students* (2016) (PowerPoint slides) (on file with the University of Cincinnati College of Law and the author).

<sup>7</sup> MARJORIE M. SHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 53–55 (2008), <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

appropriate tools for assessing things like bar exam risks.<sup>8</sup> Nonetheless, the LSAT is used by law schools in ways that systematically exclude Black people to extents experienced by no other racial or ethnic group—using justifications that merit much suspicion.

Unfortunately, for many Black applicants who do receive offers of admission, the marginalization process continues. They are often required to pay higher proportions of their law school’s “sticker price” than other students. They are also disproportionately funneled into schools with the least favorable outcomes. Lastly, they are exposed to a curriculum that is presented in a way that alienates Black students and other students from underrepresented backgrounds.

Part I of the paper introduces the concept of marginalization. Part II explains how the law school admission process funnels Black students into schools with the least favorable outcomes. Part III discusses how law school scholarship policies contribute to higher student loan debt among Black students. Part IV argues that the law school environment marginalizes Black students through the lack of diversity and the centrality of White racial and cultural norms. In the end, Black law students are often, in the words of Du Bois, outcasts and strangers in their own law schools, if they are not excluded from law school altogether.

## I. WHAT IS MARGINALIZATION?

The origins of marginalization as a research framework are typically said to be within sociology, most notably, an article titled, “Human Migration and the Marginal Man.”<sup>9</sup> The article, written in 1928 by American sociologist Robert Park,<sup>10</sup> presents the concept of “the marginal man,” a person who, due to societal upheaval,<sup>11</sup> is torn between the “warm [but limiting] security” of his cultural origins and the “cold freedom” of the larger, changing world.<sup>12</sup>

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<sup>8</sup> Press Release, Daniel O. Bernstine, President, Law Sch. Admission Council, Why LSAT Scores Should Not Be Used to Label Law Schools and Their Students, [https://www.lsac.org/sites/default/files/media/lsac-statement-dec-1-final\\_0.pdf](https://www.lsac.org/sites/default/files/media/lsac-statement-dec-1-final_0.pdf).

<sup>9</sup> Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. SOC. 881 (1928).

<sup>10</sup> Robert J. Dunne, *Marginality: A Conceptual Extension*, in 12 RESEARCH IN RACE AND ETHNIC RELATIONS 11, 12 (Rutledge M. Dennis ed., 2005); see also Thomas Jenkins, *The Marginal Man: Evolution of a Concept*, in 12 RESEARCH IN RACE AND ETHNIC RELATIONS 49, 54 (Rutledge M. Dennis ed., 2005) (asserting that the marginal man concept arose out of previous research in other academics fields, including cultural anthropology and psychology).

<sup>11</sup> Park framed this upheaval in the context of his “catastrophic theory of progress,” which posits that progress is most forcefully advanced through territorial and cultural conquests and the “collisions, conflicts, and fusions of people and cultures” that often accompany these phenomena. Park, *supra* note 9, at 882.

<sup>12</sup> *Id.* at 892.

Park was describing a person essentially on the margins of two societies or cultures because of circumstances thrust upon him. But Park's focus on the psychic effects of marginality seems to render the framework as much a psychological concept as a sociological one.<sup>13</sup>

Park was not the first person to conceive of marginality as a condition. In *Souls*, W.E.B. Du Bois writes about the "double-consciousness" of being an "American Negro."<sup>14</sup> This duality captured the psychic and social conflicts facing Black Americans, the descendants of enslaved Africans.<sup>15</sup> In *Souls*, written a quarter-century before "Human Migration and the Marginal Man," Du Bois describes individuals split between their country of nominal citizenship and the land of their not-too-distant heritage. The latter was particularly significant given the stigma associated with darker skin and given the distinctive culture spawned by the endurance of African customs among people enslaved in America.<sup>16</sup> Elementally, Du Bois was describing people torn between two conflicting existences: "an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body."<sup>17</sup> This was the fundamental basis of the theory of marginalization.

#### A. *Defining Terms and Framing Concepts*

Marginalization frameworks have been adapted to many academic traditions, including sociology, psychology, geography, economics, political science, anthropology, and ecology. This diffusion has spawned a plethora of conceptions and definitions of relevant terms. Thus, clarity regarding the meaning and scope of important terms is essential.<sup>18</sup>

The terms *marginalization* and its lexical cousin, *marginality*, are both derivatives of the word *marginal*. Thus, the meanings and conceptions of *marginalization* and *marginality* descend from how *marginal* is defined. The Oxford dictionary defines *marginal* as "[r]elating to or situated at the edge or

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<sup>13</sup> *Id.*

<sup>14</sup> DU BOIS, *supra* note 1, at 3.

<sup>15</sup> Everett Stonequist, *The Problem of the Marginal Man*, 41 AM. J. SOC. 1, 4 (1935) (noting that slavery "deprived the Negro of his African cultural heritage and forced him to accept the American culture and its values.").

<sup>16</sup> An example of this merging of culture, according to Du Bois, was the black church, which he described as "the social center of Negro life in the United States, and the most characteristic expression of African character." DU BOIS, *supra* note 1, at 193.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> Rutledge M. Dennis, *The Age of Marginality*, in RESEARCH IN RACE AND ETHNIC RELATIONS, *supra* note 10, at 3, 8.

margin of something.”<sup>19</sup> Therefore, *marginal* is a relative construct denoting deviation or distance from some notion of normality, center, or power.<sup>20</sup>

Building on this basic conception, *marginality* has been conceived as a “complex condition of disadvantage;”<sup>21</sup> “the temporary state of having been put aside;”<sup>22</sup> and “an involuntary position and condition” of existing at the margins.<sup>23</sup> *Marginalization* has been defined as “a process of becoming peripheral,”<sup>24</sup> representing the “convergence of political, cultural, economic and environmental problems.”<sup>25</sup> In essence, research frameworks centered on marginalization attempt to describe and explain the multifaceted processes that cause marginality. The multidisciplinary and interdisciplinary nature of the frameworks reflect the nature of the processes being studied. Von Braun and Gatzweiler assert that marginalization frameworks integrate “poverty, discrimination, and social exclusion; the degradation of ecosystem function; and access to services, markets, and technology.”<sup>26</sup>

Informed by the relevant literature, essential terms are defined thus:

- *Marginal* is defined as *relating to exclusion, incomplete assimilation, or adverse incorporation into dominant cultures or centers of power, resulting in deficient power in relevant contexts.*
- *Marginality* is the multidimensional condition of being marginal.
- *Marginalization* is the multifaceted process through which marginality occurs.

