CLASS IN AMERICAN LEGAL EDUCATION

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It is hard to think of any issue in the legal academy that has generated as much discussion, reflection, or debate over the past forty years as the quest for student diversity.[1] Nearly all law schools have some type of diversity program; the ABA weighs school efforts in fostering diversity heavily in its process of accrediting law schools; epic legal battles have been fought to protect the right of law schools to maintain their efforts on behalf of diversity. In rhetorical terms, the diversity of which the academy speaks is about both class and race. Opening doors of opportunity once closed, improving mobility in American society, making sure that national elites reflect talent from all corners of society, producing graduating classes that look like America—all of these aspirations would seem to apply as much to addressing social and economic disadvantage as they apply to racial disadvantage.

Yet as a practical matter, whenever discussions of law school diversity become concrete, the discussion almost invariably focuses on race.[2] Sometimes gender and sexual orientation come up as important diversity topics as well, but almost never is there an explicit focus on class. Indeed, there is no official data generated by law schools that even considers socioeconomic issues, and there are almost no research efforts anywhere in the legal academy that have a mandate to help the legal academy understand socioeconomic questions.[3]

A parallel disparity between rhetoric and behavior long existed in the world of elite undergraduate education, but that has changed marked-

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1. *See generally, e.g.*, LAW SCH. ADMISSION COUNCIL, LAW SCHOOL ADMISSIONS, 1984–2001: SELECTING LAWYERS FOR THE TWENTY-FIRST CENTURY (Walter B. Raushenbush ed., 1986) (containing a series of papers, speeches, and discussions largely revolving around the issue of diversifying the legal profession).

2. *See generally id.*; Robert Zelnick, Accreditation and Affirmative Action (Sept. 11, 2008) (unpublished manuscript) (discussing the ABA's battle with George Mason University Law School over its lack of racial diversity), *available at* http://seaphe.org/pdf/zelnick-accreditation.pdf. ABA accreditation committees, as documented in this battle and in my other interactions with the process, are consistently concerned about racial diversity but give no attention whatsoever to socioeconomic diversity. Zelnick, *supra*.

3. The various institutions that have been established to, in part, gather information helpful to the legal academy—such as the Law School Admissions Council, the National Association for Law Placement, the American Association of Law Schools, and the American Bar Foundation—all gather extensive data related to race, but none, so far as I am aware, gather any systematic data about class or socioeconomic status among law students, law faculties, or lawyers.

ly in just the past few years. Richard Kahlenberg's 1996 book, *The Remedy*, pointed out the neglect of class matters, and changed—at least a little bit—the terms of the discussion.[4] Two researchers, encouraged by Kahlenberg, produced a widely-discussed study in 2004 which showed that young people from the top socioeconomic quartile in America were some twenty-five times as likely to matriculate at elite colleges as were young people from the bottom quartile.[5] In the same year, prominent educator William Bowen published *Equity and Excellence*, which documented in detail the lack of class-based diversity at elite colleges and the attitudinal and programmatic barriers that impeded the access of low-socioeconomic ("SES") students.[6] These works, and the discussions they produced, have led to the adoption of initiatives at a number of Ivy League colleges and other elite schools that aim to sharply reduce or waive tuition and fees for low- and moderate-income students.[7]

The purpose of this paper is twofold: first, to uncover and explore some of the basic facts about socioeconomic diversity in law schools, and second, to compare racial and "class" diversity as objectives that law schools should pursue. While the available data is not perfect, it is detailed enough to make possible several robust conclusions:

- The vast majority of American law students come from relatively elite backgrounds; this is especially true at the most prestigious law schools, where only five percent of all students come from families whose SES is in the bottom half of the national distribution.

- The degree of SES eliteness across law schools is very similar in recent surveys (from the 1990s and early 2000s) as it was in surveys from the early 1960s. Although racial diversity has increased sharply during the intervening decades, the great majority of non-white law students are, like whites, from relatively elite backgrounds.

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4. RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996).

5. Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 106 tbl.3.1 (Richard Kahlenberg ed., 2004).

6. WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION (2005).

7. *Harvard Liberalizes Undergraduate Financial Aid*, HARV. MAG. (Dec. 10, 2007), http://harvardmagazine.com/breaking-news/harvard-liberalizes-undergraduate-financial-aid; *see also* Tom Hayden, *We Can't Afford to Be Quiet About the Rising Cost of College*, CHRON. HIGHER EDUC. (Mar. 28, 2010), http://chronicle.com/article/Rising-Cost-of-College-We/64813/; *Harvard Announces Sweeping Middle-Income Initiative*, HARV. GAZETTE (Dec. 10, 2007), http://news.harvard.edu/gazette/story/2007/12/harvard-announces-sweeping-middle-income-initiative/; *Harvard Expands Financial Aid for Low- and Middle-Income Families*, HARV. U. GAZETTE (Apr. 6, 2006), http://www.news.harvard.edu/gazette/2006/04.06/01-finaid.html.

- Both racial minorities and non-elite classes are underrepresented when we compare law school enrollments to the general population. But blacks and Hispanics are numerically well-represented in law schools compared to the general pool of college graduates. This is not true of low- and moderate-SES college graduates.

- Law school admission policies use very large and relatively mechanical racial preferences, but appear to generally ignore SES considerations. Some law school policies militate against the admission of low- and moderate-SES applicants. Even in awarding grants and scholarships, law schools apparently generally ignore need; low-SES whites receive half as much scholarship aid as do high-SES whites.

- Policies implemented by both law schools and undergraduate colleges have shown that class-based preferences are feasible and effective in creating diversity, and they involve much smaller academic costs than do racial preferences.

In short, a serious discussion in the legal academy about how to address socioeconomic diversity is long overdue. I hope the collective work in this issue of the *Denver University Law Review* will convey such a consensus, and will be followed by some organized effort within the academy to pursue these questions in a thoughtful and sustained way.

I. DATA AND THE MEASUREMENT OF CLASS

Class position in modern Western society is complicated, reflecting myriad aspects of life, including friendship networks, lifestyles, sources and uses of power, and resources of various kinds. Yet there is a definite convention among a great many social scientists that class—or at least socioeconomic status, which is the prosaic stand-in for class when statistics are involved—can be reasonably well-captured with three types of information about individuals: their income, their level of education, and their occupation.[8] Because these three characteristics are highly correlated with one another, researchers will often use one or two of the three measures as indices of SES.[9] In research involving students, SES is

8. *See generally* PETER M. BLAU & OTIS DUDLEY DUNCAN, THE AMERICAN OCCUPATIONAL STRUCTURE (1967); ROBERT ERIKSON & JOHN H. GOLDTHORPE, THE CONSTANT FLUX: A STUDY OF CLASS MOBILITY IN INDUSTRIAL SOCIETIES (1992).

9. HANDBOOK OF RESEARCH DESIGN AND SOCIAL MEASUREMENT 327–65 (Delbert C. Miller ed., 5th ed. 1991) (discussing a number of SES scales, which draw to various degrees on education, occupation, and income, but tend to single out occupation as the single most useful measure); *see also* Vickie L. Shavers, *Measurement of Socioeconomic Status in Health Disparities Research*, 99 J. NAT'L MED. ASS'N 1013 (2007) (discussing a recent study of the advantages and disadvantages of various SES measures).

measured by the characteristics of the student's parents.[10] When data is collected through surveys of students, researchers often ask only about the education and occupation of parents—on the grounds that students are likely to have good information about their parents' educational level, and certainly about their occupation—while their knowledge about their parents' income or assets may be largely speculative (or, if known, might be information the student feels she should not reveal without the parents' permission).[11]

Such is the case with the After the JD study ("AJD"),[12] which is probably our best source of information on the SES of contemporary law students. AJD created a nationally-representative sample of some four thousand law graduates who became licensed attorneys in 1999 or 2000.[13] Participants completed paper surveys or phone interviews in late 2002 and 2003; while most questions focused on the early careers of participants, AJD asked a number of questions about family background and schooling, including questions about the educational level and occupation of both parents. Nearly three-quarters of the participants provided useful responses to at least two of the four SES questions.

How best can responses from questions such as these be translated into an analytically convenient SES scale? The goal is to create a scale that allows one to assign to each student's household an SES value between 0 and 100, where a value of, say, 60, would mean that the household had SES indicators that were higher than 60% of the general population. Any method involves imperfect assumptions and tradeoffs, and the use of numbers should not be taken as an assertion on my part that these measurements are truly precise. They are not. However, quantifying SES in some reasonable way is necessary if one is to have a discussion that moves beyond vague generalities. I believe that a numerical SES index is a very valuable heuristic for making discussion concrete, and I believe that the ways in which this heuristic is used in this analysis are robust to alternative methods of measuring SES. Appendix I provides a detailed explanation of how I generated SES percentiles for each AJD

10. *See, e.g.*, MASSEY ET AL, THE SOURCE OF THE RIVER, 41–44 (2003) (discussing a major study of the social origins of elite college students. The study uses an unusually wide range of measures of social background—including some measures of sibling achievement—but relies principally on parental characteristics to capture socioeconomic status).

11. Consequently, questions about parental income tend to have a higher non-response rate than questions about parental education or occupation. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 477, 483 & tbl.2 (1997).

12. For a good overview of AJD, see RONIT DINOVITZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (Janet E. Smith et al. eds., 2004). AJD was based at the American Bar Foundation, and the research was conducted with the support of the NALP Foundation, the National Science Foundation, LSAC, the National Conference of Bar Examiners, and others.

13. AJD also included oversamples of blacks, Hispanics, and Asians, bringing the total sample to around 4,500. *Id.* at 14–15.

respondent. The discussion that follows summarizes some key elements of the method.

First, one must decide upon an appropriate comparison group. To whom, demographically, should one compare the parents of law students who completed law school around 2000? I compared the AJD data to 2000 census data for adults between the ages of 45 and 65, reasoning that most people who became lawyers around 2000 had parents who were between 45 and 65 that year.

