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Professional apartheid:

The racialization of US law schools after the global economic crisis

ABSTRACT

After the 2008 global financial crisis, US law schools suffered a steep drop in enrollment. In response, many professional law programs, especially so-called fourth-tier institutions, turned to ethnoracial minorities as a new market for student recruitment. They relaxed admissions standards, enabling more "diverse" students to finance their studies with guaranteed federal student loans. By raising diversity in a lower-status "southern hemisphere" of legal education and services, however, this new approach replaced outright exclusion with a racialized professional dualism justified by the neoliberal ideology of market access. Some have called this an "apartheid model"—a freighted term with broad theoretical and ethical entanglements. This pairing of race and free-market logics resembles wider, specious extensions of market citizenship into the global peripheries. [*law*, *education*, *professions*, *neoliberalism*, *race*, *markets*, *United States*]

The 2008 global financial collapse was a watershed for US law schools. The sudden loss of capital, triggered by overspeculation and the repackaging of debt among multinational banks, caused global corporations to cancel transactions, settle litigation, and demand greater efficiency in remaining legal-services agreements. Large global law firms laid off thousands of attorneys, canceled new recruitments, and began outsourcing work to legal temp agencies, which in turn benefited from a professional labor oversupply and the new "gig" economy. In the preceding years, US law schools had expanded their operations and planned their budgets based on tuition priced against once-widespread lucrative corporate law incomes. Now they faced austerity. And because it was already in doubt whether law school job outcome reports were accurate, the moral hazard that they generated seemed to multiply after the economic crash. Prospective students took heed. Whereas legal education had seen increased demand in prior economic downturns, this time would be different: enrollment in US law schools plunged 30 percent from 2011 to 2015.[1]

Indexing public fascination with this, failures in legal education made headlines in the *New York Times*, the *Wall Street Journal*, Bloomberg, and the *Huffington Post*. In an age of new cultural insurrections like Occupy and Black Lives Matter, people grew fascinated by the discomfort of this once-elite knowledge community. Beneath those news stories lay serious lessons about difference and knowledge capitalism in the contemporary global system. The so-called crisis of legal education and the legal profession, along with the overwhelmingly market-based reaction to it, suggests something deeper about the state of social justice under neoliberal political economy.

This is in part because, in the United States, formal legal education is virtually the only pathway to legal expertise, and law school—namely the three-year course of study in pursuit of the Juris Doctor, or JD degree—is a graduate-level, professional program only. Falling law school enrollment in the United States would shrink the legal profession, but the country already has one of the largest

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lawyer-to-population ratios in the world. Prominent legal academics have nevertheless argued that the demand for legal education should remain high because the profession still lacks ethnic and racial diversity and because existing attorneys have not equitably served minority communities. In this context, the "crisis" of US law schools is as much about political economy as it is about the character of the legal profession.

Inequalities in legal education have long been present. For instance, the ethnographically salient division of US law schools into "top tier," "second tier," "third tier," and "fourth tier" already long signified a preoccupation with hierarchy. The economic crisis would only exacerbate these inequalities. Facing declining enrollments, so-called fourth-tier law schools saw a market-based solution: to increase their marketing to ethnic and racial-minority communities and to style this as a mission to diversify legal services (Taylor 2015; Tejani 2017). The suggestion appeared to be that US ethnic and racial minorities—long limited in their ability to access the justice system (Herrera 2014; Rhode 2004, 2015b)—can benefit merely from greater representation in the legal profession, if largely at a lower level of prestige and opportunity. This new approach to political-economic redemption in the legal-education community captures the marketization of race as a new feature of neoliberalism and has been critically labeled by at least one former law dean an "apartheid model."[2]

This is an apt term for the way global neoliberalism is transmogrifying the legal profession in the United States. Recognized as an important vector of global marketization (Riles 2011), the US legal profession has been taken for granted as a privileged actor and a subject of neoliberalism's increasing inequality. Professional apartheid captures how the legal profession is both a key subject *and* object of neoliberalism. It takes extant symbolic and material stratification and engrafts it with an ethnoracial identity: the further one moves down the "tiers," the more "diversity" one finds in law schools. Most importantly, in neoliberal approaches, this diversity becomes an institutional asset, a survival imperative amid shifting global markets. This belies a striking contradiction: diversity's mere presence becomes the justification for its unequal and predatory concentration near the "bottom."

"Apartheid" here is not quite a native category and comes with broad ethical entanglements; its use evokes the deep social inequalities tied to racial, ethnic, and religious belonging in sensitive environments such as 1980s South Africa or contemporary Israel-Palestine. Clearly, any similar bifurcation in a US white-collar profession shares only some, largely symbolic similarities. But this story is not only about professional bifurcation. It is also about the marriage of professional *and* ethnoracial inequality for the survival benefit of faculty and administrations in the US legal academy.

Studying stratified "inclusion" in law schools offers the theorist more than a sample of dissonance between social problem and market solution. It illustrates law's professional rationalization under pressure to diversify the legal-services marketplace. *Rationalization* describes the process by which spontaneous emotion, wonder, and freedom become replaced by bureaucracy, order, and efficiency in modern societies. For Max Weber (2002), this was visible in how certain Protestants professionalized everyday life as action toward eschatological redemption. They converted the erstwhile "magical" quality of religion and redemption into a stream of microtransactions with God that ordered working life for white Protestants in North America like nowhere else (Weber 2002, 93) and, in turn, challenged pat distinctions between society and "the market" (Zelizer 2013, 363).