<sup>19</sup> *Marginal*, OXFORDDICTIONARIES.COM, [http://www.oxforddictionaries.com/us/definition/american\\_english/marginal](http://www.oxforddictionaries.com/us/definition/american_english/marginal) (last visited May 28, 2016).

<sup>20</sup> Bradley T. Cullen & Michael Pretes, *The Meaning of Marginality: Interpretations and Perceptions in Social Science*, 37 SOC. SCI. J. 215, 216 (2000) (“Deviants from a standard or norm are deemed ‘marginal,’ just as those people who differ from Western society are deemed ‘primitive.’”).

<sup>21</sup> Assefa Mehretu et al., *Concepts in Social and Spatial Marginality*, 82 GEOGRAFISKA ANNALER 89, 90 (2000).

<sup>22</sup> Ghana S. Gurung & Michael Kollmair, *Marginality: Concepts and Their Limitations* 10 (NCCR North-South Dialogue, IP6 Working Paper No. 4, 2005), <http://www.nccr-pakistan.org/wp-content/uploads/2018/09/Marginality.pdf>.

<sup>23</sup> Joachim von Braun & Franz W. Gatzweiler, *Marginality—An Overview and Implications for Policy*, in MARGINALITY: ADDRESSING THE NEXUS OF POVERTY, EXCLUSION AND ECOLOGY 3 (Joachim von Braun & Franz W. Gatzweiler eds., 2014) [hereinafter Braun & Gatzweiler].

<sup>24</sup> Dan Trudeau & Chris McMorran, *The Geographies of Marginalization*, in A COMPANION TO SOCIAL GEOGRAPHY 437, 438 (Vincent J. Del Casino, Jr. et al. eds., 2011).

<sup>25</sup> Mehretu, et al., *supra* note 21, at 90.

<sup>26</sup> Braun & Gatzweiler, *supra* note 23, at 4.

## 1. Marginality and Exclusion

Exclusion has been described as “both a process and condition” that leads to “disadvantage, relegation and the systematic denial of individuals’ or communities’ rights, opportunities and resources.”<sup>27</sup> Marginalization and exclusion are distinct, though closely related, concepts.<sup>28</sup> Both concepts are concerned with the processes that determine one’s position and interconnectedness relative to some notion of centrality.<sup>29</sup>

Some authors have positioned marginalization frameworks as a means of explaining or helping frame exclusion.<sup>30</sup> Von Braun and Gatzweiler assert that marginalization frameworks integrate many conditions, including exclusion.<sup>31</sup> This conception informs the manner in which the interplay between marginalization and exclusion are treated in this paper. The condition of marginality among Black aspiring lawyers explains why they are excluded from the profession in such disproportionate numbers.

## 2. Marginality as Adverse Incorporation

Adverse incorporation is essentially inclusion on disadvantageous terms. Park illustrated this type of marginality in a strikingly, if not unsettlingly, romanticized account of slavery. He asserted that slavery fostered the assimilation of enslaved Africans into “their masters’ families.”<sup>32</sup> This assimilation was characterized by the adoption of certain “manners and customs.”<sup>33</sup> The completeness of the assimilation, according to Park, depended on the level of “close and intimate contact” between the enslaved and their enslavers.<sup>34</sup> Therefore, the enslaved person who toiled in the

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<sup>27</sup> Matthias Bernt & Laura Colini, *Exclusion, Marginalization and Peripheralization* 5–6 (Leibniz Inst. for Reg’l Dev. and Structural Planning, Working Paper No. 49, 2013), [https://leibniz-irs.de/fileadmin/user\\_upload/IRS\\_Working\\_Paper/wp\\_exclusion-marginalization-peripheralization.pdf](https://leibniz-irs.de/fileadmin/user_upload/IRS_Working_Paper/wp_exclusion-marginalization-peripheralization.pdf).

<sup>28</sup> *See id.* at 21.

<sup>29</sup> *See id.*

<sup>30</sup> Marginality is “a political concept, describing the dynamics of oppression, powerlessness and disadvantage which produce concentrations of poverty and exclusion in modern Western metropolises.” *See id.* at 16.

<sup>31</sup> VonBraun and Gatzweiler assert that marginalization frameworks integrate “poverty, discrimination, and social exclusion; the degradation of ecosystem function; and access to services, markets, and technology.” Braun & Gatzweiler, *supra* note 23, at 4.

<sup>32</sup> Robert E. Park, *Racial Assimilation in Secondary Groups with Particular Reference to the Negro*, 19 AM. J. SOC. 606, 612 (1914).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 614.

“patriarchal big house”<sup>35</sup> was more assimilated than “the Negro field hand.”<sup>36</sup> Du Bois made a similar point in *Souls* when he lamented the post-American Civil War decline in the “bonds of intimacy, affection, and sometimes blood relationship” between “domestic servants” and their enslavers.<sup>37</sup>

The significance of these illustrations lies mainly in how they highlight the often one-sided nature of the assimilation process. For marginal people, assimilation means embracing dominant culture. They may be technically assimilated but are rarely considered equal in a substantive sense. So, while Park and Du Bois waxed nostalgically about “kindly relations of master and slave,”<sup>38</sup> those relationships were rooted in power asymmetries that left the enslaved assimilated, but on disadvantageous terms.

An adversely incorporated law student could be one who enrolls in a school with unfavorable outcomes, due to few, if any, other options. A student who enrolls without the benefit of a scholarship, resulting in higher student loan debt at graduation, is another example. In both scenarios, the students are enrolled and, therefore, incorporated, but under less favorable, or adverse, circumstances.

### 3. Marginality as Incomplete Assimilation

Many early theorists, including Du Bois and Park, spoke of marginalization in terms of assimilation. The marginal person’s status as an outsider was embodied by incomplete assimilation into relevant cultures, particularly the dominant culture. While not terming it assimilation, Stonequist described “social situation[s]” in which “members of one cultural group are seeking to adjust themselves to the group which possesses greater prestige and power.”<sup>39</sup> He tied these situations to the psychic difficulties and mental confusions of the marginal existence, as conceived by Du Bois and Park.

Wardwell trod a similar path, but he challenged the notion that the mental confusions associated with marginality were the result of being torn between opposing cultures. Writing almost a century after the abolition of U.S. slavery and a half-century after Du Bois’s *Souls*, Wardwell argued that Black Americans were not conflicted over embracing African or American culture; they sought to be “full-fledged” Americans.<sup>40</sup> Their marginality,

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<sup>35</sup> DU BOIS, *supra* note 1, at 167.

