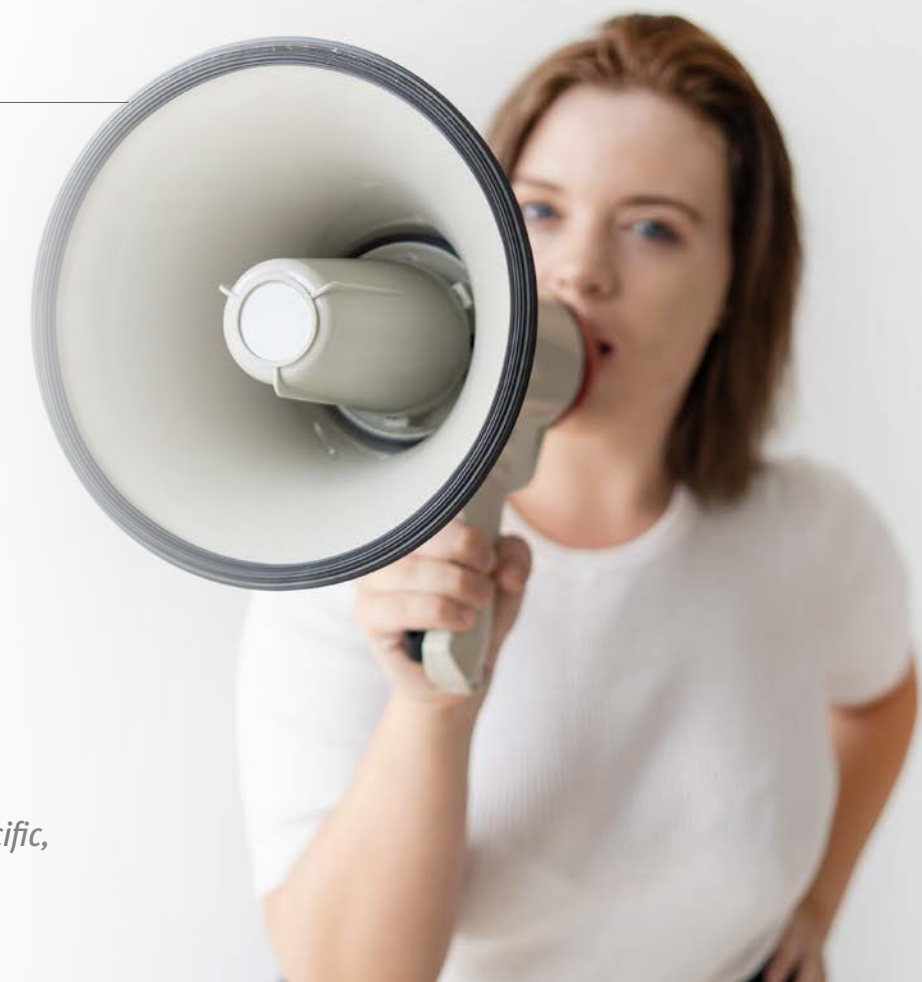


Not Making Enough Noise: The Costs of Failing to Dismantle Racism and White Supremacy in the Legal Profession

By Alison Ashe-Card, Molly Stafford, and Nicole Netkin-Collins

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In the first article in this series, “Making Noise: Doing our Part to Dismantle Racism and White Supremacy in the Legal

Profession,” (*NALP Bulletin* September 2020), we noted the importance of committing to diversity, equity, and inclusion (DEI) on the individual and

institutional levels. We highlighted the life-long nature of the work and encouraged readers to “find your lane.” We now turn to the overwhelming amount of data that reveals the costs that students and lawyers who are Black, Indigenous, and People of Color (BIPOC) bear as a result of the racism and white supremacy prevalent in our profession. Some of this data is highlighted below, along with ideas for engaging in anti-racism efforts with regard to the law school pipeline, law school, and law firms.

I. The Pre-Law Pipeline

As early as elementary school, teachers help set a student’s professional course. A 2018 survey conducted by the American Association of Law Schools (AALS) and Gallup found that one-third of law students first considered law school before high school, and more than half before college.

BIPOC students are faced with many systemic barriers as they progress through

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the U.S. educational system, including the structural racism implicit in tests like the SAT and LSAT, the practice of legacy admissions, resource inequity, and white-centered success ideologies throughout the college and law school admissions processes. While there is a healthy discussion to be had around unconscious bias at all levels of education, this section focuses on a few prevalent systems that promote white supremacy along the college and law school pipeline.

The first systemic barrier is resource inequity. One example of this is the level of career-planning support that is offered to students. Public school counselors are expected to handle all student issues, from drug abuse to bullying to academic issues to career advising.