Professional apartheid is a novel form of rationalization that programmatically squares the need for professional bureaucracy with demands for social justice. It does this while maintaining the legal profession's legitimacy under globalization and minimizing disruption of its dominant sociocultural core. Under this logic, law schools recognize that African American, Asian American, Native American, and Latino aspirants deserve a voice in the legal profession.[3] But including them wholesale would present a dilemma for diasporic white Europeans' ownership narrative of legal rationalism and the rule of law. Like the organization of world space into global assemblages (Collier and Ong 2008), this rationalization of ethnoracial difference in the legal profession puts difference to work in the service of economic hierarchy. The inclusion of minorities takes place at a safe, lower level of prestige, income, institutionalism, and hegemony. Minority lawyers, through this new inclusion, are rationalized into their proper, structural place in a manner that, left undisturbed, would protect the purity of the law's professional core.

Illuminating this process, ethnographic material from one subsector of the US legal academy serves as a *monad* that reflects wider assumptions and values endemic to neoliberal racial reproduction today. In particular, it focuses attention on the problem of ethnoracial minority "access to justice" as envisioned by legal educators, and it captures some of their efforts to resolve this problem through new policies and practices expressing increased fealty to "the market" as a solution for extant inequalities. This fealty suggests a belief in the moral neutrality of markets, but perhaps more importantly, it helps secure the ontological status of markets in the minds of a new generation of legal practitioners, adjudicators, and lawmakers—groups still greatly entrusted with social policy making in our entrepreneurial age.

This, then, is a story about race and representation further paired with marketization. It captures what might be considered "second wave" neoliberalism as it extends

market fundamentalism into new, previously untapped student communities rendered useful in the United States by the availability of public debt financing for higher education. Moreover, it highlights the uses to which racial diversity can be employed as a recruitment tool—in other words the marketing value of "difference" in cosmopolitan social contexts (Shankar 2015). In US higher-education diversity training, race itself becomes the object of commodification for trade in the educational or employment marketplace (Urciuoli 2003, 2008, 2009). But given this augmented value of difference, how do we explain heightened inequality in the legal profession? Is apartheid deliberately structured into the "juridical field" (Bourdieu 1987, 816; Peletz 2015) of an endemically hierarchical profession? Or is it a by-product of increased marketization in expertise and service delivery?

On these questions, it will be useful to reconsider the concept of professional "hemispheres," introduced by John Heinz and Edward Laumann (1994) in their 1974 study of ethnic stratification in the Chicago bar. The hemisphere metaphor, like apartheid, emerges ethnographically but demands ethical disentanglement. Inequalities that structure a "learned" profession in the metropolitan North do not approach the vast inequality between the northern and southern hemispheres of the world system. Yet the metaphor remains valuable, if provocative, for the way it captures professional differences mapped onto ethnic and racial alterity.

Situated studies of profession

The analysis of professions has yielded considerable material for social theory since the industrial age. In particular, C. Wright Mills's (1969) *White Collar* provides an apt starting point in the tradition of Weber's work on charisma and bureaucracy. Here, the new US white-collar worker markets his own persona as a commodity of high capitalism. Foreshadowing the notion of "human capital" (Brown 2015) by over a decade, Mills informs the ethnography of legal professional ambition on the part of socioeconomic outsiders in the United States. They may be pursuing cultural capital (Bourdieu 1986), but their ability to obtain it through professionalization is limited by the status that their institutions and teachers occupy in the academic hierarchy, even though certain law school recruiters speciously represent these hierarchies as fluid. Pursuing the law degree despite often-bleak job prospects is, for some aspirants, simply a matter of socialization into a white-collar community. In this way, they resemble Thorstein Veblen's (1979) leisure-class students, who pursue higher education largely for personal networks and social finesse.

Professional law's importance at the center of US racial formation has been described widely (Gross 2008, 9; Haney-Lopez 2006, 7; Omi and Winant 1994, 53). Law plays a key role in fixing social significance to putative biological human differences, making its neglect by new racial science subfields like "epigenetics" particularly dubious. In another sense, lawyers figure as sentinels of social justice—an image supported by their presence at most of the key moments of sociocultural progress in modern US history (Lobel 2007). Labor rights, racial desegregation, free speech, religious free exercise, and women's rights have all been litigated by professional attorneys. Moreover, the legal profession itself has offered upward mobility to some immigrant and minority newcomers, thereby confronting racial stratification head-on.

Materialist scholars in race and ethnic studies (Gilroy 1991; Hall 1980) have asked whether such class mobility has any real impact on racial formation. On the one hand, as Michael Omi and Howard Winant (1991) have famously argued, it is important not to treat racial formations as "merely" epiphenomenal of class, particularly in a social matrix like the United States—where race is idiosyncratically fixed by a past system of chattel slavery and affixes meaning to human bodies (DaSilva 1998). After all, even "successful" minority figures remain racialized despite attaining wealth and status. On the other hand, race and class have grown more difficult to uncouple as social interaction becomes heavily mediated by finance, technology, and data (Semuels 2016). Today, in other words, we can better appreciate Stuart Hall's observation that race becomes the "modality in which class is lived" (1980, 342).

Representations in fourth-tier law schools' marketing seem to embrace this race-class slippage. Aware of the law's historical organization along racial lines in the United States, administrators and business offices suggest that increasing racial diversity in law school enrollments is a matter of social justice. They are not just selling seats in a first-year cohort; they are selling racial upward mobility in the form of access to justice. This move well illustrates Nancy Fraser's (2013) conception of the "triple movement," a post-civil-rights joinder of markets and emancipatory identity politics against regulatory social protection in a manner unforeseen by critics like Marx and Polanyi.

Social justice through market emancipation has become a conspicuous manifestation of neoliberal political economy, but it coincides with a disconnect, taught in legal education, between the "rule of law" and substantive justice. Only a few key writers have broached this disconnect. For example, following on foundational work by Duncan Kennedy (2007), Elizabeth Mertz (2007) argues that the structure of linguistic exchange in law school classrooms rewards students who most buy in to the moral distanciation (from social context) that professors teach as the modus operandi of common law jurisprudence. Mertz also suggests that this aversion to social contingency disproportionately affects students from ethnic and racial-minority groups—those from the social peripheries most likely to recognize the social embeddedness of norms

and procedures born of the power centers. Building on that, contemporary legal sociologists (Deo 2014; Taylor 2015) document racial exclusion and inclusion in the law school sector but leave aside significant interpretive lessons that might explain what inequalities mean to the people affected by them.