<sup>36</sup> Park, *supra* note 32.

<sup>37</sup> DU BOIS, *supra* note 1, at 183.

<sup>38</sup> Park, *supra* note 32, at 613.

<sup>39</sup> Stonequist, *supra* note 15, at 3.

<sup>40</sup> Walter I. Wardwell, *A Marginal Professional Role: The Chiropractor*, 30 SOC. FORCES 339, 340 (1952).

according to Wardwell, was forced upon them by racial discrimination.<sup>41</sup> In other words, the incompleteness of their assimilation was imposed on them by the dominant class, rather than caused by the mental confusions described by Park or by the “double consciousness” conceived of by Du Bois. It was the imposition of marginality that caused the confusions, not the converse.<sup>42</sup>

In the law school context, incomplete assimilation could be a student who is placed on academic probation due to low grades and, therefore, subjected to a range of curricular restrictions not placed on other students. The differences between incomplete assimilation and adverse incorporation are subtle. It would not be difficult to argue that the conditions can co-exist, and certainly people can move out of one condition into the other.

## II. MARGINALIZATION AND EXCLUSION IN THE ADMISSION PROCESS

In 2016-17, 49 percent of Black law school applicants received no offers of admission. This was the highest shut-out rate among all racial and ethnic groups. As explained earlier, LSAT score disparities are a major explanation for these trends. The shut-out rate increases as the LSAT score band decreases. This trend holds with almost complete consistency for each racial and ethnic group. This means that for groups whose score distribution trends lower, the admit rate for that group is lower.

Seventy-two percent of Black applicants during the 2016-17 cycle had LSAT scores below 150. This was by far the largest proportion among the four largest racial and ethnic groups; double the overall proportion of 36 percent; and almost three times the proportion of Asian and White applicants.<sup>43</sup> Intensifying the exclusionary effects of these trends is the fact that Black applicants with LSAT scores between 135 and 149 were admitted at lower rates than White applicants and overall. The majority, 55 percent, of Black applicants within this band received no offers of admission, compared to 39 percent of White applicants and 46 percent overall.<sup>44</sup>

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<sup>41</sup> “[The American Negro] wants to be accepted as a full-fledged American citizen, with all the rights and privileges thereof, but . . . he has only partially succeeded.” *Id.*

<sup>42</sup> A study of Native American children, themselves the targets of racial segregation, concluded that negative marginal personality traits were most intense among individuals who identified with white culture, but who faced resistance to their assimilation into that culture. See Alan C. Kerckhoff & Thomas C. McCormick, *Marginal Status and Marginal Personality*, 34 SOC. FORCES 48, 54 (1955).

<sup>43</sup> Overall: 36 percent (20503/56410); Asian: 26 percent (1549/5935); Black: 72 percent (6097/8439); Latino/a: 49 percent (3662/7406); White: 27 percent (9349/35076). LAW SCHOOL ADMISSION COUNCIL, *supra* note 2.

<sup>44</sup> Proportion receiving no offers of admission: 46% (8538/18697); Black: 54% (2848/5221); White 39% (3472/9000). *Id.* at 4.

These trends contradict the conventional wisdom that Black applicants with lower LSAT scores have advantages over White applicants with similar or even higher scores. The opposite is true. It is noteworthy that the entire 135–149 range falls well below the average LSAT score for White test-takers (153) and straddles the average for Black test-takers (142). Even if the range is narrowed to 135–144, the lower limits of what even “access” schools consider theoretically acceptable, Black applicants were more likely than White applicants to be shut out of law school—70 percent to 60 percent.<sup>45</sup> The trends suggest that to the extent factors other than the LSAT bear upon admission decisions, it is to the detriment of Black applicants.

Applicants are assessed based on an ostensibly uniform application of standards. The downside of this uniformity is that it assumes equality of opportunity and too often ignores the unequal backgrounds from which applicants come. In an article titled, “Reimagining Merit as Achievement,” I argue that law schools should consider the credentials and accomplishments of applicants in the context of “what could have reasonably been expected, given their background.”<sup>46</sup> This type of contextualization is the only fair way to assess merit. Otherwise, you get the continued propagation of a system that rewards privilege under the guise of meritocracy.

There are a few “non-merit” factors, ostensibly within the control of the applicant, that can influence whether an applicant is admitted to law school—most notably, *where* an applicant applies and *when* an applicant applies. If an applicant only applies to schools with low admit rates, she is less likely to receive an offer of admission, irrespective of her credentials, than if she also applied to at least one “safety” school. The number of applications submitted matters too. More than 95 percent of applicants who applied to ten or more law schools received at least one offer compared to 56 percent of applicants who applied to only one law school.<sup>47</sup>

The timing of application submission is important as well. Most law schools use a “rolling” admissions framework, in which they consider applications roughly in the order they are received. Applicants who apply later in the cycle are often less likely to gain admission, due to fewer available seats remaining in the entering class. It is likely that, at most law schools most seats in the entering class are accounted for before the application deadline passes. As supply dwindles, competition increases. An applicant

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<sup>45</sup> 1346/3406 white applicants; 994/3317 black applicants. LAW SCHOOL ADMISSION COUNCIL, *supra* note 2.

<sup>46</sup> Aaron N. Taylor, *Reimagining Merit as Achievement*, 44 N.M. L. REV. 1, 6 (2014).

<sup>47</sup> LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (2015), [https://www.lsac.org/docs/default-source/data-\(members\)/national-applicant-trends-2015.pdf](https://www.lsac.org/docs/default-source/data-(members)/national-applicant-trends-2015.pdf) (on file with author).

who could have been a shoo-in for admission in November could be waitlisted or outright denied in March.

Black law school applicants tend to apply later in the admission cycle than applicants of other racial and ethnic backgrounds. During the 2017-18 admission cycle, 43 percent of Black law school applicants applied in March or later.<sup>48</sup> This was compared to 26 percent of Asian applicants;<sup>49</sup> 29 percent of White applicants;<sup>50</sup> and 36 percent of Latino/a applicants.<sup>51</sup> The plurality of Black applicants applied in March, compared to November for Asian, Latino/a, and White applicants.<sup>52</sup>

The decisions of where and when to apply rest with the applicant; but they are influenced by many factors, including access to information. There are more than 200 ABA-approved law schools. It is virtually impossible to acquire substantive information about all of them, and it may be needless to do so. But information is critical to developing an application strategy. Applicants who have access to pre-law advisors and others who can effectively assist in the development of an application strategy tend to fair best. Unfortunately, students who attend non-selective colleges, the types of institutions Black students are most likely to attend,<sup>53</sup> have less access to advisors. As one group of researchers asserts, high student-to-advisor ratios at these schools mean that advisors “rarely have time to engage in long-term education planning, discuss career goals, or provide comprehensive support” to students.<sup>54</sup> Therefore, students at these schools tend to have less support in pursuing graduate and professional school, including in developing strategies for applying to law school.