According to a 2019 survey by the American School Counselor Association, there is a nationwide average of one school counselor for every 455 public K-12 students. Private

schools, by contrast, often have a designated career counselor alongside other counselors. Further exacerbating this issue,

“White students must reflect on their identities so that they are better positioned to disrupt white supremacy and contribute to DEI efforts.”

predominantly white school districts on average receive \$23 billion more in funding than school districts that primarily serve students of color and those from low-income families (the difference is largely due to local wealth and taxes). The college application process is difficult to navigate and students are at a disadvantage without school support.

Another barrier is an over-reliance on standardized test scores. The LSAT, GRE, and other standardized metrics used in the admissions process, and relatedly used to predict students’ success in law school, play a significant role in upholding systemic racism.

Appearing in the Florida International University Law Review, a study by Aaron N. Taylor, Executive Director of AccessLex Center for Legal Education Excellence and longtime expert on diversity in legal education, notes the average LSAT score for Black test takers is 142, while the average for white and Asian test takers is 153. Standardized tests often cannot provide a level playing field for test takers, given our country’s record of inequitable educational opportunities, socioeconomic disparities, the phenomenon of stereotype threat, among other factors that can impact performance on exams like the LSAT.

For example, a recent study of newly-admitted African American lawyers found that many were working full time while in college or lacked the financial resources to take LSAT prep courses. In an effort to make the LSAT more accessible to all students, the Law School Admission Council is in partnership with Kahn Academy and Law Hub to provide free test preparation support for aspiring law students.

While the LSAT was intended to be one factor in a holistic approach to lead to equitable admissions/enhance diversity, *US News & World Report’s* ranking system has the effect of driving LSAT cutoffs and creating an imbalanced reliance on standardized test metrics. Many law school professionals are encouraging *US News* to add diversity, equity, and inclusion as a measure in its rankings, which could help ameliorate the imbalance that the LSAT and GRE rankings cause. Many law school admissions offices actively work to

deemphasize reliance on standardized test scores and develop new methods to accurately and fairly assess the skills of applicants.

Further helping to break down these systemic barriers are several nonprofit organizations, such as the Council on Legal Education Opportunity, that work to expand opportunities for minority and low-income students to attend law school. The ABA Council for Diversity in the Educational Pipeline and the Law School Admission Council (LSAC) created the Pipeline Diversity Directory to provide a clearinghouse of opportunities and resources for reaching BIPOC students as early as grade school.

II. Law School

Law school is stressful and piling on the experiences of microaggressions, implicit bias, and racism can make it an uphill battle for BIPOC students. ABA research

reveals that students from historically underrepresented backgrounds in the law — those identifying as American Indian, Asian, Black, Hispanic, Native Hawaiian, and two or more races — leave law school for reasons other than transferring to another school at disproportionately higher rates than white students. In 2016, white students comprised 62% of 1L enrollment and 49% of 1L non-transfer attrition, while minority students made up 30% of 1L enrollment but accounted for 44% of 1L non-transfer attrition.

Recent research from the Law School Survey of Student Engagement (LSSSE) sheds light on the experiences of BIPOC students, which undoubtedly contribute to the higher rates of non-transfer attrition and to disparate employment outcomes. For the first time, the LSSSE included questions focused on student perceptions of diversity and inclusion within their legal institutions. The answers revealed

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disparities between BIPOC and white students' (i) sense of belonging in their law schools and (ii) the amount of time spent reflecting on their identities.

For example, 31% of white law students strongly agreed when asked whether they felt "part of the community at this institution," while only 21% of Native American and Black law students strongly agreed. Women of color were more likely than men from their same racial/ethnic backgrounds to feel left out of the campus community — including 34% of Black women law students nationwide. White students were more likely than those from other backgrounds to be comfortable being themselves on campus, with 12% noting they were not, while 21% of Native American, Black, or Latinx students stated they were not. These results are sobering as research demonstrates that students are more likely to succeed when they have a strong sense of belonging at their schools.

Professional norms, including those presented during law school, are embedded in white supremacist traditions. "Professionalism" has long been synonymous with whiteness, particularly given that natural Black hairstyles, such as dreadlocks for example, and the use of African American Vernacular English, Spanglish, or Chicano English are routinely flagged as "unprofessional." The result is often that students code-switch, the cost of which is high. Code-switching (changing speech, appearance, and behavior in order to make others feel comfortable — often occurring in spaces where negative stereotypes of Black people run counter to what are considered "appropriate" behaviors and norms for a specific environment) can take an emotional toll on BIPOC students, negatively impacting their mental health and hindering their academic performance.