Legal education has come under additional pressure from the globalization of the legal profession. The past decade has seen, for example, the advent of the "global law firm" (Darian-Smith 2015). Through multinational offices and staffing, even erstwhile "American" firms have extended their reach into remote corners of the global system. Yet the skills recently taught in US law schools, according to critics, poorly match the kinds of services expected by clients operating in global assemblages (Henderson 2013; Susskind 2010). Unless they adapt to these "market signals," critics argue, law schools can expect to become obsolete. This reflects growing pressure among influential institutions of professional learning to maintain commercial viability by shifting their attention away from challenging metaconcepts like "justice" and toward creating technical legal expertise to support the global economy.

Studying this phenomenon builds on long-standing ethnographies of expertise. Laura Nader (1973) offers the early model for treating professionals as an object of study by reversing the knowledge differential between ethnographer and "native" that was once common to our discipline's encounter with the world. More recently, that inversion has grown especially important under conditions demanding increasingly specialized knowledge. Ethnographies of expertise show the ways knowledge practices and hierarchies subordinate "the social" to "the economic" (Greenhouse 2011), favor quantitative data over qualitative understanding (Merry 2016), and situate experts such as lawyers as key agents for global market operations (Riles 2011).

US higher-education policy has in turn shaped how law schools reproduce legal expertise. By looking "through" (Shore and Wright 1999) the flow of policy implementation, I examine the effects of policy practices by the US Department of Education, the American Bar Association (ABA), which regulates the profession in the United States, and local law school leadership. The metaphor of studying "through," rather than "up" (Nader 1973), captures the interconnectedness of layered norm hierarchies more common under globalization—what I have elsewhere termed the "policy cascade" (Tejani 2017). That policy produced in a power center begets more policy as it emanates outward has been increasingly observed in Europe, where legal technologies like "subsidiarity" and "direct effect" create the dual experience of local norm autonomy and centralized governance. The United States has long seen this under federalism—layered state and national legal regimes—dating nearly from its inception. As legal governance grows more technical and multilayered, its norm structures resemble cascades that are better appreciated by looking "through" rather than up or down at them.

Policy cascades are visible across the anthropology of higher education, in which national policies in effect flow toward local institutions and call for increased auditing and accountability (Brenneis 2009). This phenomenon is heightened in the context of the neoliberal, low-ranked law school, where "value" exchanged for student indebtedness must be closely monitored and "continuously improved." The emphasis on education as financial transaction has been well documented. At the college level, Andrea Flores (2016) examines practices of educational finance among minorities to better understand moral economy and citizenship among undocumented students in the United States. Such transactions can serve to reconfigure citizenship for students. Seen elsewhere, in the Indian state of Kerala, for instance, local civic membership itself becomes reconfigured by neoliberal privatization in and around higher education (Lukose 2005).

Turning back to the law school environment, recent attempts to diversify the US legal profession have called into question its unitary character. Whereas other countries like the United Kingdom and France (until recently) have formally distinguished between "high" and "low" legal practice through divisions between barrister and solicitor or *avocat* and *avoué*, the United States has long maintained a single professional citizenship for all lawyers. Informally, however, this appears to be changing, and race and class are the lines on which a new dualism may be taking shape. How, then, is *professional* citizenship for racial minorities altered by the structural embrace of market fundamentalism to survive the downturn among their institutions of legal education? And how does the moral economy producing these professionals shape their future role in the unequal global economic system?

Encountering concealed predation

This project breaks with some conventions in fieldwork and participant observation. Commonly, the ethnographer devises a research question, plots out a strategy to spend time with local actors, attains experience at a field site, and then returns to analyze materials and compile these in a seemingly bounded ethnography. In this case, I was offered an opportunity to join the faculty of an ABA-accredited law school upon completion of my JD and PhD programs, and I agreed knowing there was much to learn about this subsector that would otherwise remain opaque to even well-trained outsiders. Having just completed an ethnographic dissertation on French antiracism activists and lawyers, I was attuned to both the shifting roles of legal expertise in the West and the delicate interplay between elitism, advocacy, representation, and racial justice. As with much early ethnography, I used this opportunity to place myself in a

stream of obscure, "insider" information about law teaching, school governance, recruitment, and financing, with the intention of waiting to see what surprises might arise.

My field site was a freestanding, for-profit JD-granting law school, which I have called New Delta School of Law (NDSL). On the one hand, this site represents a very narrow subsection of US law schools, given that it is one out of only six accredited for-profit law programs in the country. On the other hand, such law schools have quietly become very influential on nonprofit institutions. This is because the law school "crisis" is informed by a long-standing tension between tradition and innovation, with deep cultural roots in the US national mythos. Historically, US colonial lawyers had to cast off the rigid tradition of English common law in establishing their own native legal regimes, yet they recognized agonistically that efficiency demanded they retain certain traditional institutions and practices (Friedman 1973). Over time, evidenced in the longtime prestige of the oldest law schools and reputational struggles of the newest, to be institutionally "young" in legal education was to be inferior or second rate. Since the onset of the legal-services crash, however, institutions of legal education were forced—sometimes on the advice of external management consultants—to seek out "innovations" that would enable them to survive.

Untethered by prestige rooted in tradition, fourth-tier law schools generally and for-profits in particular had already been experimenting with "innovation" before the crisis. For example, they emphasized "value proposition" through academic-success counseling and skills training, turned to online course delivery, expanded legal-writing programs, offered new clinics, and increasingly called for "practice experience" in tenure-line recruitment. Most importantly for this discussion, they emphasized admissions "access" to boost diversity; similar trends have spread among elite upper-tier law schools so that some are now accepting the Graduate Record Examination (GRE) in lieu of the long-mandatory Law School Admissions Test (LSAT) and justifying this as an effort to increase "access" to legal education (Svrluga 2017).