Financial resources also loom large in the decisions of when and where to apply. Applying to law school can be an expensive endeavor.<sup>55</sup> Application

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<sup>48</sup> 3841 out of 8846 applicants. LAW SCH. ADMISSION COUNCIL, CURRENT VOLUME SUMMARIES BY REGION, RACE/ETHNICITY, SEX & LSAT SCORE (2018) (on file with author).

<sup>49</sup> 10963 out of 38350 applicants. *Id.* (on file with author).

<sup>50</sup> 1718 out of 6679 applicants. *Id.* (on file with author).

<sup>51</sup> 2917 out of 8011 applicants. *Id.* (on file with author).

<sup>52</sup> Calculations on file with author.

<sup>53</sup> See, e.g., Elizabeth Baylor, *Closed Doors: Black and Latino Students Are Excluded from Top Public Universities*, CTR. FOR AM. PROGRESS (Oct. 13, 2016, 12:01 AM), <https://www.americanprogress.org/issues/education/reports/2016/10/13/145098/closed-doors-black-and-latino-students-are-excluded-from-top-public-universities/>.

<sup>54</sup> Melinda M. Karp et al., *How Colleges Use Integrated Planning and Advising for Student Success (iPASS) to Transform Student Support 4* (Cmty. Coll. Res. Ctr., Working Paper No. 89, 2016), <https://ccrc.tc.columbia.edu/media/k2/attachments/how-colleges-use-ipass-transform-student-support.pdf>.

<sup>55</sup> *LSAT Fees & Refunds*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/jd/applying-to-law-school/lSAT-cas-fees> (last visited Mar. 12, 2019) (providing an overview of LSAC fees).

fees at individual schools can be as high as \$85.<sup>56</sup> The LSAT costs \$190.<sup>57</sup> Applicants must also have their academic transcripts and letters of recommendation processed by the LSAC Credential Assembly Service (CAS)—another \$185, not including the costs of the transcripts themselves. Then the cost of having the CAS report sent to law schools is \$35 each. Applicants who apply to ten or more schools have the best chances of receiving at least one offer, but the cost of submitting ten applications can be upwards of \$1,300.<sup>58</sup>

LSAC offers need-based fee waivers, and many law schools will grant application fee waivers. But these waivers do not cover all the expenses of applying,<sup>59</sup> and some applicants likely do not know about the waivers. Lack of money can force applicants to limit the number of schools to which they apply or delay applications until sufficient funds are acquired. Thus, while the decisions of where to apply and when to apply do indeed rest with the applicant, they are nonetheless influenced by factors that disproportionately disadvantage some applicants, especially Black applicants.

#### A. *Racial Stratification*

Exclusion is the most extreme form of marginalization, and as the data points out, Black aspiring lawyers are excluded from legal education to the largest extent. And while an offer of admission spares some Black aspiring lawyers from being excluded, it does not spare them from marginalization. In fact, an offer of admission can begin a longer marginalization process that begins as adverse incorporation. Black admitted applicants are granted access to legal education, but often on disadvantageous terms. Racial and ethnic stratification in legal education provides a compelling example.

The 2010-11 admission cycle represented a boon for law schools, with record numbers of first-year students enrolling that fall.<sup>60</sup> But the manner in

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<sup>56</sup> See, e.g., *JD Application Process*, STAN. L. SCH., <https://law.stanford.edu/apply/how-to-apply/jd-application-process/> (last visited Mar. 12, 2019) (listing an application fee of \$85).

<sup>57</sup> *LSAT Fees & Refunds*, *supra* note 55.

<sup>58</sup> Ten applications at an average fee of \$60 (\$600) plus the cost of one LSAT administration (\$180) plus the cost of sending CAS and sending 10 CAS reports to law schools (\$185 + \$350) is \$1,315.

<sup>59</sup> The LSAC fee waiver covers two LSAT administrations and four CAS reports sent to law schools. Applicants must self-fund LSAT administrations beyond two, and any CAS reports beyond four. *Fee Waivers for the LSAT & Credential Assembly Service (CAS)*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat/lsat-dates-deadlines-score-release-dates/lsat-fees-refunds/fee-waivers-lsat-credential> (last visited Mar. 12, 2019). Also, some law schools may not grant application fee waivers only in extreme cases. See, e.g., *JD Application Process*, *supra* note 56 (“The [application] fee may be waived in cases of extreme personal hardship.”).

<sup>60</sup> A record 52,488 first-year students enrolled that year. AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ENROLLMENT AND DEGREES AWARDED 1963–2012 ACADEMIC YEARS (2013),

which law schools packed their classes that year was a harbinger of vast declines in applications and enrollments that would take hold once it became clear that the recessionary legal job market could not support the volume of graduates. Much has been written about the extent to which law school admit rates have increased in this climate.<sup>61</sup> Less has been written about the extent to which these trends have somewhat ironically made it harder for Black law students to gain admission to schools with the most favorable outcomes.

In previous research, I divided law schools into five groups based on their 2010-11 median LSAT score. The median LSAT was used as a proxy for factors such as institutional wealth, a factor associated with a school's ability to invest heavily in the success of its students.<sup>62</sup> Compared to schools with the lowest median LSAT scores, schools with the highest scores had lower student faculty ratios,<sup>63</sup> almost double the number of advanced courses,<sup>64</sup> much lower student attrition,<sup>65</sup> higher bar passage rates,<sup>66</sup> and higher employment rates among their graduates.<sup>67</sup> These schools are in the best positions to not only foster diversity, but wide-ranging success among diverse groups of students. Unfortunately, these schools are doing little to foster diversity, and even less now than they were before the application downturn.

In fall 2015, Black first-year students were less likely to be enrolled in schools with the highest LSAT medians and most favorable student outcomes than they were in the record-breaking fall 2011. In the earlier year, a third of Black first-year students were enrolled in the schools in the two highest median LSAT groupings. In 2015, that proportion had declined to 29 percent. On the other hand, White and Asian first-year students were more likely to

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[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf).

<sup>61</sup> See, e.g., Aaron N. Taylor, *Diversity as a Law School Survival Strategy*, 59 ST. LOUIS U. L.J. 321, 325 (2015).