Second, I assigned percentile values to specific levels of educational attainment. The AJD asks respondents to assign one of nine levels of educational achievement to their parents, ranging from "grade school" to "graduate or professional degree." Similar—but not identical—categories exist in decennial long-form census data,[14] so one can determine the distribution of educational achievement for men and women (separately) aged 45 to 65 in the 2000 census.[15] By taking a representative sample of women from the census and ranking them from lowest educational level to highest, one can determine the median percentile of each given level of education. Thus, I assigned a "33rd percentile" measure to women with a high school diploma but no further education; in comparison, a woman with a B.A. is assigned an 84th percentile.[16] I applied the same procedure to men.

It is a little more challenging to assign percentiles to occupations, but there are well-developed protocols for this purpose.[17] A number of sociologists have created occupational indices that rank occupations by their socioeconomic status; some of these use correlations between occupation and other measures of social class, while others use subjective measures of prestige.[18] One of the most widely used systems is the Cambridge Social Interaction and Stratification ("CAMSIS") scale, which measures levels of social interaction between occupations to create a hierarchy. Though developed in England, CAMSIS scales have been developed for many countries and lately have been rescaled after each decennial census. Since I sought to measure the socioeconomic status of

14. The AJD data includes, between "high school diploma" and "associate degree or some college," a category called "trade or vocational school." There is no direct counterpart for this in the census data, so I treated this category as equivalent to "associate degree or some college."

15. Specifically, I used the 2000 Public Use Microdata 5% Sample, or PUMS 5%, a standard electronic extract produced by the Census that captures households representing roughly one in twenty American households. The sample was weighted to better approximate the American population as a whole.

16. For a chart of all education levels and corresponding percentiles, see *infra* Appendix I, Table A1–1.

17. *See generally* Donald J. TREIMAN, OCCUPATIONAL PRESTIGE IN COMPARATIVE PERSPECTIVE (1977).

18. *See, e.g.*, BLAU & DUNCAN, *supra* note 8, at 118–28.

occupations reported around the year 2000, I used the CAMSIS scale developed from occupational categories in the 2000 U.S. Census.[19]

The CAMSIS scale ranks occupations from lower to higher SES, but it does not directly associate a percentile ranking with particular occupations. To create this, I assigned CAMSIS codes to random samples of female and male census respondents (aged 45–64, as before), determined their CAMSIS occupational code, ranked them, and assigned percentiles. Thus, for example, women physicians have a CAMSIS code of 82.46; 99% of employed women in this age cohort have lower CAMSIS codes, so women physicians are assigned a percentile of 99. Women who are registered nurses have a CAMSIS code of 59.11; 75% of employed women in this age cohort have lower CAMSIS codes, so registered nurses are assigned a percentile of 75.[20]

I averaged the educational and occupational percentiles for the parents of each respondent, and then used my random sample of census households to rescale these averages (this corrected for regression to the mean from averaging). The end result was a percentile between 0 and 100 for each of some 3,300 AJD respondents.[21]

These measures are not precise—no measure of SES is really precise—but neither are they unduly subjective or arbitrary. The education and occupation percentiles derived through this method correlate highly with one another, and both correlate highly with household income.[22] As we will see, one can improve on these measures significantly by including such factors as household wealth and the SES of one's neighborhood, but given the very limited extant information on the SES of law school students, this is a good start.

II. SES PROFILES FROM THE AJD

By following the process described above, we can make interesting and useful comparisons between the law school population and the broader American population of young adults. As noted above, it is important not to be too entranced by the seeming precision of specific numbers. This methodology has several flaws: some law students and lawyers in the U.S. have arrived from overseas; the SES status of students from single-parent families will tend to be overstated by the approach used here; the AJD sample is comprised of law students who eventually

19. For a helpful overview of CAMSIS, see Paul Lambert, *Introduction*, CAMSIS: SOCIAL INTERACTION AND STRATIFICATION SCALE, http://www.camsis.stir.ac.uk/ (last modified May 25, 2008).

20. For a full chart of CAMSIS codes and percentiles for women, see *infra* Appendix I, Table A1–2.

21. I only used respondents who reported at least two of the four possible values for their parents.

22. The correlation of the mean education and occupation measures for households is .6 in my PUMS sample. On the relation of these measures to income, see *infra* note 25.

passed the bar, and is thus a bit unrepresentative of law students generally.[23] In one important respect, this method will be too conservative in characterizing the eliteness of law students. In a population (like law students) that obviously includes many persons from privileged backgrounds, many will have values that tilt towards the elite end of standardized categories.[24] Thus, many law students' parents have not just bachelor degrees, but bachelor degrees from very elite schools. In standardizing these characteristics, one undoubtedly derogates the currency of an elite group.

Table 1 summarizes the SES distribution of law students as measured by the AJD. Students are split into five categories, based on the eliteness of their law school, and into five tiers of SES. The results should be sobering to those who imagine our law schools are socially diverse places. Across the spectrum of law schools, there is a lopsided concentration of law students towards the high end of the socioeconomic spectrum, which becomes more lopsided with the eliteness of the law school. At the most elite twenty law schools (combining the first two rows), only two percent of students come from American households with low SES (that is, SES in the bottom quartile), while more than three-quarters come from households with high SES (SES in the top quartile) and well over half come from households with *very* high SES (SES in the top decile). One way of describing this disparity is *that roughly half the students at these schools come from the top tenth of the SES distribution, while only about one-tenth of the students come from the bottom half.*

Or, to put it differently: among young people in the United States, a person whose family SES placed them in the top decile was *twenty-four* times as likely to grow up and attend an elite law school as was a person whose family SES placed them in the bottom *half* of the national distribution.

At less elite schools, the disparities are substantially smaller. Nonetheless, even if we consider legal education as a whole, it appears that students from top decile families are nearly ten times as likely to end up

23. This potential bias appears to be quite small; the educational distribution of AJD respondents is very close to the educational distribution of a sample of first-year law students studied in a 1995 national survey.

24. An easy way to see this is to consider the following thought experiment. Among the general American population aged 45–64 in 2000, about 40% of college graduates have an advanced degree. Among the parents of AJD respondents, however, [60%] of the parents with bachelor degrees have some more advanced degree as well. Thus, if we measured educational achievement only up to the B.A. level, we would understate the actual eliteness of the AJD respondents. The same tendency exists in the measures that really are unobserved in our data (eliteness of schools attended, income, status within occupation, etc.), so our statistics understate the eliteness of these respondents. This is quite analogous to the concept of the "principle of the return of the repressed," an idea Deboarah Malamud has discussed in a different context. Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 456–58 (1997).

in law school as students from the bottom half, and more than eighteen times as likely as students from the bottom quartile.[25]

Table 1
SES Eliteness of Law Students in AJD Panel

School Eliteness	Proportion of students with SES in the following ranges:				
	Bottom Quartile	Third Quartile	Second Quartile	75^{th} to 90^{th} Percentile	90^{th} to 99^{th} Percentile
(1) "Top Ten" (n=272)	1%	4%	13%	25%	57%
(2) Ranked 11th-20th (n=346)	3%	9%	12%	28%	49%
(3) Ranked 21st-50th (n= 533)	3%	7%	17%	25%	48%
(4) Ranked 51^{st}-100 (n=880)	7%	12%	17%	27%	36%
(5) Ranked 101^{st} & lower (n=814)	6%	15%	21%	31%	27%
(6) All Schools (n=2944)	5%	11%	17%	28%	39%

Source: *See* text and Appendix I. Rankings are based on the 1997 U.S. News rankings of law schools (when most of these respondents entered law school). Note that the totals in row 6 include 99 respondents who did not provide a usable answer to the "law school" question and thus could not be included in an "eliteness" category.

An interesting and important question is whether these disparities are completely conditioned by other parts of the educational system. For

25. One important question raised by this data is whether the suggested levels of eliteness really translate into *economic* eliteness—that is, whether these socially elite students are in fact actually rich. While the AJD does not tell us this directly, there are many reasons to believe this is so. In the general population (as captured by the PUMS), the correlation between our SES index and household income is fairly high—between .4 and .45, depending on how the measurement is done. The Warkov data, discussed *infra* in the text accompanying notes 32–43, found law students in the 1960s to be as economically elite as they were elite by measures based on parental education. In my own past research, I have gathered data on several cohorts of UCLA students, and consistently found the students to be from households that were as elite in economic terms as they were in educational or occupational terms.

example, are the relative odds of completing college so heavily tilted against low-SES students that there is no meaningful pool of potential law school entrants? Fortunately, an excellent and recent study provides useful comparison figures for a national sample on this issue.[26] Among a representative sample of young people who graduated from high school in 1992 (making them exact contemporaries of the typical AJD respondent), the authors found that young people from the top quartile had a 68% rate of securing a bachelor's degree, compared to 43% for the second quartile, 28% for the third quartile, and 14% for the fourth quartile.[27] These are dispiriting numbers—students from the top quartile were nearly five times as likely to finish a four-year college as students from the bottom quartile—but the disparities are much smaller than those in law school. As a comparison of the second row of Table 2 with the fifth row of Table 1 suggests, even the least elite law schools admit students whose average SES is significantly higher than the SES of new college graduates generally.

Table 2
SES Eliteness of Undergraduate Students

Undergraduate College Group	Bottom Quartile	Third Quartile	Second Quartile	Top Quartile
(1) Attending "Tier One" Schools	3%	6%	17%	74%
(2) All students achieving bachelor's degree	7.6%	15.3%	27.4%	49.7%

Source: The "Tier One" statistics come from Carnevale & Rose, *supra* note 5. Row 2 figures are calculated from the Table 3 statistics in Goldin et al, *infra* note 26.