By approaching NDSL with an inductive research posture, I embraced ethnography's tool of "impression management" (Bernard 2014, 311), moving from full participant to observer over three years. I began the fieldwork as a participant teaching doctrinal law courses, advising students, participating in governance meetings and program development, and engaging in the deep assessment processes described elsewhere (Brenneis 2009; Tejani 2017). As time progressed, it became clear that governance over matters such as curriculum and the faculty's security of position were increasingly decided not locally by professors and administration but by off-site corporate executives and business-management consultants. As this realization set in, my role shifted to one of participant-observer: someone engaged in the daily activities of the organization but with the intention to depart and subsequently interpret observations for later analysis. As a full-time law professor, I had substantial access to people and information, but because of the proprietary nature of the environment and absence of informed consent for observation, I waited until my departure to begin compiling the information, file for approval from my institutional review board, and interview research participants—many of whom had by that time also left this setting. Although it is uncommon to obtain informed consent for interviews but not earlier participant observation, this approach is not unprecedented. In Melvin Konner's (1987) *Becoming a Doctor*, for instance, the researcher documented his participation as a student in medical school without prior consent.

This approach may be increasingly productive and necessary under conditions of neoliberal globalization. Today, fiduciary institutions such as banks and regulatory agencies have a strong incentive to operate as "predatory formations" (Sassen 2014) that place organizational ethics in question but shift blame for predation to individual agents. Such institutions would likely not consent to studies of their predatory behavior. Yet, as supported by certain "invasion of privacy" cases in the legal community, there is sometimes an overriding "public interest" privilege suggesting these investigations should be protected. Like whistleblowing or covert journalism, the heightened inductive approach of *postarrival* fieldwork becomes the best available means of illuminating concealed predation. And if one of the key purposes of institutional ethics review is to protect "vulnerable" research subjects, the conditions described here are ones in which the research subject itself may be responsible for predation on others of heightened vulnerability.

My data thus consist of notes and timelines that I compiled after leaving my position, together with roughly 50 semistructured conversations with former students, faculty, staff, administrators, and outside legal-education experts recorded and transcribed over the subsequent two years. Whereas this project relies on observations and participant accounts as primary evidence, it also demands awareness of seven key structural realities that these sources do not fully capture.

The first is an increasingly disproportionate student debt-to-income ratio among new law school graduates. Whereas law tuition was once priced at a level thought sustainable when weighed against future earnings, today's tuition costs far exceed the earning potential of most new graduates.

The second feature is a seemingly lavish arrangement for full-time law faculty. Professors in the social sciences and the humanities enjoy reasonably comfortable salary and benefits packages, but their law school counterparts have long earned nearly double in base salary. According

to figures cited by Brian Tamanaha (2012, 48), law professor salaries increased 45 percent from 1998 to 2008—the period that roughly corresponds to the law school "bubble." These institutions appear to have joined a wider trend toward redistribution or "plunder" (Mattei and Nader 2008) of vulnerable populations by elite organizations and individuals in recent decades.

The mismatch between legal-education instruction and law practice skills was a third feature that has prompted "crisis" talk in the past decade. The business of being a lawyer out in the community was left for students to learn on the job, while professors mostly dwelled on the theory and policy underlying legal precepts.

This feature has slowly softened in recent years in reaction to the fourth feature: a precipitous decline in law student applications prompted by the global crisis and greater awareness of the resulting employment and student debt problems.

Fifth, in an attempt to adjust to this admissions squeeze, law schools downsized their incoming class numbers in an effort to maintain public selectivity rates (and thus rankings), and they have in some instances laid off tenure-line faculty for the same reason.

Connected to legal education by virtue of student debt and the above skills gap, a sixth structural reality of the law school crisis is the broader contextual problem in "access to justice"—an inability of poor and middle-income demographics to access affordable legal services in much of the United States.

And finally, seventh, the constitution of US law student and faculty populations still remains disproportionately white and upper-middle class. It is these latter two problems that invite legal-education reformers to promote professional apartheid as a means of addressing all previous five issues. In doing so, they juxtapose markets and identity politics in a manner not previously seen in the legal profession or the education that reproduces it.

The "pull" of markets and identity politics

The notion of self-regulating markets has achieved great appeal among US lawyers and legal academics in recent decades. Lawyers themselves are considered *autopoietic*, regulated by state bar organizations made up of other lawyers, and these groups are responsible for the primary mechanisms of discipline and coercion in cases of ethical misconduct. More broadly, the trend has been toward increased commercialization of the profession, such that attorney marketing—itself once highly restricted—has become far more acceptable. It was once risqué for lawyers to advertise in the Yellow Pages, but after the Supreme Court ruled on the matter in 1977 (*Bates v. Arizona*), it became common to see such ads on buses, billboards, and the Internet.

Meanwhile, legal education has also become increasingly commercial—particularly in the context of the recent enrollment slump. Law degrees are now framed as increasing human capital (Leichter 2015). Tuition rates have been raised and explained as payable on credit borrowed against likely future income (Simkovic and McIntyre 2014). And school rankings are viewed as a snapshot of market capitalization (Camson 2013).