<sup>62</sup> Of the 36 law schools in this grouping, 33 were affiliated with a university that had an endowment of more than one billion dollars. *Id.* at 357 (listing schools in grouping).

<sup>63</sup> Schools with the highest median LSAT scores had median student-faculty ratio of 11:1, compared to 15.5:1 among schools with the lowest median LSAT scores. Calculations by author. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ANNUAL 509 REQUIRED DISCLOSURES (2011).

<sup>64</sup> Schools with the highest median LSAT scores had a median number of advanced courses of 193, compared to 104 among schools with the lowest median LSAT scores. Calculations by author. *Id.*

<sup>65</sup> Schools with the highest median LSAT scores had a median attrition rate of 3 percent, compared to 17 percent among schools with the lowest median LSAT scores. Calculations by author. *Id.*

<sup>66</sup> Schools with the highest medians had a median differential between their bar exam passage rate and that of their relevant jurisdictions of plus-10 percent, compared to minus-5 percent among schools with the lowest median LSAT scores. Calculations by author. *Id.*

<sup>67</sup> Schools with the highest median LSAT scores had a median full-time employment rate of 91 percent, compared to 67 percent among schools with the lowest median LSAT scores. Calculations by author. *Id.*

attend these schools. In fall 2011, 39 percent of White first-year students were enrolled in these schools; that proportion increased to 47 percent in 2015. The increase among Asian first-year students was even more dramatic, from 52 percent to 64 percent.

Another way to illustrate racial stratification trends is through the frame of potential value of the law school investment. Along with my research team, I conducted an analysis in which we divided schools into four groups, using the following factors to make distinctions:

- 1) Proportion of 1L students who received scholarships of 50% or more
- 2) Proportion of students who left law school after 1L year (not including transfers out)
- 3) Average first-time bar passage rate differential
- 4) Proportion of graduates employed in full-time bar-required or JD advantage jobs

This type of analysis invokes the value proposition of legal education—the amount students pay and the type of payoff they can reasonably expect. But the trends highlight the extent of adverse incorporation among Black law students. They were least likely to attend schools with the most generous scholarship awards, the lowest attrition, and the best bar exam and employment outcomes.<sup>68</sup> Conversely, they were most likely to attend the least favorable schools.<sup>69</sup> In fact, they were only nine percentage points more likely to attend the most favorable schools than the least favorable, compared to 17 points for Latino/a students; 46 points for White students; and 53 points for Asian students. On a whole, Black law students are attending law school under the riskiest terms of any of the four largest racial and ethnic groups—textbook adverse incorporation.

### III. MARGINALIZATION AND SCHOLARSHIPS

As the pressure to attract students with high LSAT scores and undergraduate GPAs has increased in legal education, merit aid has grown as the predominant form of tuition discounting.<sup>70</sup> According to the ABA, merit

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<sup>68</sup> Forty percent of Black students attended these schools, compared to 42 percent of Latino/a students, 58 percent of White students, and 64 percent of Asian students. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ANNUAL 509 REQUIRED DISCLOSURES (2015).

<sup>69</sup> Thirty-one percent of Black students attended these schools, compared to 25 percent Latino/a, 12 percent of White students, and 11 percent of Asian students. *Id.*

<sup>70</sup> Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 965 (2014).

scholarship funding increased 68 percent among public law schools and 53 percent among private schools between 2005 and 2010.<sup>71</sup> Need-based funding—the most equitable form of tuition discounting—remained essentially flat.<sup>72</sup> Funding for so-called “need-plus” scholarships increased 68 percent and 59 percent at public and private law schools respectively.<sup>73</sup> Law schools purport to consider both financial need and notions of merit in awarding need-plus scholarships. Indirect trends, however, suggest these scholarships have little equitable impact, operating as merit scholarships by another name.

Law schools are highly tuition-dependent. In 2013, tuition payments accounted for an average of 69 percent of law school revenue. A quarter of law schools (about 50) received 88 percent or more of their revenue from tuition. This financial structure has direct implications on scholarship policy. For schools that are highly tuition-dependent, tuition discounts to some students are funded in large part by tuition revenue from other students. Therefore, students who pay full tuition (or close to it) subsidize the attendance of their peers receiving scholarships.

The LSAT-driven nature of scholarship awarding ensures that tuition discounts will flow most lucratively to students from privileged backgrounds. Disadvantaged students are then required to pay higher proportions of the tuition rate in order to account for the discounted rates of their privileged peers. While this method of cost-shifting is pervasive throughout legal education, the wealthiest institutions tend to rely less on tuition revenue in funding scholarships. For instance, Ivy League law schools award based predominantly on financial need.<sup>74</sup> But because Black students are less likely to attend the wealthiest schools, they are disproportionately funding the attendance of their often more well-off peers. These trends, in turn, contribute to higher student loan debt among Black law students.

#### A. *Scholarship Awarding Trends*

The data underlying this section is taken from the 2016 administration of the Law School Survey of Student Engagement (LSSSE). LSSSE is a

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<sup>71</sup> Memorandum from Dennis W. Archer, Chair, Am. Bar Ass’n Task Force on Fin. Legal Educ., to Interested Parties (June 17, 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2015\\_june\\_report\\_of\\_the\\_aba\\_task\\_force\\_on\\_the\\_financing\\_of\\_legal\\_education.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Infra* Part III.C; see also Dave Roos, *How Ivy League Admissions Work*, HOWSTUFFWORKS, <https://money.howstuffworks.com/personal-finance/college-planning/admissions/ivy-league-admissions5.htm> (last visited Jan. 20, 2019).

roughly 100-item annual survey of the effects of legal education on law students. LSSSE is rooted in the concept of student engagement, which is based on the simple, yet powerful observation that the more engrossing the educational experience, the more students will gain from it. Student engagement is a holistic concept, capturing the intricate web of individual and institutional processes and actions that contribute to desired student outcomes.<sup>75</sup>

In 2016, 16,424 students from 67 U.S. law schools accredited by the American Bar Association responded to the survey. The demographics of LSSSE respondents tend to reflect those of all law students, giving the Survey immense descriptive value as a means of investigating legal education trends.