At the same time, it does seem very likely that the admissions and recruitment practices of elite colleges do help shape the high-SES character of law students. Row (1) in Table 2 shows the SES distribution of students attending "Tier 1" colleges—roughly one hundred forty undergraduate colleges and universities which have median SAT scores above 1240. Even though this is a fairly broad definition of "elite" colleges, the concentration of SES privilege at these schools is very high (strikingly similar, in fact, to the SES distribution of Tier 3 law schools). Since these elite colleges are prime recruiting grounds for law schools, it is perhaps not surprising that their SES character is similar. It is important to note, however, that the Tier 1 and Tier 2 law schools appear to have even higher SES levels than the elite colleges.

26. *See* Claudia Goldin et al., *The Homecoming of American College Women: The Reversal of the College Gender Gap*, J. ECON. PERSP., Fall 2006, at 138–42, 146–48 & tbl.3.

27. *See id.* at 147.

As we shall see in more detail below, there is nothing inevitable about the predominance of SES elites at most top undergraduate schools. The University of California-Berkeley and UCLA, which are generally ranked among the top five public universities in the nation, have dramatically more socioeconomic diversity than other elite schools. A simple comparative measure of SES diversity is the proportion of students who receive Pell Grants, which are need-based.[28] Very roughly speaking, students in the bottom half of the income distribution are eligible for Pell Grants, and those in the top half are not.[29] Thirty-two percent of Berkeley undergraduates and 33% of UCLA undergrads receive Pell Grants.[30] The numbers for other elite public schools, such as the University of Virginia and the University of Wisconsin, are 8% and 11%, respectively—lower even than the Ivy League average of 12%.[31] We will explore the reasons for these disparities further in Part VII, but for now the important point is that SES diversity can be significantly influenced by college policies.

III. SOME HISTORICAL CONTEXT

Faced with any interesting phenomenon, it is generally helpful to seek out an historical perspective; some sense of trends over time. In the world of legal education, there is no official data to draw upon. We do, however, have one very helpful source, created through the efforts of an economist named Seymour Warkov.[32]

In the early 1960s, Warkov was part of a research team at the National Opinion Research Center ("NORC") that surveyed a large cross-section of college students.[33] In a follow-up survey, NORC tracked the

28. *Economic Diversity: National Universities*, U.S. NEWS & WORLD REPORT, http://colleges.usnews.rankingsandreviews.com/best-colleges/national-economic-diversity (last visited Feb. 9, 2011).

29. The Pell formula takes into account multiple factors, such as net household wealth, the needs of other dependent children, and whether a student is "independent" of his parents (e.g., older students returning to school), but grants are highly correlated with income. As one authoritative source reports, "Pell Grants are awarded primarily to low-income students. For example, among 1995-96 beginning students, 87 percent of Pell Grants were awarded either to dependent students whose parents' incomes were under $45,000 (59 percent) or to independent students with incomes under $25,000 (28 percent)." Wei, Horn and Carroll, "Persistence and Attainment of Beginning Students with Pell Grants," National Center for Education Statistics (May 2002), p. 17. Another useful source are University of California statistics on financial aid for freshmen, reported here: http://statfinder.ucop.edu/reports/financialaid/default.aspx?Year=2008-09. Calculations from this data suggest that 87% of all UC freshmen receiving Pell Grants were dependent students with family incomes under $48,000; moreover, 93% of these dependent students with family incomes under $48,000 received Pell grants.

30. *Economic Diversity: National Universities*, *supra* note 28.

31. These numbers cover the 2008–09 academic year and come from charts compiled as part of the U.S. News college rankings report. *Id.*

32. SEYMOUR WARKOV, LAWYERS IN THE MAKING (1963). This book is a joint publication of the National Opinion Research Center and the American Bar Foundation. It is included in the NORC's Monographs in Social Research.

33. *Id.* at iii.

post-graduate activities of these students, and Warkov undertook a detailed analysis of the twelve hundred or so students in the original sample who landed in law school.[34] The NORC questionnaires gathered substantial data on the educational experiences, aspirations, and achievements of participating students, and also asked about the education, occupation, and income of respondents' parents.[35]

On socioeconomic matters, Warkov made two basic findings. First, American law students tended to come from the very elite strata. Second, the eliteness of student backgrounds was correlated with the eliteness of law schools. A representative table from Warkov showed the following:

Table 3
Income of the Parental Family of Law Students, by Law School Strata

Family Income	Law School Stratum		
	I	II	III
$20,000 or more	42%	31%	21%
$15,000–$19,999	16%	8%	11%
$10,000–14,999	15%	20%	21%
$7,500–9,999	11%	17%	18%
$5,000–7,499	8%	14%	21%
Under $5,000	8%	10%	8%
Total	100%	100%	100%
"n" in sample	262	311	449

Source: WARKOV, *supra* note 32, at 59.

In grouping law schools, Warkov put eight very elite schools in Stratum I (all schools in this group had median LSAT scores above 600), sixteen moderately elite schools in Stratum II (schools with median LSAT scores between 500 and 600), and the rest of law schools in Stratum III (schools with median LSAT scores below 500).[36] It is worth noting that well over half of Warkov's sample—which was apparently representative—attended one of the top twenty-four schools; the other one hundred-odd schools were typically quite small.[37] Roughly speaking,

34. *Id.* at iii–v.

35. *Id.* Appendix I contains the undergraduate survey; questions 56, 57 and 58 deal with parental education, occupation and income.

36. The LSAT has been rescaled twice since Warkov's time (when the mean was roughly 500 points and the standard deviation was roughly 100 points). Under the current scale, the mean is roughly 150 points and the standard deviation is roughly 10 points, creating a 120 to 180 scale. Thus, the Stratum I schools in Warkov's time had LSAT medians equivalent to about 160 under the modern LSAT scale. Of course, Stratum I schools today have much higher medians—a reflection of vastly increased numbers of applicants and far more competition for slots in the elite schools. The origins of this trend is discussed in Richard H. Sander & E. Douglas Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 462–63 & tbl.13 (1989).

37. Keep in mind that as recently as 1964, accredited American law schools granted only 9,638 degrees, about one-fifth of current production. Richard Abel, *American Lawyers* (1989), p.

Warkov's Stratum 1 would be analogous—both in relative academic strength and numbers—to the top twenty schools in my Table 1 hierarchy (Tiers 1 and 2). Similarly, Stratum 2 would be analogous to the next thirty schools (Tier 3), and Stratum 3 would be analogous to the rest of the law schools (Tiers 4 and 5).

By modern price levels, the income levels in Table I look quite low; but if one multiplied the income figures by 10, one would probably have a reasonably good comparison with present day income levels (nominal median family income in the U.S. increased by a factor of almost exactly ten between 1960 and 2005).[38] In 1960, only 5.7% of American families reported incomes of $15,000 or higher, while 58% of the families of elite law students had incomes above this level.[39] Similarly, 57% of the fathers of Stratum I law students were college graduates, at a time when just over 10% of adult males in the United States had bachelor degrees.[40] Roughly speaking, Warkov's data show—for the elite schools—patterns very similar to those we observe today in elite schools: some fifty percent of the students at these schools came from families in the upper tenth of the socioeconomic pyramid, while only a tenth of the students came from the bottom half of the pyramid.[41]

Without the original data, it is impossible to compute SES indices that are directly comparable to those I use in Table 1. Nonetheless, one simple and interesting way of directly comparing the Warkov data to the AJD data is through a measure of distribution known as the index of dissimilarity.[42] The index compares two categorical distributions and measures how much overlap there is between them. If the two distributions are identical, the index has a value of 100. If the distributions are completely disjoint, the index has a value of 0. Consider this example: suppose there are only three categories of educational achievement (low, medium, and high), suppose that in the general population people are evenly distributed across these three levels (33% of people attain each level), and suppose that among some comparison group (fans of NPR) the distribution is 10%, 20%, and 70%. Then the index of educational

256. Few of the elite schools were part of the dramatic enrollment increases of the intervening decades, so the elite schools accounted for a much larger proportion of all lawyers than they do now.

38. Median family income was $5,620 in 1960 and $56,194 in 2005. The 1960 figure comes from BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 297 (1975). The 2005 figure comes from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at tbl.683 (2010).

39. BUREAU OF THE CENSUS, *supra* note 38, at 290; WARKOV, *supra* note 32, at 59 tbl.4.1.

40. BUREAU OF THE CENSUS, *supra* note 3, at 380 (citing a figure from 1959); WARKOV, *supra* note 32, at 58 tbl. 4.1.

41. *See infra* Table 4.

42. An explanation of how to compute the index of dissimilarity can be found at *Racial Residential Segregation Measurement Project*, UNIVERSITY OF MICHIGAN: POPULATION STUDIES CENTER, http://enceladus.isr.umich.edu/race/calculate.html (last visited Feb. 9, 2011). The index was originally developed to analyze residential segregation levels, where the categories compared are small geographic units like census tracts, but it is now used in much sociological research to compare differences in distributions across fixed categories.

dissimilarity between NPR fans and the general population would be .37, which is to say that 37% of NPR fans would have to change their level of educational attainment (move from the "high" category to the "low" or "medium" category) to achieve the same distribution as the general population.

In Table 4, below, I report indices of "educational dissimilarity" between the fathers of students in each of Warkov's three law school strata and the level of educational attainment of American males generally in 1960. I then compare these with indices of educational dissimilarity between the fathers of AJD respondents who attended each of the five law school tiers, and the educational attainment of American males aged 45-64 in 2000. While the comparison is not perfect, it is revealing. The educational eliteness of law student's fathers seems to have generally increased across the top three tiers of American law schools, relative to comparable institutions in the early 1960s. It has decreased some at the low-tier schools, partly reflecting, perhaps, the fact that most of these schools did not exist in the earlier period, or were much smaller operations.