Regulation of law schools, meanwhile, was pushed back on the vociferous advice of free-market adherents. Groups historically excluded from the legal profession and from the justice system more broadly, many said, could better find entry through deregulated legal education. That exclusion had long been a hallmark of the legal profession. In midcentury Chicago, for instance, the practicing bar sorted itself neatly into so-called hemispheres with one higher-paid, higher-prestige segment taking on most lucrative corporate and union representation and a second, lower-paid one concerned with small claims and transactions among families, small businesses, estates, and individual disputants (Heinz and Laumann 1994). As with the contemporary Global North and South, there was a cultural dimension to this dualism that ascribed high economic and political stakes to the upper hemisphere and greater social and moral obligations to the lower. While the number of racialized minorities practicing law at the time was still almost negligible, even among "white" attorneys the work divided itself among northern and western European, Protestant, "white shoe" firms and southern and eastern, Catholic and Jewish, immigrant law firms. These observations have in turn been accepted among scholars of the legal profession as generalizable to other metropolitan areas and to the law school industry itself (Jonakait 2006–7).

Although the profession remains one of the least "diverse" (Rhode 2015a), today racial minorities make up a larger proportion of the legal community than in the past. There are several explanations for this trend. One is that higher-education affirmative action programs from previous decades may be seeing their longer-term benefits take hold. For a time, law schools could set aside seats for minority applicants, and even after that practice was declared unconstitutional (*Regents of University of California v. Bakke*, 1978), they could favor certain diversity students using a point system with the logic that greater classroom diversity enhanced learning for everyone. Another explanation may be the important role of the legal profession in attaining marginal racial justice in the United States. Attractive already as a pathway to greater income and social mobility, the practicing bar also became a venue for modern-day battles of David and Goliath in the name of racial desegregation, interracial marriage, and the right to counsel in many criminal cases.

Even with the increased diversity in legal education, the *success* of minority students in the law classroom has been

another matter. In some cases, and for structural reasons, those students have not fared as well as other students in the arcane Socratic and case-method formats common to law pedagogy (Mertz 2007). In others, they have lacked the white-collar networks to secure top-paying jobs after graduation (Espinoza 1988, 291). As a result, these groups have continued to be marginalized even after law schools opened their doors to them.

One known outcome of this was that minority attorneys have been channeled "back" to serve their own communities. Importantly, this has not been the only option available to minority graduates; many, for example, have found work in government service, and some have made it to lucrative firm jobs. Nevertheless, the social-justice narrative of "going back" has been privileged in institutional training materials, marketing, and career services counseling. At NDSL, one key example I have described in greater detail elsewhere (Tejani 2017) was the near-ritual practice of Charter Review. There, faculty were compelled to begin each meeting with a review of the corporate mission statement emphasizing, above all else, their social-justice mission of "serving the underserved." In this way, faculty were encouraged to feel they were channeling expertise to communities in need. In some cases, this matching between practitioner and clients brought success for minority attorneys.

Two of my interlocutors, both white male legal educators, spoke favorably about this matching.[4] As one said,

> Identity politics is a lot of how you make your career. [. . .] We've seen Armenian-only practices, basically a whole lot of Spanish-language practices, Korean-only practices, Arab-only practices, and so there's something about access to individuals that makes having a particularly diverse bar important, but this is the fine line. [. . .] We found that most people, an overwhelming number of people, are happy with their decision to be a lawyer. The biggest complaint is that it's too much work.

At NDSL as elsewhere, racial-minority students were recruited with the promise of both upward mobility and greater access to justice. The school, however, encouraged these students to return to their home communities to practice for two reasons. The first and most important was to satisfy private-equity investors' expectations for high returns, which were promised as part of "capital commitment" agreements reached at the height of the law school "bubble" in the mid-2000s. The second was that school recruiters could not point to reputational rankings to assure students they would be able to find well-paying jobs in the local legal community. NDSL conspicuously occupied a rung in the fourth tier, a stratum in which most graduates, even the most accomplished, would have a hard time finding gainful employment.[5] Several fourth-tier minority students expressed anxiety about this fact; one Native American student joked that he was considering working as a pole dancer to pay down his law school debt. Within the program, however, professors and administrators—in part thanks to the organizational cultural "tools" invoked at all meetings and events touting social justice as the mission—felt proud to be sending lawyers back to minority niches. One faculty member separately told me that

> as the African American students come out, as Hispanic students, and those others that are from cultural backgrounds that we don't have a lot of [. . .] in the bar, the population centers are starting to gravitate to those students. Being Jewish, if I were the first Jew to graduate from our law school in a community that doesn't have a lot of Jewish lawyers, I wouldn't have a problem getting business because of the affinity. People say, "We have a Jewish lawyer we can go to now." We're the same thing. And the African Americans are going to our African American young lawyers that are graduating, and they're rising in the legal community. Same with the Hispanics. They're not having problems getting clients because there's a need for them in terms of people who want a natural trust or affinity. That's all good. I'm pretty proud of it.

Emphasis on a "natural" affinity between lawyers and clients of the same race or ethnic group was a key premise of legal educators' support for the apartheid model. It also belied assumptions about race and ethnicity themselves as natural rather than cultural qualities.

Feelings of satisfaction with minorities' returning to their communities prompted NDSL to recruit more heavily among those communities. The message was conveyed to students by professors and admissions officers who would periodically speak to minority groups at colleges and universities. Moreover, the school after my departure would eventually sign an "affiliation agreement" with a historically black college in the US South—leaving little doubt as to how it hoped to survive the admissions downturn or at whose expense. Under US Department of Education policies, it could receive public monies in student loans for these prospective students with little to no scrutiny over their educational or professional outcomes. Paid up front, the loans presented the institution with little risk. Meanwhile, the students carrying this new debt as a nondischargeable liability were encouraged to take responsibility for their own employment opportunities by "networking" in local communities.[6] This encouragement, already a feature of the marketization of legal education and responsibilization (Brown 2015) of student debt, in turn pushed ethnoracial minority students to view their own communities as "untapped markets."