Below is the racial and ethnic breakdown of LSSSE respondents.<sup>76</sup>

a. Race and Ethnicity

- American Indian or Native American: 0.6% (98)
- Asian, Asian American or Pacific Islander: 6.1% (1,007)
- Black or African American: 7.8% (1,290)
- Hispanic or Latino/a: 9.2% (1,519)
- Multiracial: 2.5% (404)
- Other/Unknown: 9.5% (1,572)
- White: 62.5% (10,275)
- International or Foreign National: 1.6% (259)

N=16,424

The racial and ethnic demographics of LSSSE respondents align closely with those of the 111,881 law students enrolled in Juris Doctor programs nationwide during the 2015-2016 school year.<sup>77</sup> The four largest racial and ethnic groups comprised the following proportions of all law students: Asian: 6.6% (7,409); Black: 8.8% (9,894); Latino/a: 10.2% (11,402); White: 62.3% (69,870).

Law schools profess to use an array of criteria to select scholarship recipients, and to an extent most do. Factors such as undergraduate grades, leadership ability, diversity, and even financial need can impact scholarship awarding decisions.<sup>78</sup> But this theoretical holism cannot shield an

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<sup>75</sup> Alexander C. McCormick, Jillian Kinzie & Robert M. Gonyea, *Student Engagement: Bridging Research and Practice to Improve the Quality of Undergraduate Education*, in HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 55 (M.B. Paulsen ed., 2013).

<sup>76</sup> 2016 Enrollment DataSet, ANALYTIX BY ACCESSLEX (2016), <http://analytix.accesslex.org/DataSet> (follow instructions posted on webpage to access 2016 Enrollment DataSet).

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., *Scholarships For Entering Students*, U. D.C. DAVID A. CLARKE SCH. LAW (2017), <https://www.law.udc.edu/page/FinAidScholarships> (noting that the University of the District of Columbia School of Law lists the following criteria: academic record, LSAT score, career goals, overcoming

incontrovertible reality: the LSAT is the primary driver of scholarship awards. In this way, the scholarship awarding process is an almost seamless extension of the admissions process. Applicants with advantages in the admissions process tend to benefit from the same advantages when scholarships are awarded.

Most law students receive scholarships. Seventy-one percent of LSSSE respondents reported receiving scholarships or grants during the 2015-2016 school year.<sup>79</sup> As a means of rough comparison, among all law students, almost 64 percent received scholarships or grants during the 2014-2015 school year;<sup>80</sup> this figure was up from 49 percent just four years earlier.<sup>81</sup> The increased awarding is driven mostly by the need to fill classes in a very challenging environment. Historic application and enrollment declines have forced most law schools to increasingly discount tuition to attract students.<sup>82</sup>

### 1. By LSAT Score

LSAT pressures have intensified the stakes. Not only do many schools need to attract students, but they want to attract students with attractive LSAT scores. The application declines have been most intense among high LSAT-scorers,<sup>83</sup> so the battles for the remaining applicants have increased in pitch, often prompting outright bidding wars among law schools.<sup>84</sup> The resulting bounty, ostensibly a favorable development for students, has not been spread evenly or equitably. The aid has tended to flow most generously to students most likely to come from privileged backgrounds.

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adversity or obstacles, extensive community involvement, military participation, range of employment and life experiences, D.C. residency, quality of written documents, diversity, and commitment to public service).

<sup>79</sup> 2016 Enrollment DataSet, *supra* note 76 (10,844 of 15,278 respondents received scholarships).

<sup>80</sup> 2016 Financial Aid DataSet, ANALYTIX BY ACCESSLEX, (2016), [http://analytix.accesslex.org/DataSet\(74,949/118,012\)](http://analytix.accesslex.org/DataSet(74,949/118,012)) (follow instructions posted on webpage to access 2016 Financial Aid DataSet) (using source to support author's calculations).

<sup>81</sup> AccessLex Inst., 2012 Financial Aid DataSet, ANALYTIX BY ACCESSLEX, (2012), [http://analytix.accesslex.org/DataSet\(73,187/148,401\)](http://analytix.accesslex.org/DataSet(73,187/148,401)) (follow instructions posted on webpage to access 2012 Financial Aid DataSet) (using source to support author's calculations).

<sup>82</sup> Chelsea Phipps, *More Law Schools Hagggle on Scholarships*, WALL STREET J. (July 29, 2012), <https://www.wsj.com/articles/SB10000872396390444130304577557182667927226>.

<sup>83</sup> As of February 3, 2017, the number of applicants with LSAT scores of 165 or higher declined 9%, from 6,265 at the same point in 2016 to 5,704. The number of applicants with scores below 165 increased 1% to 25,738 from 25,440. LAW SCH. ADMISSION COUNCIL, CURRENT VOLUME SUMMARY REPORT (2017) (on file with author).

<sup>84</sup> Dorothy Brown, *Law Schools Are in a Death Spiral. Maybe Now They'll Finally Change.*, WASH. POST (Mar. 9, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/03/09/law-schools-are-in-a-death-spiral-maybe-now-theyll-finally-change/>.

Merit scholarships are, by far, the most prominent type of tuition discount awarded by law schools. Seventy-nine percent of the scholarships awarded to LSSSE respondents were merit-based.<sup>85</sup> The manners in which awarding patterns tracked LSAT scores were unsurprising, yet stark. Respondents with higher LSAT scores were most likely to have received merit scholarships. Table 1 charts the trends.

Table 1: Scholarship Chances by LSAT Score Band

LSAT	140-less	141-145	146-150	151-155	156-160	161-165	166-180
Chance	16%	36%	45%	57%	75%	87%	90%
N=	28/176	365/1023	1111/2495	1966/3420	2135/2857	1567/1803	504/558

Respondents in the highest LSAT band (166–180) were almost six times as likely to report receiving a merit scholarship than respondents in the lowest band (140 and under). But the disparities among closer bands tell an even more unmistakable story. In lockstep fashion, a higher LSAT band was associated with a higher chance of having received a merit scholarship. Eighteen percentage-points separated the 156–160 band from the 151–155 band. It is difficult to imagine that differences on other factors would be so stark among these respondents to justify such a profound difference in merit scholarship chances. Differences in average undergraduate GPAs trended higher across the ranges, but never exceeded one-tenth of one point between adjoining ranges.<sup>86</sup> But in spite of the insignificance of these differences, it is possible that differences in UGPAs contributed to the trends as well.

Even when scores were analyzed individually, the trends were remarkable. Over the 21-point span of 140–161, a span within which 84 percent of LSSSE respondents scored,<sup>87</sup> scholarship chances ranged from 13 percent at the lowest extreme to 86 percent at the highest. There were only five instances over the span where a group of respondents with a certain LSAT score received merit scholarships at a lower rate than a group with the next lower score.