These measures are probably not accurate enough for one to opine convincingly on whether the socioeconomic eliteness of American law students has become more intense or less intense since Warkov's time. But this chart, along with the other comparisons one can make between the Warkov and AJD data, persuasively shows that there has been no marked improvement in SES diversity over the past forty years. During this period, schools have undertaken aggressive affirmative action programs, federal loan programs have been created that make available tens of thousands of dollars of credit on reasonable terms for most students, and the scale of "public" legal education has greatly increased.[43] Based on the available evidence, it seems that none of these changes has had much impact in making legal education more accessible to low-SES students—or, if there has been an impact, it has been largely or entirely negated by other developments.

43. On the scale of public legal education, 1960 enrollment statistics can be found in John G. Hervey, *Law School Registration, 1960*, 13 J. LEGAL EDUC. 248, 248–61 (1960). Statistics from 2002 can be found in AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2004 EDITION (2003). By these sources, first-year enrollment at public law schools nearly tripled from 1960 to 2002, rising from 5,283 to14,262. (Of course, private law school enrollments also rose sharply during these years.) On the development and scale of law school affirmative action over these decades, see Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 374 (2004).

Table 4
Indices of Educational Dissimilarity for Law Student's Fathers: Comparing the Warkov data on 1961 matriculants with AJD 1996-97 matriculants

<table>
<tr><td colspan="4">Indices of Educational Dissimilarity for Fathers of:</td></tr>
<tr><td>Warkov's 3 Law School "Strata"</td><td>1961 Matriculants</td><td>1996–97 Matriculants</td><td>Five Tiers of Contemporary Law Schools</td></tr>
<tr><td rowspan="2">Stratum I (most elite)</td><td rowspan="2">52.7</td><td>56.9</td><td>Tier 1 (most elite)</td></tr>
<tr><td>49.9</td><td>Tier 2</td></tr>
<tr><td>Stratum II</td><td>41.7</td><td>46.8</td><td>Tier 3</td></tr>
<tr><td rowspan="2">Stratum III (least elite)</td><td rowspan="2">35.7</td><td>34.6</td><td>Tier 4</td></tr>
<tr><td>29.6</td><td>Tier 5 (least elite)</td></tr>
</table>

Sources: WARKOV, *supra* note 32, and calculations from Appendix I.

IV. COMPARING RACIAL AND SES DIVERSITY

The pursuit of greater diversity has, of course, been a major objective in higher education generally—including, and perhaps especially, in legal academia—for the past forty years. Although the rhetoric of diversity often invokes both class and race, or, more generally, social "disadvantage,"[44] I believe that nearly all of the actual diversity effort has focused on race. As a first step towards assessing this claim, consider the relative underrepresentation among various racial groups and SES groups.

Table 5 attempts to quantify underrepresentation, by comparing the presence of various groups in law schools to their numbers in the general population. For example, about one in every seventy whites in their mid-twenties enrolls in law school (i.e., 1.4%). For blacks, the rate is about

44. See sources cited in notes 1 and 2, supra. See also Robert E. Hirshon, President's Message: Excellence and Diversity, ABA Journal June 2002: "..if the American bar is to represent this culture, it must reflect the diversity of America. This is fundamental to fostering the public's perception that our system is fair, unbiased, and inclusive. Without that perception, our judicial system ultimately fails. Such long overdue change in our profession's diversity can only begin in law schools…nothing divides this society so completely as race…which is only exacerbated by the cold reality that wealth, and the potential for wealth, is decidedly not colorblind." Id. at 1-2. See also MacCrate report; Carnegie report….

one in one hundred and sixty (i.e., 0.62%).[45] This suggests that for a white and black born in 1985, the white child had about 2.2 times the chance, as compared to the black child, of growing up to become a law student. Or, to put it the other way, for every one hundred white children who would grow up to attend law school, only forty-five black children would grow up to attend law school.

There are various assumptions and oversimplifications in these calculations,[46] but the point here is to get a general idea of relative "life-chances" for various groups we might consider to be disadvantaged from a racial or socioeconomic standpoint. Appendix 2 provides the raw data on which these numbers are based (as well as those in Tables 6 and 7), and shows in some detail how the rates are calculated.

Table 5
Estimated Relative Representation of Racial and Socioeconomic Groups
Comparing Law Students to the General Population

Control Group	Comparison Group	Representation Rate
Whites	American Indians	52%
	Blacks	39%
	Hispanics	25%
	Asians	137%
SES in top 10%	SES in 50th to 90th percentile	29%
	SES in bottom half	8%
	SES in bottom quartile	5%
SES in top quartile	SES in 50th to 75th percentile	25%
	SES in bottom half	12%
	SES in bottom quartile	7%
SES in top half	SES in bottom half	19%
	SES in bottom quartile	12%

Source and calculations: *See* Appendix II.

The disparities in representation are shockingly large for both racial minorities (excepting Asians[47]) and low-SES groups. Many readers will

45. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at tbl.10 (2010); *Legal Education Statistics*, AM. BAR ASS'N, http://www.abanet.org/legaled/statistics/stats.html (last visited Feb. 9, 2011).

46. For example, as noted below, many blacks at American law schools are not "African-Americans" per se. *See infra* note 95 and accompanying text.

47. Note that both "Hispanics" and "Asians" are broad ethnic categories that include subgroups with very different levels of representation. *See* Sean A. Pager, *Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 302–03 (2007) (discussing the problems associated with defining ethnic groups in broad categories when major discrepancies exist among subgroups in those categories). Americans of Japanese, Chinese, Korean, or Cuban origin are very well-represented, while Americans of Mexican, Puerto Rican, Cambodian, Vietnamese, or Filipino origin are not. *Id.* at 309, 333.

be surprised that, despite the inclusion of Hispanics in affirmative action efforts by most law schools for a generation or more, young Hispanics, on a per capita basis, are one-quarter as likely to enroll in law school as are whites. Yet, stark as black and Hispanic underrepresentation is, it pales in comparison to the absence of students from the bottom half of the SES distribution. Depending on the control group we choose, Americans in the bottom quarter of the SES distribution are between one-eighth and one-twentieth as likely to attend law school as their more affluent peers. For the entire bottom half, the chances range from one-twelfth to less than one-fifth.

Much of the reason for underrepresentation of some groups in law school has to do with low rates of college entrance and completion.[48] This is particularly true for young Hispanics, who often drop out of high school to help support their families, and who have relatively low rates of college entrance even among those who finish high school.[49] For blacks, a major barrier to graduate education is the low rate of graduation among those who start college.[50]

Another way of comparing access, then, is to examine representation in law school among the pool of young people who graduate from college. This is, after all, the pool from which law schools can recruit and choose students. Table 6 presents these results; the numbers are calculated the same way as in Table 5, except here we are measuring relative representation rates among college graduates (see Appendix 2 for details).

Table 6
Estimated Relative Representation of Racial and Socioeconomic Groups
Comparing Law Students to College Graduates

Control Group	Comparison Group	Representation Rate
Whites	American Indians	103%
	Blacks	75%
	Hispanics	84%
	Asians	109%
SES in top 10%	SES in 50^{th} to 90^{th} percentile	50%

48. *See infra* Appendix II, Table A2-1; *see also* Sander, *Systemic Analysis*, *supra* note 43.

49. On high school dropout patterns, see Jordan, Lara and McPartland, "Exploring the Causes of Early Dropout among Race-Ethnic and Gender Groups," 28 Youth & Society 62 (1996). Among Hispanics aged 25-29 in 2009, 29.9% had not completed high school, compared with 7.8% of the rest of the U.S. population. Among those who completed high school, only 59% had attended any college, compared with 75.6% of the non-Hispanic population. Author's calculations from 2009 ACS data.

50. Among U.S. blacks aged 25-29 in 2009, only 34.7% of those who had ever attended college had earned a bachelor's degree, compared with 52.3% for the non-black population. Author's calculations from 2009 ACS data.

	SES in bottom half	42%
	SES in bottom quartile	39%
SES in top quartile	SES in 50th to 75th percentile	46%
	SES in bottom half	52%
	SES in bottom quartile	48%
SES in top half	SES in bottom half	65%
	SES in bottom quartile	60%

Source and calculations: *See* Appendix II.

Table 6 presents quite a contrast to Table 5; the representation rates are uniformly higher, and sometimes much higher. Clearly, the "pool" problem is important: law schools cannot admit students who do not even reach the applicant pool, and the applicant pool is limited to college graduates. But the contrast between "race" and "SES" representation is still striking. College graduates of all races attend law school at rates that approach or even exceed the white rate. But low-and-middle SES college graduates are far less likely to attend law school than are high-SES graduates.

The contrast becomes stunning if we examine elite law schools. Table 7 reports the same set of calculations as Table 6, except it only counts students at the top ten law schools.

Table 7
Estimated Relative Representation of Racial and Socioeconomic Groups, Comparing "Top 10" Law Students to College Graduates

Control Group	Comparison Group	Representation Rate
Whites	American Indians	102%
	Blacks	88%
	Hispanics	108%
	Asians	192%
SES in top 10%	SES in 50th to 90th percentile	30%
	SES in bottom half	9%
	SES in bottom quartile	4%
SES in top quartile	SES in 50th to 75th percentile	29%
	SES in bottom half	13%
	SES in bottom quartile	6%
SES in top half	SES in bottom half	17%
	SES in bottom quartile	8%

Source and calculations: *See* Appendix II. "Racial representation" is based on 2002 data for college graduates and first-year law students; "SES representation" is based on 1996 data.