Pairing diversity and markets

With greater public focus on breaches of fiduciary responsibility and professional ethics since the global financial crisis, lawyers now more than ever prefer to think of their profession as a venue for pursuing social justice. Efforts to increase diversity, therefore, have at least formally become part of many bar associations' and large firms' mission statements. Many see including minority professionals as a symbolic act that confirms their profession's liberal neutrality (Kymlicka 1989; Rawls 1993). The matching of diverse professionals to diverse clients seems like a "rational" (in the Weberian sense) approach to managing difference and closing the gap between legal expertise and lay experience.

Yet the emergence of law school diversity strategies represents a new permutation of this multicultural rationalization. This is on heightened display at for-profits, where endowments and public support are at their lowest. For-profit programs are geared toward generating revenue for off-site investors by espousing a mission to produce large numbers of minority practitioners and send them "home" to practice. This model worked for about a decade, when the for-profits evaded regulatory scrutiny and grew exponentially. By 2017, as the law school enrollment crisis entered its seventh year with no clear end in sight, the model characterized as "diversity as survival strategy" (Taylor 2015) had spread across much of the fourth tier. One illustration of this is in the Alternative Admissions Model Program for Legal Education (AAMPLE), through which several dozen fourth-tier schools have been able to reject low-indicator applicants but sell them additional prelaw training before conditionally admitting them at full price. Because minority applicants often have lower incoming indicators, administrators use AAMPLE as a tool to help increase diversity while skirting an ABA standard requiring that "a law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar" (ABA 2016b, 31). This expansion of ethnoracial diversity as a "mission" among bottom-ranked schools captures well the pairing of diversity and marketization.

NDSL offers early indicators of how this is internally perceived. Initially, the tapping of minorities qua market appeared coincidental and fresh. The new model embraced in the for-profit modality paralleled talk of "disruption" among business scholars and writers around the same period (Christensen, Raynor, and McDonald 2015). *Disruption* described the sudden upsetting of norms in the business world so that small, insurgent actors like technology startups could render large, institutionalized actors too slow or outmoded almost overnight. Examples of this include Amazon in book retail and Airbnb in the hospitality industry before each became the new "establishment." Some of my faculty interlocutors seemed to believe, along with school leadership, that NDSL student and instructor diversity was *itself* a disruptor in legal education. And as a management tool, it did seem so. As one professor told me, "[Ethnoracial] egalitarianism may be [. . .] utilized to ensure faculty don't demand more in terms of salary, research money, et cetera." In meetings, the administration's closure to faculty input reflected this. For instance, amid one protracted conflict over curriculum changes, several senior faculty raised concerns about their likely harmful effect on minority students, but the school president dismissed them as "just throwing stones"—unwittingly supporting the analogy to "apartheid" power relations and resistance in real world contexts.

As time wore on, and as the national enrollment slump brought severe austerity to the schools most hospitable to diversity, students grew increasingly skeptical about the coincidence of access and markets. In one conversation, a high-ranking member of NDSL's Student Body Association (SBA) said the administration had withheld his organization's funding for the semester. With their tuition students had been assessed an "SBA fee," which was paid into a common fund that the organization could then disburse to member organizations such as the Black Law Students Association or the Asian-Pacific Law Student Association. Students had long understood this fee to be "their money" and had treated it that way during my years of participant observation. Now the administration was saying the money was its own to be disbursed at its discretion. I asked the student officer why the policy had changed; he suggested it looked good on auditor balance sheets, showing marginally more liquidity than it otherwise would have. "It's a shame," he said, "because we could probably help them." Echoing that willingness to help, some expressed sympathy for the school's fiscal problems but felt there ought to be a balance between diversity and business priorities. "At the school level," one professor said, "I do think there is some room for altering practices so that the commitments to diversity and to student learning are still honored, even in an economic crunch, but I don't know that school leadership really does that."

Despite its recurring invocation in informal contexts, *diversity* rarely appeared in institutional language. Instead, the word *underserved* became the generic substitute for ethnoracial and class alterity. Roberta, a young Latina student, reflected on this lucidly. "To tell you the truth," she said, "I am not really sure what *underserved* means in the context of the school. They have this pillar, and they say it's their most important pillar, yet they are so ambiguous to its context." This reflected a broader discontinuity between the social-justice mission as conveyed to students and the lingering corporate culture that administrators imposed on faculty. For example, shortly after moving the entire NDSL campus to a new building, school administrators

had installed motivational posters enshrined in steel-and-glass frames throughout the facility. Just outside my own office hung one large corporate poster displaying the word "Awareness" under the image of a goldfish swimming in a small, clear fishbowl. It seemed more appropriate for a break room in a Fortune 500 company. Students visiting me for academic guidance often joked about the meaninglessness of the poster and others like it around the building.

But there was a special irony to the fishbowl imagery in an environment where employees' actions were closely controlled. Faculty were, for example, increasingly asked to brainstorm new business strategies that would generate new income streams—a necessary step after five years of operation for a for-profit institution that depended on federal student loans.[7] For this group, "serving the underserved" played an ideological role intended to reconcile the moral dilemma of their participation in the larger business model.

Lowered standards, heightened struggles

Operating under conditions of "exception" brought on by the crisis, many law schools were concerned foremost with survival. With falling enrollments, school administrations across the for-profit and nonprofit fourth tier relaxed their entrance standards. They did this knowing that it was permissible under the ABA's accreditation standards at the time.[8]

Lowering admission standards heightened risk in several ways. On the "back end," lower standards were openly expected to create several problems, including weak postgraduation outcomes (e.g., a high rate of failure to pass the bar and gain employment), graduates unable to pay back loans, and problems for accreditation. Meanwhile, the classroom grew tenser for both students and faculty. Students were frequently asked to work together in groups or pairs to complete "practice-ready" assignments as part of the push for greater skills training. Such assignments might require that they draft a contractual offer memo to be submitted to another group of students and then countered. On several occasions, I was surprised to hear students describe these assignments as insufferable, even though they seemed like a fresh departure from the rote learning of traditional law school. High-performing students complained that they were forced to carry "weaker," underperforming minority students who, they said, seemed not to understand or care. Although common to school environments in general, this resentment at NDSL was especially troubling because it showed that the school's model was establishing an apartheid structure at the level of classroom readiness. Weaker students, some mainstream students said, should not have been admitted to law school and would be a liability to the profession. Faculty, meanwhile, were forced to reconcile the two clusters of an apparent "bimodal distribution" of classroom aptitude. The difficulty arose not because some students lacked any natural ability but because the stronger and weaker students appeared to have vastly different levels of prior exposure to analytic reasoning, writing, and professionalism.