When we fail to create inclusive environments within our law schools and BIPOC students don't feel comfortable bringing

their authentic selves to their studies, we create additional barriers to their success. Anti-racism efforts must address these barriers and should seek to:

- **Ensure speaker invitations are diverse and inclusive.** Without tokenism, allow BIPOC students to see themselves represented in the profession.
- **Review CSO materials to ensure inclusivity.** For example, does advice regarding interview attire prioritize white norms of "professionalism?"
- **Look inward.** Ensure staff hiring practices are inclusive to increase CSO diversity.

As law school professionals, we also can encourage white students, staff, and faculty to understand their roles in upholding cultural norms on campus. In the LSSSE study referenced above, when students were asked how frequently they reflect on their cultural identities, only 12% of white students noted they do so "very often,"

compared to 50% of Native American students, 44% of Black students, and 34% of Latinx students. Additionally, 28% of white men and 25% of white women law students reported they NEVER reflect on their cultural identity during law school, compared to the 50% of Black women who do so "very often."

White students must reflect on their identities so that they are better positioned to disrupt white supremacy and contribute to DEI efforts. CSOs can provide opportunities for storytelling and encourage students to reflect on their experiences, unpack privileges, and discuss perspectives. Moreover, CSOs can model how to respond to microaggressions — both when called out for committing them (affirm the individual's feelings, apologize, change the behavior) and when on the receiving end (this may involve addressing the behavior upfront, asking an ally to do so, engaging in a follow-up conversation, or a different response altogether).

III. Legal Employment

Starting with the bar exam, legal employment data bear out a similar story of structural racism. The bar exam is “an incredible gatekeeper that keeps people of color and women out of the profession,” Kimberly M. Mutcherson, Co-Dean and Professor of Law at Rutgers Law School, has noted. “The bar exam really tests

privilege and the ability to pay thousands for preparation and not have to work so you can focus.”

NALP’s *Jobs & JDs, Employment and Salaries of New Graduates for the Class of 2019* included an expanded demographics section which demonstrates that despite gains in the overall employment

rate, there are marked disparities in employment outcomes by race and ethnicity. Native Hawaiian or other Pacific Islander graduates and white/Caucasian graduates had the highest employment rates (92.9% and 92.1%, respectively), while Native American /Alaska Native and Black/African American graduates had the lowest employment rates (85.5% and

85.4%, respectively). Similarly, white/Caucasian graduates had the highest rate of employment in bar passage required jobs (79.8%), while the rate was 17 percentage points lower for Black or African American graduates (62.4%).

NALP Executive Director James G. Leipold correctly opined (see “Truth and Reconciliation in the Legal Profession,” *NALP Bulletin*, October 2020) that the profession’s focus on prestige as an indicator of merit and achievement — that is, the reputation of firms, law schools, and the pedigrees of individual lawyers — is the single biggest factor holding back diversity efforts in legal employment and beyond.

Embracing Diversity, Equity, and Inclusion in Law Firms

Black/African American and Hispanic/Latinx individuals represent 12.3% and 18.3%, respectively, of the U.S. population but only represent 5.9% and 5.7%, respectively, of the population of lawyers in the country, according to data

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compiled by LSAC. Black/African American and Hispanic/Latinx individuals represent 3.50% and 4.08%, respectively, of all lawyers in law firms yet they are only 1.94% and 2.62, respectively, of equity partners. In contrast, white/Caucasians represent 60.2% of the U.S population and 86.6% of the population of lawyers. Similarly, white/Caucasians represent 81.69% of lawyers in law firms and 89.87% of equity partners.

The dual goals of retention and creating a firm culture that genuinely values and reflects diversity, equity, and inclusion weave together as key components of any effective firm DEI program that achieves inclusiveness. Law firms are slowly becoming more diverse, but continue to struggle with retention of diverse lawyers, particularly lawyers of color. Retention of Black/African American lawyers remains an ongoing issue, as they continue to leave their firms at a higher rate than other groups. More than 6% of associates who left their firms in 2018 were African American, the highest figure since 2011.

There are universal tenets that have proved essential to a successful strategy for enhancing and embracing diversity, equity, and inclusion in the legal industry. First, there must be a strong demonstrated commitment from leadership. Second, diversity, equity, and inclusion must be defined as core values of the organization and woven into all. Finally, specific goals must be identified, and metrics must be utilized to ensure accountability and progress. Firm management must stay actively engaged in reviewing progress on, and in rewarding contributions to, DEI.

2020 is a year of reckoning and we look forward to law schools and firms taking steps to be true to the anti-racist statements they issued after the deaths of George Floyd, Breonna Taylor, Ahmaud Abernathy, and the ensuing protests. As Co-Dean/Professor Mutcherson states in the Foreword to the LSSSE's 2020 Annual Survey Results, "it all begins with difficult, probing, and uncomfortable conversations. The challenges before us are surmountable if we truly want to build better law schools." ■

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