Among the pool of college graduates, most minority groups are represented at elite law schools at rates that exceed white rates. The only exception is blacks, and that is a relatively recent development.[51]

But the same is not even faintly true across class lines. Among the pool of college graduates, someone with an SES in the top tenth is more than twenty times as likely to attend an elite law school as a graduate from the bottom quarter of the SES distribution. All of the SES comparisons produce dramatic discrepancies. Indeed, it is fair to say that low-SES representation at elite law schools is comparable to racial representation fifty years ago, before the civil rights revolution.[52]

IV. WHAT IS THE OVERLAP OF RACIAL AND SES DIVERSITY?

An obvious question is raised by the patterns we just examined: why does racial diversity at law schools add so little to class diversity? The two are often conflated in discussions of diversity; many writers on affirmative action assume that race-based preferences, by reaching out to disadvantaged populations, necessarily catalyze socioeconomic diversity at the same time.[53] It is of course true that blacks, Hispanics, and American Indians in the U.S. are all over-represented among the nation's poor. In fact, poverty rates in each group are at much more than double the white rate.[54] But that does not mean that low-SES minorities are the ones getting into law school.

Table 8 is a first step towards understanding the intersection of race and class at law schools. It is similar to Table 1, except that the data is broken down into the four principal racial groups. Additionally, sample sizes in Table 8 for Native Americans and "others" were too small for useful analysis, and even in the case of blacks, Asians, and Hispanics, it is important to note that we are looking at relatively modest samples. I

51. During the 1990s, the black representation rate substantially exceeded the white rate, but that has changed in recent years as the number of black college graduates has risen sharply with a much smaller rise in black law school enrollments. See the last paragraph of Appendix II for further discussion of this pattern.

52. In 1964, blacks accounted for 1.3% of American law students; depending on whether we calculate their representation relative to pool of college graduates or relative to the general population, their representation rate was between 10% and 30%—similar to the rates of representation for the low-SES categories, relative to the top 10%, in Tables 5, 6, and 7. *See* Sander, *supra* note 48, at 375.

53. For a recent example, see Michelle Anderson, "Legal Education Reform, Diversity, and Access to Justice," 61 Rutgers Law Review 1011 (2009). Anderson writes that "there is a justice gap between impoverished and affluent communities in this country, one that leaves the poor with inadequate legal representation….[a]t least 80% of the civil legal needs of low-income Americans are not being met…" But while Anderson believes that increasing racial diversity in law schools will address this problem, she never mentions the absence of socioeconomic diversity in law students of all races. Id. at 3-4.

54. Many standard reference works fail to distinguish non-Hispanic whites from the rest of the white population, thus giving a misleading cross-group comparison. My analysis of 2009 American Community Survey ("ACS") data shows, for 2008 reported income levels, an 8.9% poverty rate among non-Hispanic whites, compared to 21.9% among Hispanics and 24.3% among blacks.

have consolidated the "tier" analysis to reduce the problem of small cell sizes.

Table 8
SES Eliteness of AJD Students, by Law School Tier and Race

Race	School Tier	Proportion of students with SES in the following ranges				
		4th Quart.	3rd Quart.	2nd Quart.	75-90 Per.	90-99 Per
Asian-American (n=290)	Top 2 Tiers	3%	8%	20%	25%	47%
	All Tiers	7%	9%	19%	26%	39%
African-American (n=289)	Top 2 Tiers	1%	10%	23%	23%	43%
	All Tiers	7%	17%	22%	25%	29%
Hispanic (n=266)	Top 2 Tiers	21%	16%	15%	19%	29%
	All Tiers	20%	20%	18%	19%	23%
White (n=2410)	Top 2 Tiers	1%	6%	11%	28%	54%
	All Tiers	4%	10%	17%	28%	41%

Source: AJD data analyzed by the author. *See* text and Appendix I for details. Bear in mind that in some cells the underlying "n" is quite small, especially for nonwhites, so anomalous numbers are likely to reflect some random variation and should not be taken too literally.

There are multiple stories embedded in Table 8, so let me peel off several different layers of interpretation that strike me as important. For all racial groups, in all law school groupings, the SES distribution is tilted towards the top—that is to say, the typical student has above-average SES. It is not the case—as many observers imagine—that the typical beneficiary of race-based law school affirmative action has low SES. On the other hand, racial minorities are responsible for much of the small amount of SES diversity we can currently observe in law schools.

White law students are breathtakingly concentrated in the top quartile of the SES distribution. Each of the other racial groups has a somewhat unique pattern:

- Asian-American law students have very high SES measures. In fact, the SES measures are nearly as high as those for whites, but there is a larger sprinkling of Asian students in the bottom two quartiles. Much of this is due to the large proportion of these students who are immigrants or the children of immigrants. The AJD did not ask respondents about their immigrant status (for fear of discouraging participation from illegal immigrants), but it did ask whether respondents' parents were born in the U.S. Somewhat more than three-fifths of the Asian respondents reported that both parents were born outside the U.S., and these respondents accounted for three-quarters of Asians in the sample who fell into the bottom two SES quartiles. It is more difficult to apply our SES scale to an immigrant, since international education levels may not be strictly comparable. Asian-American respondents with native-born parents had SES levels indistinguishable from those of whites.

- Black respondents in the AJD also had remarkably high SES levels. Two-thirds of blacks from the top two tiers of law schools have SES in the top quartile.[55] Yet, it is important to keep in mind that the measures we use are particularly likely to overstate black SES. Blacks disproportionately come from single-parent families, whose income will usually be lower—despite high educational and occupational prestige—than otherwise similar two-parent families.[56] Black households tend to have much lower wealth at a given level of income (or occupation or education) than otherwise comparable white households.[57] And, middle-class blacks are much more likely to live in segregated neighborhoods with high poverty rates than are whites with otherwise similar SES.[58] Unfortunately, none of the data sources I know of on the SES of the general population of law students help us take these factors into account. It seems fair to say that although most black law students are upper-middle-class, that means

55. *See infra* Table 8.

56. Many of the issues discussed in this paragraph are explored, in the context of law students, in Sander, *supra* note 11.

57. The best-known work on this issue remains MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/ WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (originally published 1995; 2nd edition, 2006).

58. Sander, *supra* note 11, at 494–95.

something different than what it means when applied to whites or Asians.

- Hispanic respondents show by far the greatest SES diversity in this data. Yet, just as our SES measures probably overstate the degree of black privilege, they probably understate it for Hispanics. Only a third of the AJD Hispanics have two immigrant parents (about half the rate for Asians) although, as with Asians, the children of immigrants account for a disproportionate share of the low-SES Hispanics. More importantly, there is a considerable disjunction between measured educational and occupational SES levels among AJD Hispanics that does not exist with the other racial groups examined here. The mean occupational SES of AJD Hispanic parents is 12 points higher (on our 100-point scale) than the mean educational SES of those parents. Many of these parents, in other words, have modest educational credentials but high-status occupations and, probably, relatively high incomes.

This discussion cautions us that there are important nuances involved in making SES comparisons across racial groups. One way of sidestepping this issue—which gives us further insight into the race/class connection—is to use intra-racial measures of SES. In other words, rather than comparing the parents of Asian law students to the SES distribution of middle-aged Americans generally, we can compare them to Asians aged 45–64, and similarly compare the parents of black law students to the general SES distribution of middle-aged blacks, and so on. The results of this analysis are shown in Table 9.

Table 9
SES Eliteness of AJD Students, by Law School Tier and Race Using Intra-Racial Measures of SES

Race	School Tier	Proportion of students with SES in the following ranges				
		4th Quart.	3rd Quart.	2nd Quart.	75-90 Per.	90-99 Per
Asian-American (n=290)	Top 2 Tiers	4%	15%	24%	18%	39%
	All Tiers	9%	14%	24%	21%	32%
African-American	Top 2 Tiers	0%	5%	18%	18%	59%
	All					

(n=289)	Tiers	6%	10%	19%	22%	43%
Hispanic (n=266)	Top 2 Tiers	3%	16%	21%	18%	42%
	All Tiers	6%	13%	24%	21%	36%
White (n=2434)	Top 2 Tiers	2%	7%	12%	29%	50%
	All Tiers	6%	11%	17%	28%	38%

Source: AJD data analyzed by the author. *See* text and Appendix I for details.

Using the intra-racial method, the differences in SES eliteness among these four racial groups dwindle. By visual inspection, it is hard to see any meaningful difference between the relative SES eliteness of blacks and whites. Hispanics and Asians are somewhat more socioeconomically diverse (particularly Asians at non-elite schools), but for all four racial groups, the relative odds of students coming from the "top tenth" rather than the "bottom half" are ten to one or greater.

We might then speak of white law students (as a group) as "first among elites." They have the highest SES, on average, of all the racial groups, and the interpretation of what those high SES numbers means is less complicated for whites than it is for the other racial groups. But it is also clear that within each racial group, the most privileged members are very disproportionately over-represented in law school. Therefore, the contribution *racial* diversity makes to *socioeconomic* diversity in legal education is quite modest. Even though nonwhites constitute over one-fifth of all students, they raise the overall proportion of law students from the bottom SES quartile only from 4% (the white proportion) to 5% (the proportion for all law students); they raise the overall proportion of law students from the bottom SES quartile only from 14% to 16%. This helps explain the patterns we saw in Tables 5, 6, and especially 7: achieving some kind of racial representation—if it is done with SES blinders on—does not imply much socioeconomic representation.

The next issue, then, is to look at why this is. What are admissions officers doing when they try to create diverse law school classes?