In meetings and in conversations, faculty members expressed forethought about this. As one professor explained,

> Most faculty initially thought "serving the underserved" meant training our students to meet the unmet legal needs of marginalized communities. We thought it also meant a willingness to work with a student population that was drawn from those communities and would also require us to work harder with them for them to achieve their goals. We did not ever contemplate that it meant that we were committed to admitting students in the bottom 10 percent of all LSAT takers who had no real chance for completing the course of study and passing the bar. Nor do I think any faculty member thought this was consistent with our ethical obligations as members of the bar or as educators to admit, pass, and graduate people who we thought were not intellectually fit to practice law. This, however, began to be described as "elitism."

To mitigate the increased likelihood of failure brought on by this model, some fourth-tier law programs boosted investments in academic support services. These services included in-house academic counselors or instructors dedicated to teaching study skills. This was in part because of the unique form in which law essay exams, memos, and briefs are structured and written. Operating with their own idiom, these genres of legal writing depend largely on formal constraints that some students—particularly those trained in the humanities and those from nonprofessional households—find less intuitive when mastery matters most.

The influx of more students with lower indicators raised a logistical challenge for the group of academic-success counselors employed at NDSL. One former counselor described self-awareness about limitations in meeting the increased demand:

> We knew that we would have to provide more assistance to some of them. That is why Critical Skills, or the group in charge of improving those struggling with classes, was such a key and yet extremely dysfunctional. I believe that will continue to hurt the school because the premise was to admit the lower-indicator students but provide them with the tools to succeed in law school.

This "hurt" was nearly realized when, shortly before my departure, NDSL came under the scrutiny of the ABA's accreditation team. NDSL officials knew tighter oversight could be avoided if the school could argue that it would

eliminate the high diversity the school was achieving. Their argument assumed that the academically "at risk" group consisted *primarily* of ethnic and racial-minority students. Fortunately for the school, but unfortunately for the students and their communities, this assumption was correct. Academic skills counselors articulated this clearly.

> Counselor: The majority of students I worked with while on the old NDSL campus were students of diversity, and if I recall correctly, I believe I had more female students than male.
>
> Riaz Tejani: So it was true that, at least initially, a large share of the academically faltering students was people of color? Did this change with the new campus? Also, did you see noticeable turnaround in their performances after they worked with ASC [academic-success counseling]?
>
> Counselor: Yes, it was true. I would say in the beginning it was students of color that were struggling academically. I still think it is true at the new campus, but the overall quality of all students had gone down significantly. [. . .] As the school grew, the ASC department did not. It became too difficult to continue the work on the individual basis. There were just too many students on alert and probation, and the ASC department could not meet the demand.

In this way, diversity became one of the school's strongest assets. The very groups most in need of regulatory protection became the means by which executives could argue for increased marketization. The growth of academically at-risk students and the disproportionate ethnoracial makeup of this group would have dire consequences just a few years later. If, before the law school crisis, NDSL reported bar passage rates in the 80 to 90 percent range—at one time the highest in its jurisdiction—by the time students from this new wave of diversity recruitment graduated, the overall bar pass rate had dropped to 26 percent. Worse still, those general outcomes hid a starker reality: that bar passage among minority graduates was even lower.

Access and inequality

This tension between diversity and regulatory protection continues to structure debate over law school crisis and reforms. As awareness of moral hazard increases, calls for stricter regulation are heard and parried with the diversity argument: high-diversity schools, many say, will be unduly and disproportionately burdened by tighter accreditation standards requiring greater incoming scores (e.g., LSAT or grade point average) or penalizing low-performing schools for lower outcomes (e.g., bar passage and employment). This in turn, legal-education reformers say, will further exacerbate the "access to justice" problem that for-profits cited as their raison d'être before the crisis and fourth-tier nonprofits invoked well into it. In short, this has become a rhetorical battle between the social protectionism of tighter regulation and the open access of free marketeerism. My interlocutors' positions were spread between these poles. As one professor told me,

> If the suggestion is for more people to put barriers so that you can only get people who are sure to pass the bar, I'd be against that too. I think a dialogue at that point of why is this happening and what can we do to help you, would be a much better model for the ABA than to be heavy-handed about it.

Others were more willing to see regulation restrict the kind of access that law schools were touting to prop up their business models. They came to notice the irony of granting minority access to low-outcome institutions at a high price. Another faculty member likened this to postcolonial upward mobility through collaboration:

> It just crushes me to the core because I know that here they are trying to use the race card when it suits them, OK, but their hearts and minds are not really with the downtrodden. [. . .] They're like a Clarence Thomas [. . .] and a lot of people [. . .] in Africa, the elite. [. . .] If your heart is not in the struggle to lift up your other brothers and sisters, to speak out against injustice [. . .] and you are joining forces with the New Deltas of the world, to exploit your own minority or whatever they want to call them, your African Americans, Native Americans [. . .] then you're just part of the problem.

In view of the "apartheid" and "hemisphere" metaphors, this statement was especially poignant. Colonial powers often professed benevolence as they moved into the Global South, educating and grooming select members of local populations to assist in social control as elite go-betweens for colonial administrations. Law training and professionalism were important elements of colonial administration, and they were essential to establishing and maintaining "apartheid" in places where it took hold. Analogizing the predicament of low-end law programs in the United States to internal colonialism, this professor captured something distinct about the interplay of difference, professionalism, and market-based emancipation.