## 2. By Race/Ethnicity

Disparities in LSAT scores had predictable racial and ethnic impacts among LSSSE respondents. As a threshold matter, within each demographic

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<sup>85</sup> 2016 Enrollment DataSet, *supra* note 76 (8,823 of the 11,208 scholarships awarded were merit-based).

<sup>86</sup> Average UGPAs for each LSAT band: 140 or less: 3.04; 141-145: 3.1; 146-150: 3.18; 151-155: 3.25; 156-160: 3.35; 161-165: 3.42; 166-180: 3.45.

<sup>87</sup> 2016 Enrollment DataSet, *supra* note 76 (10,375 of 12,332 LSSSE respondents).

group, receipt of a merit scholarship was associated with a higher LSAT score.

Table 2: Average LSAT Score by Merit Scholarship Recipience, by Race

Scholarship?	Asian		Black		Latino/a		White	
	Yes	No	Yes	No	Yes	No	Yes	No
Average LSAT	156	152	150	146	154	150	157	152

Overall, Black respondents had both the lowest average LSAT score and the lowest chance of receiving a merit scholarship.

Table 3: Scholarship Chances and Average LSAT Score, by Race

	Asian		Black		Latino/a		White	
% Chance	61%	705/1162	48%	498/1045	52%	779/1507	66%	5858/8897
Avg. LSAT	154		148		152		155	

These trends are tangible reflections of the marginalization of Black aspiring lawyers. Black applicants are least likely to gain admission. Even when offered admission, they are least likely to attend law schools with the most favorable outcomes and least likely to receive financial aid that reduces their costs of attendance. This latter form of adverse incorporation contributes to another hallmark of marginalization among Black aspiring lawyers: higher student loan debt.

### B. Student Loan Debt Trends

In their most common form, scholarships are tuition discounts. Schools leverage these discounts for different reasons, but most commonly as enrollment incentives. For many students, a tuition discount has direct implications on the amount of money borrowed for law school. Therefore, a law school's decision to grant or not grant a discount to a particular student has far-reaching implications for that student.

About 83 percent of LSSSE respondents incurred or expected to incur student loan debt from law school. This high level of usage<sup>88</sup> along with the high costs of legal education render law graduates a highly-indebted group. In 2012, the average debt for graduates of private law schools was \$127,000;

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<sup>88</sup> *Project on Student Debt*, INST. FOR C. ACCESS & SUCCESS, <http://ticas.org/posd/map-state-data> (last visited Mar. 12, 2019) (As a means of comparison, 68% of college graduates incurred student loan debt during their course of study.).

the average for public law school graduates was \$88,000.<sup>89</sup> These figures, which are surely higher today, place the typical law graduate in the top 3–4 percent of student loan indebtedness.<sup>90</sup>

As with all things, student loan reliance and indebtedness are not distributed evenly. Blacks and Latinos have the highest rates of borrowing and the highest expected student loan balances.<sup>91</sup> On the LSSSE Survey, 95 percent of Black respondents and 92 percent of Latinos reported relying on student loans to cover the costs of law school. Reliance among Asian and White respondents was high as well; but at 77 percent and 81 percent respectively, they are tangibly lower than their other counterparts.

LSSSE asks respondents to estimate how much law school debt they expect to incur by graduation. Forty percent (40 percent) of Black respondents expected to owe more than \$120,000 in law school debt; only Latinos had a higher proportion (43 percent). The respective rates for White and Asian respondents were 27 percent and 30 percent. At the other end, Black respondents were least likely to expect no law school debt (5 percent).

Table 4: Expected Debt by Race

	N=	\$0	\$1-40K	\$40,001-\$80K	\$80,001-\$120K	\$120,001-\$160K	\$160,001-\$200K	>\$200K
All	14137	17%	11%	20%	22%	14%	10%	6%
Asian	832	23%	10%	16%	17%	15%	10%	9%
Black	1045	5%	7%	22%	27%	20%	12%	8%
Latino/a	1290	8%	8%	16%	25%	19%	15%	9%
White	8937	19%	12%	21%	22%	13%	9%	5%

Taken together, these trends appear to highlight the impact of inequitable merit scholarship policies on student debt. With less of their tuition discounted, legal education is more expensive for Black and Latino/a students.<sup>92</sup> And because these students are less likely to have access to other

<sup>89</sup> *Id.*

<sup>90</sup> DUSTIN WEEDEN, HOT TOPICS IN HIGHER EDUCATION: STUDENT LOAN DEBT 2 (2015), <http://www.ncsl.org/Portals/1/Documents/educ/StudentLoanDebtBrief.pdf>. Student loan debtors owing more than \$100,000 comprise 4 percent of all student loan debtors. *Id.*

<sup>91</sup> See, e.g., SANDY BAUM & PATRICIA STEELE, WHO BORROWS MOST? BACHELOR'S DEGREE RECIPIENTS WITH HIGH LEVELS OF STUDENT DEBT 6 (2010), <https://trends.collegeboard.org/sites/default/files/trends-2010-who-borrows-most-brief.pdf>. Disparities in student loan debt based on the socioeconomic, racial, and ethnic backgrounds of students persist throughout higher education. *Id.*

<sup>92</sup> In another piece, I called the higher education costs paid by first-generation law students with lower LSAT scores a "merit surtax." Aaron N. Taylor, *Op-Ed: Law School Scholarships Foist Surtax on*

sources of funds, disadvantaged students must rely more heavily on loans. The implications of these inequities are vast and long-lasting, and tangibly illustrate the extent of adverse incorporation experienced by these students.

#### IV. MARGINALIZATION AND THE LAW SCHOOL ENVIRONMENT

One of the most salient characteristics of the law school environment is a lack of racial and ethnic diversity. At the vast majority of law schools, students of color are underrepresented, relative to their proportion of the population in the state and regions in which schools are located. In 2017, the 36 law schools with the largest enrollments of Black law students accounted for more than half of all Black law students nationwide.<sup>93</sup> Put differently, 18 percent of the 200 law schools analyzed<sup>94</sup> accounted for half the enrollment of Black law students.<sup>95</sup> At only 46 schools (out of 200) was Black student enrollment at or above the proportion of Black people in the states in which the law schools are located; at only 40 law schools was Black student enrollment at or above proportion of their regional populations. These trends are artifacts of the racial and ethnic exclusion and stratification discussed earlier and further highlight how law schools can be isolating and marginalizing environments for Black law students and others from underrepresented backgrounds.