V. LAW SCHOOL ADMISSIONS PRACTICES

Most legal educators are aware that law schools give substantial admissions preferences to underrepresented racial minorities—most commonly to blacks, but also, at most schools, for Hispanics and American Indians, and, at a few schools, for particular Asian ethnicities.[59] In most cases, these preferences are very large: equivalent to a fifteen point LSAT boost for African Americans, and a seven or eight point LSAT

59. *See* Sander, *supra* note 48, at 385–86.

boost for Hispanics.[60] What is less well-known is that these preferences are applied in a fairly mechanical way. Justice O'Connor, in giving constitutional blessing to the race-preferences system used by the University of Michigan Law School, viewed its admissions system as one in which race was simply one of a multitude of factors considered in creating a strong and diverse class.[61] In fact, the University of Michigan Law School in the late 1990s did what most law schools still do today: it admitted, with a few exceptions, the students with the highest LSAT scores and undergraduate grades within each racial cohort.[62]

To see this point more clearly, let us consider an example chosen more or less at random[63] from scores of school admissions databases my research team has gathered over the past few years. The example is the University of Missouri at Columbia ("UMC"), a strong but non-elite law school that has a fairly typical student body and racial makeup. UMC calculates an index for each student, based essentially on LSAT score and undergraduate performance. The index probably has a theoretical maximum of 100, but few applicants have scores above 80. In the 2006-07 admissions cycle, having an index score of 68 or higher almost guaranteed admission. The school had 129 white applicants with scores of 68 or higher, and it admitted nearly all 122 of them. For whites with scores of 63 to 67, the odds of admission were still good—100 out of 143 whites in that range were admitted. For whites with index scores in the 58 to 62 range, the odds of admission were relatively low—50 out of 144 whites in that range were admitted. Whites had very low chances of admission if their index score was below 58—only 18 of 259 white applicants in that range (about 7%) were admitted.[64]

If index score was the predominant determinant of admission for whites, it carried even more weight in the school's consideration of blacks. In this same admissions cycle, the school admitted all but one black applicant who had an index score above 44, and rejected every black applicant who had an index score below 44. This is a marked contrast to white admissions in two ways: blacks were virtually guaranteed admission in a credential range where nearly all whites were rejected, and the school had no "middle range" for blacks where index scores were important but not completely determinative of admission.[65]

The two points are connected. Law schools are understandably concerned about the academic effects of using large racial preferences. They

60. Jane Yakowitz & Richard Sander, Race and Admissions at American Law Schools 28–29 (Jan. 26, 2011) (unpublished manuscript) (on file the Denver University Law Review).

61. *See* Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

62. *See* Sander, *supra* note 48, at 404–05.

63. Schools that seemed clearly un-representative were omitted.

64. Author's analysis of UMC Law School Data; original datafile is available from the author and on file at the University of Denver Law Review.

65. *Id.*

would like to minimize the credential distance between their black and Hispanic students on the one hand and their white and Asian students on the other.[66] Given the goal of admitting a "representative" number of minority students, they achieve the goal by focusing almost entirely on the credentials of those students.[67]

This, then, leads us to the answer of our earlier question about the overlap of class and race. Law schools do not try to pick out and admit the most "disadvantaged" black and Hispanic applicants, because they see nearly all of these applicants as already handicapped by low credentials. They therefore try to admit the very strongest blacks and Hispanics in the pool, as measured by traditional criteria, and these strong applicants come from predominantly advantaged backgrounds. This, in a nutshell, is why upper-middle-class minorities capture most of the benefits of law school preferences.

But what about "class" preferences? Surely, given the lip service paid to socioeconomic factors in diversity talk, class must play an important and independent role in admissions? There is very little evidence that it does. To begin with, very few law schools collect systematic information on socioeconomic status. Without some objective measures of SES, it would be hard to imagine a fair basis on which class preferences could be given. Similarly, law schools almost never release data on the SES composition of their students, though they always release data on their students' racial composition.[68]

More to the point, the available data on law students shows very little evidence of "class" preferences, unless it is a preference for upper-class students. In 1995, a couple of dozen schools participated in a national study of students in the first semester (the "National Study of Law Student Performance" or "NSLSP").[69] Nearly eighty percent of the students at the participating schools completed surveys that included a few demographic questions, and nineteen participating schools provided background data on their students.[70] Although all data was anonymized, the schools provided codes that allowed us to match student background data with their survey responses. We can thus compare the average cre-

66. *See* Brief Amicus Curiae for the Ass'n of American Law Schools in Support of Petitioner at 24–26, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187968.

67. By empirical inference, not their stated policy.

68. Universities that receive federal aid are required to report to the federal government the ethnic makeup of their student bodies. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,266, 59,271 (Oct. 19, 2007).

69. The NSLSP database may be accessed at *Databases*, PROJECT SEAPHE, http://www.seaphe.org/databases.php (last visited Feb. 14, 2011). For a description of the data, see Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 240–44 (2001).

70. *Id.* The survey, codebook, and introduction to the study can be found on the same site.

dentials of students whose parents have graduate degrees with the credentials of students whose parents did not finish high school. If schools are giving significant class preferences, the result would be that students with poorly-educated parents would have lower credentials than their classmates.

Table 10
Mean Standardized Index of NSLSP White Students, by Level of Parent's Education

Parent's Mean Education	Sample Size	Standardized Index
< 3.0 (less than 12 years)	79	- 0.09
3.0–4.0 (12–14 years)	567	0.05
4.5–5.0 (14–16 years)	469	0.05
5.5–6.0 (some graduate education)	490	0.00
> 6.0 (prof. or doctoral degree)	368	- 0.11*

*Significantly different from mean at 6% level

Grouped into these five categories, the only group of students whose credentials are significantly lower than those of the other students are the ones in the most highly-educated category; that is, the most elite students. A plausible reading of the data in this table is that a few students who have overcome dramatic personal hardships receive a thumb on the scale in admissions (accounting for the possibly lower credentials of the small group with very low parental education), but that otherwise, higher SES is, if anything, an advantage in law school admissions.[71] [Note bias in the data against low-SES; note that if schools simply admitted students who met a certain threshold, then they would have some credential gap facing low-SES students.]

Consider, now, similar numbers comparing the standardized index of law students by race:

[71] The reader should also bear in mind that Table 10 is, if anything, biased against a finding that high-SES is an advantage in admissions. Since in the law student pool as a whole, low-SES law students have lower academic credentials on average than high-SES students, we would expect that any given school's students would show a modest credential gap between low- and high-SES students. For example, among students with an academic index between 625 and 675, NSLSP respnodents whose average parental education was less than a high school diploma had an average index of 647.7, while respondents whose average parental education was a post-graduate degree had an average index of 652.2. This suggests that, if law school admissions were completely unaffected by student SES, the low-SES students ending up at particular schools would tend to have slightly lower credentials than their high-SES peers. Since we observe just the opposite pattern, this strengthens the inference that schools are favoring high-SES applicants.

Table 11
Mean Standardized Index of NSLSP Students, by Race, Fall 1995[72]

Race	Sample Size	Standardized Index
Blacks	11 schools	- 2.45***
Hispanics	9 schools	-1.85***
Asians	13 schools	-0.83***
Whites (control group)	18 schools	0.00

*Significantly different from white mean at .01% level

The difference is startling. The mean index of enrolled blacks and Hispanics at law schools are generally multiple standard deviations below the white mean. The differences here are much more than an order of magnitude different from the inter-class differences among whites. If we looked at more recent data, I believe we would find slightly smaller preferences for blacks and Hispanics and a virtual disappearance of preferences for Asians. But the basic point would be unchanged: racial preferences and credential disparities are massive, while those related to SES are comparatively small, and (at least among whites) seem, if anything, to favor the affluent.

I doubt that law school admissions officers systematically or consciously favor high-SES students. Nonetheless, there are a several ways in which seemingly neutral admissions policies would tend to have a disparate negative impact on low-SES students.

First, law schools may use "legacy" preferences—that is, admissions preferences for the children of alumni—to some degree. There is growing evidence that legacy preferences are still widespread among undergraduate colleges, and even public universities.[73] Legacies receiving a preference for admittance into law school will plausibly have much higher-than-average SES levels because, by definition, at least one parent has a professional degree. Indeed, legacy preferences might account for the dip in credentials in the bottom row of Table 10, because they would imply the admission of some students with lower-than-average credentials, but with a highly educated parent. On the other hand, there is not much evidence that many law schools use legacy preferences at all, much

72. These statistics are calculated in much the same way as those in Table 10. Each student has an academic index; for each school I calculated the mean and standard deviation of the academic index for whites. Then, for each school I calculated the distance, in white standard deviations, between the mean for whites and the mean for each racial group. I only used schools where there were at least five valid index observations of the racial group in question. This table then reports the mean "gap" at all the included schools. The goal was to produce calculations that were comparable to those in Table 10.

73. *See generally* Daniel Golden, *An Analytic Survey of Legacy Preference, in* AFFIRMATIVE ACTION FOR THE RICH (Richard D. Kahlenberg ed., 2010).

less on a wide enough scale to meaningfully affect the socioeconomic composition of law students. My own law school, UCLA, certainly has not preferred children of alumni; and yet, when I began studying the composition of law students in the early 1990s, UCLA's students were as privileged as those of other schools in its stratum.[74] The use of legacy preferences in law schools is a worthwhile subject to explore at a later date, but I am not confident they play a major role.

A more likely instrument of bias is the failure of most law schools to take into account grade inflation in undergraduate grades ("UGPA"). Many law schools appear to treat UGPA as a standardized measure, like LSAT scores, without considering (if at all, certainly not in a systematic way) the quality of a student's undergraduate institution, the student's major, or the difficulty of a student's curriculum.[75] Even when admissions officers do take some of these factors into account, they almost never consider the degree of grade inflation at a college. Yet, as Stuart Rojstaczer and Christopher Healy have recently shown, grade inflation is not only pervasive in American colleges, it is also substantially more severe in private colleges than public ones.[76] The mean UGPA at good private colleges is a full three tenths of a point higher than at good public colleges.[77] Because low-SES students are more likely to attend public universities rather than private colleges, they will be disproportionately disadvantaged by law school policies that ignore grade inflation.[78]

A third systematic influence that may disadvantage lower-SES applicants is the subtle preference admissions offices give to people with "interesting" records. I have no hard data on this point, but I have strong impressions from talking with admissions officers and serving on law school admissions committees. As we have seen, numerical credentials dominate decisions, but when admissions officers and their faculty committees exercise discretion at the margins, they often look for students

74. See Sander, *Experimenting with Class-Based Affirmative Action*, *supra* note 11 at 488-89. In 1991, several years before UCLA Law School instituted class-based preferences, I conducted a survey of student SES among first-year students; since the survey was anonymous and there were no admissions consequences (or other consequences) to providing complete information, the survey had a high response rate and very little omitted information. Among the UCLA students, 50% had fathers with a graduate degree (putting them in the top 8% of middle-aged men); 56% had mothers with bachelor's degrees (putting them in the top 14% of middle-aged women); 43% had parental incomes of $100,000 or more (putting the parents among the top 8% of American families). All these indicia gave UCLA students SES measures comparable at the high end to students at other 11^{th}-to-20^{th} ranked law schools in the AJD analysis reported earlier.