Conclusion: Anthropologies of law after "law and economics"

It has long been thought that ethnography offers a privileged standpoint from which to view the machinations of market fundamentalism. Using ethnography as a socially embedded knowledge base, anthropologists have sought to

measure the very disembedding of knowledge from society at the center of renewed faith in laissez-faire political economy. Yet we have not mastered the means by which market fundamentalism sinks its hooks into the elite experts said to be driving it. The study of internal shifts in legal education, for this reason, should occupy a central role in the study of neoliberalism.

Further evidence of this comes from the quiet hegemony of "law and economics." In 1953 the US conservative industrialist John Olin created the Olin Foundation, endowing it with millions of dollars from his profits as a chemical and weapons manufacturer. Beginning in the late 1960s, the Olin Foundation began disbursing what would amount to $370 million in grants to conservative knowledge producers—most notably law schools espousing the new law and economics movement inspired by Vilfredo Pareto and Ronald Coase, among others. Pushing the theories of rational choice and marginal utility into legal theory, law and economics has since become the most influential subdiscipline in the US legal academy. Its adherents, once concentrated at key law schools like Harvard and the University of Chicago, have since spread to most corners of legal education, spanning all four tiers of US law schools. Its scholarly output has resulted in or supported global neoliberalism's "greatest hits," including the apotheosis of freedom of contract, the privatization of public utilities and natural resources, the outsourcing of state functions, and the rollback of Keynesian intervention.

What anthropologists may not realize, then, is the degree to which neoliberal economics has already long been operationalized through and fused with law. Complex political notions of *justice* and *freedom* have, through this process, become evacuated of politics as ascertaining them has been "simplified" as an economic calculus. Culture is messy, economy remains clean—all the more so under multiculturalism. This is true of both the United States and the rest of the world; through the growth of the global law firm (Darian-Smith 2015), international transactions (Riles 2011), and international programs conferring American expertise on more and more non-US attorneys (Lazarus-Black and Globokar 2015), US law and economics has come to envelope the globe, and it was already instrumental in the global financial crisis of 2008. The concurrent advent of for-profit law schools in the United States, as well as the wider fourth-tier adoption of their strategies to recruit students of color into a lower hemisphere of the profession, could thus be viewed additionally as global law and economics returning "home."

In the aftermath of the financial crisis, ABA-accredited law schools found a workable strategy within the ideological bipolarity of elite expertise and open access. When national reaccreditation officials visited NDSL in 2013, it was in the middle of great upheaval over poor outcomes, an abruptly overhauled curriculum, and several dubious faculty dismissals. When the reaccreditation team inquired into low performance, they were presented with the school's unparalleled high diversity rates. In the end, the social protectionist impulse lost out to the diversity one, and in turn regulation yielded to "the market," at least for a time.[9]

This faith in markets can help justify inequalities: under open competition human outcomes are rarely equal. Similar justifications support strict racialists—those who believe some groups are predisposed to inferior performance in any number of modern-day activities. Distinct in this story has been the pairing of markets *and* race to argue not that inequalities are justified but that ethically dubious efforts to confront them should remain beyond governance. In global perspective this belief, that the "market knows best" not only for wealth maximization but also for social justice, will be something to watch closely.

Notes

1. For more on the historically inverse relation between law school applications and general unemployment, see Tamanaha 2012, 160–62. Between fall 2010 and fall 2015, first-year enrollment dropped from 52,488 students (ABA 2013) to 37,058 (ABA 2015)—a decline of 29 percent.

2. As the former dean put it, "This is what [some want] to do. [They want] to have the class of researching schools and the class of nonresearching schools, and I think that that makes a kind of an apartheid model of legal education, and for years I opposed that, even though inevitably if we go the way we're going, you to have to—Harvard can keep adding more and more clinics, more and more resources, more expensive professors, and the Whittiers and what not of this world can't do that." In April 2017 the Whittier Law School referenced here became the first to announce outright closure as a result of the enrollment downturn (Olson 2017).

3. As of 2010, the US Census Bureau counted the Asian American, "Black," and "Hispanic" populations of the United States at 4.8 percent, 13 percent, and 16 percent, respectively (US Census 2011). According to the ABA (2016a), the fraction of the legal profession comprising each of those communities was 3 percent, 5 percent, and 4 percent, respectively. Though ABA numbers for American Indians and Alaskan Natives are unavailable for the same year, this group made up 1.5 percent of the population and less than 1 percent of attorneys in 2000 (ABA 2016a; US Census 2001). All three have therefore been numerically "underrepresented" in the legal profession to varying degrees. In the case of Asian Americans, this situation contrasts sharply with the medical profession; as of 2008, Asian Americans accounted for about 13 percent of all US physicians (AAMC 2010).

4. The names of interlocutors have been changed or omitted throughout.

5. "Gainful" is understood ethnographically as sustaining both postgraduation living and student debt payments.

6. Under US federal law, student-loan debts were made nondischargeable in bankruptcy in 1976.

7. Under the US Higher Education Act, for-profit colleges and vocational and professional schools cannot take more than 90 percent of their income from federal public financing. Significant lobbying raised this amount in the 1990s after it had been previously set at 85 percent.

8. Since then, however, the ABA has proposed tighter rules on bar passage as the federal government has increasingly pressured it to more closely scrutinize accreditation, even threatening to remove its accreditation powers altogether. The ABA Council of the Section on Legal Education and Admission to the Bar considered new language for Standard 316, which demands a minimum 75 percent bar passage over any given two-year period (Ward 2016). This has been vigorously opposed by law-school deans en masse.

9. During the period just after an ABA "site visit" team inspected NDSL to determine reaccreditation, the school's dean quoted back-channel discussions indicating that the ABA's approach would be to "let the market decide."

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