Diversity among law faculty is even paltrier than among students. In 2016, only 15 percent of law school faculty were people of color.<sup>96</sup> Representation matters. At practically every level of education, students of color have been found to attain better grades when they are exposed to same-race teachers.<sup>97</sup> The three most common theories explaining this trend are that students of color benefit from seeing “role models in a position of

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*Neediest*, NAT'L L.J., (Jul. 13, 2015, 12:00 AM), <http://www.nationallawjournal.com/id=1202731858541/OpEd-Law-School-Scholarships-Foist-Surtax-On-Neediest>.

<sup>93</sup> 4,651 Black law students were enrolled in these schools out of 9,283 Black students overall. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ANNUAL 509 REQUIRED DISCLOSURES (2017).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> ASS'N OF AM. LAW SCH., LEGAL EDUCATION AT A GLANCE: 2018 (2018), <https://www.aals.org/wp-content/uploads/2018/01/LawSchoolDemographics.pdf>.

<sup>97</sup> Dan Godhaber et al., *The Theoretical and Empirical Arguments for Diversifying the Teacher Workforce: A Review of the Evidence* 3 (CTR. FOR EDUC. DATA & RESEARCH, WORKING PAPER NO. 2015-9), <http://m.cedr.us/papers/working/CEDR%20WP%202015-9.pdf>. “There is a significant literature that argues that a match between the race/ethnicity of teachers and students leads to better student outcomes, particularly in high-poverty environments with significant at-risk student populations.” *Id.* at 1; Crystal J. Collins & William Allan Kritsonis, *National Viewpoint: The Importance of Hiring a Diverse Faculty*, 3 NAT'L J. FOR PUB. & MENTORING DOCTORAL STUDENT RES. 1, 3 (2006).

authority;” teachers of color tend to have higher expectations of students of color, compared to White teachers, which is tied to higher student achievement; and teachers of color may possess more cultural dexterity in their teaching and discipline methods.<sup>98</sup>

The lack of diversity among law professors has been found to have a marginalizing impact on students of color. A recent study that analyzed 10 years of data from a private “elite” law school found that having an other-race professor significantly reduced a student’s course grade.<sup>99</sup> The effects, while small, were statistically significant for nonwhite students and “relatively large in magnitude” for nonwhite female students.<sup>100</sup>

Feingold and Souza argued that the academic and social structures of legal education impose “particular burdens that uniquely tax” students of color.<sup>101</sup> They term these burdens “racial unevenness,” and define it as “the presence of any burden that arises solely because of a person’s race.”<sup>102</sup> They liken racial unevenness to an Olympic sprinter being forced to wear weighted clothing while her opponents are free from such requirement.<sup>103</sup>

Racial unevenness in legal education is rooted in the centrality of White racial and cultural norms. These norms are reflected most notably in the racial and ethnic demographics of most law schools (as discussed earlier) and the “race neutral” manners in which courses are often designed and presented.<sup>104</sup> The further removed a student is from the default norms, the more taxing the law school experience. In this way, racial unevenness is essentially a measure of marginality, though the authors do not label it such.

An example of how this form of incomplete assimilation plays out is the “bifurcated thinking” that Black students and other underrepresented students often have to adopt as an academic survival tactic.<sup>105</sup> On one end, issues of race are typically unspoken or ignored in case analyses and class

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<sup>98</sup> Dan Godhaber et al., *supra* note 97, at 2.

<sup>99</sup> Christopher Birdsall et al., *Stereotype Threat, Role Models, and Demographic Mismatch in an Elite Professional School Setting* 13 (AccessLex Inst., Research Paper No. 18-08, 2018), <https://ssrn.com/abstract=3210628>. “While small in magnitude, recall that these are course-specific effects that might add up to nontrivial differences in cumulative GPA.” *Id.*

<sup>100</sup> *Id.* at 16–17.

<sup>101</sup> Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 *BERKELEY J. AFR.-AM. L. & POL’Y* 71, 72 (2013).

<sup>102</sup> *Id.* at 77.

<sup>103</sup> *Id.* at 73.

<sup>104</sup> “Due largely to the legacy of a White (i.e. race-normed) judiciary, facts about race and social context have been overwhelmingly marginalized to the category of irrelevant evidence. ‘Objective’ legal analysis provides little space for the invocation of race.” *Id.* at 97.

<sup>105</sup> *Id.* at 98.

discussions; in many cases these issues are framed as irrelevant.<sup>106</sup> But on the other end, these students live in a world where they have observed, if not experienced first-hand, the relevance of race in the provision and durability of rights and privileges. In the end, they often have to take the extra mental step of disassociating their life experiences from their efforts to appease their professors. This dichotomy captures the weighted clothing analogy that the authors offered and the double consciousness that Du Bois described so compellingly.

One of the most common manifestations of these burdens are lower grades and less favorable outcomes. Black students are most likely among the four largest racial and ethnic groups to leave law school for reasons other than transferring to another law school. During the 2016-17 school year, non-transfer attrition among first-year students was 11 percent for Black students, more than double the 5 percent rate among White first-year students.<sup>107</sup> The bulk of this attrition is the result of students being dismissed due to low grades. Racial unevenness and marginality overall likely contribute to this unfortunate trend.

In a longitudinal study of law students at Case Western Reserve University and the University of Colorado, identifying as a person of color was a negative predictor of law school GPA, in the first year and overall.<sup>108</sup> The trend was evident, even after controlling for factors such as LSAT score and undergraduate GPA.<sup>109</sup> The persistence of these trends among Black students prompted the authors to conclude that the disparity “reflects something not merely about the students, but about legal education itself.”<sup>110</sup> These findings provide much support for the notion that Black law students often suffer incomplete assimilation, which negatively impacts their law school experiences and their ability to thrive and succeed as students.

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<sup>106</sup> See Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 11–12 (2010) (explaining findings from survey research observing that white male professors are reluctant to discuss issues of race in the classroom).

<sup>107</sup> Kylie Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESSLEX INST. (Sept. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

<sup>108</sup> Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMP. LEGAL STUD. 205, 245–46 (2016).

<sup>109</sup> *Id.* at 246.

<sup>110</sup> *Id.* at 247.

## V. CONCLUSION

Black people who aspire to be lawyers endure marginalized existences, which span the law school admission process through the matriculation process and into the scrum for post-law school jobs and beyond. This multifaceted condition takes different forms, outright exclusion, adverse incorporation, and incomplete assimilation. The condition contributes to the enduring underrepresentation of Black law students and lawyers. It also contributes to higher student loan debt. If legal education is to serve as a robust pipeline into the profession among people from underrepresented backgrounds, law schools must adopt methods of selecting, rewarding, and educating students that are rooted in equity, fairness, and legitimacy.