75. *See* Yakowitz & Sander, *supra* note 63, at 13–16.

76. *See* Stuart Rojstaczer & Christopher Healy, *Grading in American Colleges and Universities*, TCHRS. C. REC., Mar. 4, 2010, at 1–2.

77. *Id.* at 4.

78. *See* Marvin A. Titus, *Understanding College Degree Completion of Students with Low Socioeconomic Status: The Influence of the Institutional Financial Context*, 47 RES. HIGHER EDUC. 371, 371 (2006). This point should not be overstated, however. According to NELS data, about a quarter of students in the first and second quartile of SES attend private schools, compared to 43% of top quartile students (and probably somewhat over half of top decile students). Thus, private/public school attendance is correlated with SES, but there is no rigid demarcation.

who have done unusual things that can make the entering class more interesting. They look for the applicant who knows five languages, or nearly qualified for the Olympic ski team, or interned on Capitol Hill, or took a year off from college to volunteer as a carpenter for Habitat for Humanity. These are indeed interesting backgrounds, but they are far more likely to accrue to the resume of a child of privilege. Talented children from lower-middle-class families usually have few opportunities to live abroad. More typically, they will try to finish college as quickly as possible and spend their summers living at home while working at the local machine shop.

These are speculations, but what can be said with confidence is that law school admissions attach little, if any, special consideration to socioeconomic diversity. Indeed, the evidence very much suggests that law school policies have the effect of creating especially high barriers to applicants from low-to moderate-SES backgrounds.

V. THE ATTAINABILITY OF "CLASS" DIVERSITY

How hard would it be for law schools to achieve significant socioeconomic diversity? This is a crucial question, and it is important to be clear about the very different ways in which schools might attain this goal.

As a threshold matter, a law school could simply seek to eliminate or minimize the harmful effects of practices that favor high-SES applicants—such as those described in Part VI—and make sure that outreach efforts do not overlook parts of the pipeline that produce low-and-moderate SES applicants. This is "affirmative action" as it was originally conceived in the 1960s: not using preferences, but making sure that outreach and admissions procedures are fair and class-neutral.[79] Reforms along these lines would be a major step in the right direction, though one cannot predict how large an effect they would have in fostering SES diversity.

Law schools could also institute significant financial aid policies tied to student need. Table 12 provides estimates of the extent of need-based scholarships offered by law schools, based on the AJD survey, which asked lawyers retrospective information about their law school experiences (respondents generally attended law school in the late 1990s). The data is sobering indeed. Among whites, SES is *negatively* correlated with law school grants![80] High-SES blacks receive four times

79. President William Jefferson Clinton, Address at the National Archives (July 19, 1995) ("[Affirmative action] began simply as a means to an end of enduring national purpose equal opportunity for all Americans.").

80. *See infra* Table 12. Under my analysis of AJD data, if we control for student credentials among whites, the correlation is no longer statistically significant, but I still find it quite striking that low-SES whites receive less grant and scholarship aid than high-SES whites.

as much grant assistance as low-SES whites. Those seeking quantitative evidence that the typical law school is either indifferent or actively hostile towards SES diversity need look no further.

Table 12
Law School Grants and Scholarships by SES and Race

SES Quintile	Average proportion of law students' expenses covered by law school grants and scholarships		
	Whites	Blacks	All respondents
Lowest (n = 95)	5%	19%	10%
4th (n = 114)	7%	11%	8%
3rd (n = 367)	10%	29%	12%
2nd (n = 586)	10%	21%	11%
Highest (n= 1,532)	12%	20%	12%

Source: AJD tabulations by the author

The situation has probably worsened over the past decade, since tuition levels have escalated sharply since the 1990s.[81] It is possible that aid policies have become more generous or at least better targeted, but I am aware of no research that has shown this to be the case. It is more likely that the dramatic increase in law school costs (after adjusting for inflation) has further discouraged low-SES students from applying, adding another push towards increased class stratification.

A third strategy for increasing SES diversity is the systematic use of admissions preferences based on class. So far as I am aware, this has only been attempted in states where universities have been barred from directly taking race into account in admissions.[82] In those states, class-based preferences are widespread, though they take many different forms. My own institution, UCLA School of Law, launched a full-scale experiment in class-based preferences in 1997—the year Prop 209 went

81. The ABA website tracks average and median tuition trends over time and reports that, from 1995 to 2008, average in-state tuition at public law schools increased from $5,530 to $16,836—a 115% increase in real dollars. Out-of-state tuition at public law schools increased by a larger absolute amount over the same period, but a smaller proportionate amount, since it began at a higher base. Average private law school tuitions increased from $16,798 to $34,298 during the same period—again, a smaller percentage increase (44% in real dollars) but a larger absolute increase. For tuition levels, see *Law School Tuition 1985–2008*, A.B.A., http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf (last visited Feb. 14, 2011). For consumer price index levels, see U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at tbl.708 (2010).

82. Thorin Klosowski, *Should Race Still be a Factor in College Admissions?*, HOWSTUFFWORKS, http://money.howstuffworks.com/personal-finance/college-planning/admissions/race-college-admissions.htm/printable (discussing how public universities and colleges in states such as California and Michigan, which prohibit the consideration of race as a factor in the admissions process, consider socioeconomic status instead) (last visited Feb. 14, 2011).

into effect for University of California graduate schools.[83] I have written about this experiment in detail elsewhere, so here I will very briefly summarize our method and my conclusions from the experiment.

The UCLA Law School added a series of optional questions to its application, seeking information on the applicant's parents' income and net worth, the father's education, mother's education, and the address he or she lived at during high school. The address was used to assign the applicant to the census tract (a small neighborhood measured used by the U.S. census), which in turn was used to estimate three socioeconomic characteristics of the applicant's high school neighborhood.[84] For the two "wealth" variables, two "education" variables, and three "neighborhood" variables, applicants received points if they were in the least advantaged sixth of all applicants on that measure—e.g., if their income fell in the lowest sixth of all parental incomes reported by applicants, or if the proportion of families on public assistance in their high school neighborhood was among the highest sixth of all applicants. These points were combined into an index, which was then added to the applicant's academic index.[85] Race was not considered in applications. Financial aid for low-and-moderate income admits was generous, based on an overhaul of the school's aid system in 1994 that replaced largely need-blind assistance with need-focused aid that could equal the full amount of tuition.

The results of the experiment were remarkable. In earlier years, the Law School's SES makeup had been similar to the Tier 1 schools in Table 1; that is, half the students came from the top tenth of the SES distribution, and only one-tenth came from the bottom half. The 1997 matriculants looked quite different; over one-third of the class came from the bottom half of the SES distribution. The proportion of student's with parents earning over $150,000 (about $210,000 in today's dollars) fell from 27% to 8% of the class. Yet these changes were achieved with comparatively small preferences. The average preference granted was about 40 index points, which is about half of the preference previously given to Latinos, and a quarter of the preference previously given to blacks. And the resulting class was racially diverse; over a third of the

83. *See generally* Sander, *supra* note 11 (analyzing the UCLA study in detail). Prop 209, adopted by California voters in 1996, made unconstitutional the use of race as a factor in awarding various state benefits—including admission to state universities. *Id.* at 472 n.1.

84. *Id.* at 482. The three "neighborhood" measures were: the proportion of single-parent families in the tract, the proportion of households on public assistance, and the high school dropout rate among young adults. *Id.* at 483.

85. *Id.* at 483–85. UCLA Law School's academic index, like those used at other schools, is a weighted combination of LSAT scores and undergraduate grades. Unlike other indices, however, the UCLA index adjusts undergraduate grades to reflect both competitiveness of the college and the degree of grade inflation at the college—thus avoiding some of the low-SES bias discussed in Part VI. When the school adopted the new UGPA index in 1991, the proportion of matriculants from Cal State colleges (a common destination for working-class youths in California) shot up.

class was nonwhite, though a majority of the nonwhites were Asians.[86] Perhaps because the preferences were small, the 1997 matriculants went on, in 2000, to achieve the highest state bar passage rate in the school's history before or since.[87]

It is unlikely that the success of the UCLA Law School experiment in SES diversity could be duplicated on a national scale. The school benefited from its uniqueness; almost no other law school was giving SES preferences, so the school faced little competition in recruiting low-SES students and had a tremendous yield rate from them. On the other hand, in the absence of a change in legal regime, it is unlikely that many law schools will institute even modest class-based preferences in the near future. The field is open for a few schools willing to show leadership in fostering SES diversity.

Larger-scale experiments in SES preferences have been undertaken by undergraduate institutions barred by law from taking explicit account of race. Data from the University of California ("UC") shows that all campuses began to give significantly greater weight to socioeconomic factors after the passage of Prop 209 in 1996.[88] Over time, most UC campuses also began to operate large outreach programs to high schools in low- and moderate-income neighborhoods, and to give preference to students who graduated from underachieving high schools. Even before Prop 209, the UC system had far more generous financial aid provisions, and targeted them with better focus on low-income students, than did other elite public colleges in the United States. All these factors help account for the extraordinarily high degree of economic diversity at all the UC campuses.[89] Moreover, the shift to class preferences has not proved inconsistent with racial diversity. Black and Hispanic numbers have fallen at the two most elite UC campuses (which used the most aggressive racial preferences before Prop 209), but across the UC system,

86. Thirty-five percent of UCLA Law School's 1997 matriculants were nonwhite (possibly more, since many students did not identify their race in the new regime). Thirteen percent were underrepresented minorities. See Sander, *Experimenting with Class-Based Affirmative Action*, supra note 11 at 497.

87. The experiment was substantially modified in 1998, chiefly because of faculty disappointment that only ten blacks enrolled under the new system (the law school had averaged 25-30 black matriculants before Prop 209). The school moved a more subjective approach to evaluating "disadvantage", but this system generated even smaller black enrollments. In 2001, the faculty adopted its present system of mixing "holistic" assessments of disadvantage and admission to special programs, notably the Critical Race Studies program. Black enrollment averages at the law school, however, have continued to be much lower than before Prop 209.

88. Author's analysis of UCOP data on University of California campuses.

89. As noted earlier, Berkeley and UCLA have around three times the proportion of Pell Grant recipients among their students than other elite public schools, such as the University of Virginia and the University of Wisconsin. *Economic Diversity: National Universities*, *supra* note 28. One factor unique to California, which also contributes somewhat to the UC's economic diversity, is the substantial number of low-SES, high-achieving Asian students, many of them immigrants or the children of immigrants. Min Zhou, *Segmented Assimilation: Issues, Controversies, and Recent Research on the New Second Generation*, *in* THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 196, 205 (Charles Hirschman et al. eds., 1999).

black enrollment has increased by 56% since Prop 209, and Hispanic enrollment has more than doubled. Graduation rates for both racial groups have jumped.

None of this is accidental. Institutions of higher education are under substantial political and interest-group pressure to achieve racial diversity. They are under no such pressure to achieve SES diversity. Thus, left to their own devices, they tend to maximize racial diversity and neglect SES diversity. When barred from using racial preferences outright, they devise SES preferences that help substitute for racial diversity. In other words, while racial affirmative action has not proven to be an effective way of achieving SES diversity, class-based affirmative action is often quite effective in achieving racial diversity.[90]

VI. COMPARING THE ADVANTAGES OF "CLASS" VERSUS "RACIAL" PREFERENCES

As we have seen, law schools could do a great deal to foster more SES diversity without using class-based preferences at all. But there is much to commend going further, and using mild SES preferences as at least a partial substitute for current racial preferences. Consider some of the advantages.

SES preferences are based on individual circumstances, not group membership. This is more appealing on grounds of fairness. It is hard to justify giving large preferences to blacks and Hispanics from privileged backgrounds while ignoring the needs of low-SES applicants of all races.[91] This simple intuition is probably a major reason why public opinion polls show that substantial majorities of Americans support SES-based preferences, but oppose race-based preferences.[92]

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90. Carnevale & Rose, *supra* note 6, at 7 ("[T]he expansion of current affirmative action programs to include low-income students . . . can add both economic and racial diversity."). Using national data, Carnevale and Rose show that current racial preferences produce minimal SES diversity. *See id.* at 6 ("[U]nder current affirmative action policies, racial minorities are underrepresented, and . . . the underrepresentation of low-income students is even greater."). Their simulations of alternative admissions policies suggest that "elite" colleges could, by replacing racial preferences with SES preferences, quadruple the proportion of students from the bottom half of the SES distribution (from 10% to 38%) while reducing underrepresented minorities ("URM") representation by only one-sixth (from 12% to 10%). *See id.* at 55.

91. *See* Kevin Drum, *Obama and Affirmative Action*, WASHINGTON MONTHLY, (May 14, 2007, 7:04 PM), http://www.washingtonmonthly.com/archives/individual/2007_05/011305.php (including a transcript of the interview by George Stephanopoulos with Barack Obama); *see also* Peter S. Canellos, *On Affirmative Action, Obama Intriguing but Vague*, BOSTON GLOBE, Apr. 29, 2008, at A.2; Eugene Robinson, Op-Ed., *A Question of Race vs. Class: Affirmative Action for the Obama Girls?*, WASH. POST, May 15, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/14/AR2007051401233.html; Dahlia Lithwick, *Shades of Gray: Barack Obama Has Gotten Past Affirmative Action. Have We?*, SLATE MAG., (Mar. 31, 2008, 7:39 PM), http://www.slate.com/id/2187718/.

92. *See* Richard D. Kahlenberg, *The Conservative Victory in* Grutter *and* Gratz, JURIST (Sept. 5, 2003), http://jurist.law.pitt.edu/forum/symposium-aa/kahlenberg.php. Three national polls conducted by EPIC/MRA, the Los Angeles Times, and Newsweek early in 2003 found nearly identical

A competent system of SES preferences—using multiple factors of the type we used in the UCLA experiment, and considering both parental SES and community SES—is much more accurately targeted on the intended beneficiaries than race-based preferences. Lani Guinier has shown that fewer than one-third of the black students who enroll at Harvard Law School have four African-American grandparents; the rest are multiracial, foreign-born, or the children of immigrants.[93] The reason is simple: foreign-born and multiracial blacks tend to have somewhat higher test scores than do blacks who grow up in the U.S. with two black parents.[94] As suggested in Part VI, law schools generally pay little attention to the "diversity" contribution of individual blacks in their quest to admit blacks with the highest possible credentials. While it may be true that Caribbean-born blacks, or blacks with both black and white parents, also contribute to the diversity of a law school class, it is hard to see why they should be grouped, demographically, with blacks who are American-born and have predominantly black ancestry. The challenges involved in defining who is a "real" Hispanic are even more formidable.[95] And, as the United States continues to become more multiracial, and intermarriage rates continue to increase, the "boundary" groups that only slightly partake of a particular racial identity will grow as well.[96] The process of defining who shall receive racial benefits must necessarily become increasingly arbitrary and, thus, unfair and offensive.

As we have seen, class-based preferences can be very effective in generating diversity, even when they are quite small. Moreover, these

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patterns: from 57% to 65% of respondents supported admissions preferences based on income; 26% to 27% supported preferences based on race. *Id.*

93. *See* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 155 n.166 (2003).

94. *See* Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, *in* THE BLACK-WHITE TEST SCORE GAP 1, 3 (Christopher Jencks & Meredith Phillips eds., 1998).

95. "Hispanics" can—and in many counts do—include fifth generation Americans of Mexican ancestry, Guatemalan immigrants, Cuban-Americans, elite professionals from Argentina, and natives of Spain. *See Hispanic Population of the United States*, U.S. CENSUS BUREAU, http://www.census.gov/population/www/socdemo/hispanic/hispdef.html (last visited Feb. 14, 2011) (defining "Hispanic origin").

96. Since the census began giving Americans the option of checking a "multiracial" box, this has become the fastest-growing racial group in the country. Multiracial Americans numbered 4.08 million in 2001, 5.17 million in 2008, and are projected to number 6.44 million by 2015. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 16 tbl.14 (2002); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at tbls.10 & 11 (2010). This number does not include "partial" Hispanics, since Hispanics are considered an ethnic group, rather than a race, by the Census. *See Hispanic Population of the United States*, *supra* note 94. Further accelerating this growth is the dramatic increase in interracial marriages in the United States; according to a recent Pew study, one-seventh of all new marriages in the United States cross racial or Hispanic lines; 16% of blacks, 26% of Hispanics and 31% of Asians now marry outside their race or ethnic group. JEFFREY PASSEL, WENDY WANG & PAUL TAYLOR, MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC, at ii (2010), *available at* http://pewsocialtrends.org/files/2010/10/755-marrying-out.pdf. Interracial or cross-Hispanic marriages have nearly tripled since 1980. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at tbl.60 (2010).

preferences are "invisible": once students have matriculated to a law school, no one can readily tell which of the others have received a preference. Both the small size and the invisibility of these preferences are advantages. Students receiving such preferences are much less likely to be stigmatized and, indeed, may not even be aware that they have received a preference. They are also likely to perform scholastically at levels close to the middle of the class, a good thing both for them and for the academic atmosphere of the school. There is much less likely to be group self-segregation or the nourishment of group resentment, which sometimes happens with strictly race-based preferences.[97]

As I have argued elsewhere, a large preference extended to any student can academically harm the student. By my estimates, the current large preferences used by law schools nearly double the bar failure rate among African American law graduates.[98] The most recent estimates suggest that only one in three blacks who enter law school eventually graduate and pass the bar on their first attempt. Although the "academic mismatch" hypothesis is certainly controversial, the evidence supporting it is steadily mounting.[99] Yet despite some hand-wringing that accompanied the publication of my initial mismatch research, the institutions of legal academia, such as the Law School Admissions Council, the American Bar Association and the American Association of Law Schools—have officially ignored the issue, or have even taken steps to discourage research on mismatch effects. It is irresponsible for these institutions to continue to tacitly (or not so tacitly) support the aggressive use of large racial preferences without undertaking efforts to measure their true effects. It is similarly irresponsible for law schools to continue using mechanical, large preferences without conducting internal research, and sharing that research with students and faculty, to determine whether their own students are harmed by current admissions practices. The issue is relevant to this discussion in two ways. First, any schools giving more emphasis to SES preferences, and less emphasis to racial preferences, would likely reduce mismatch effects to the extent they exist. SES prefe-

97. *See* ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION 157 (1997) ("[N]o group of people now seems more committed to segregation than Afro-American students and young professionals.").

98. *See* Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1964–65 (2005); *see also* Sander, *supra* note 48, at 442–43.

99. *See, e.g.*, Doug Williams, Assoc. Professor of Econ., Univ. of the S., Address at the American Law and Economics Association: Does Affirmative Action Create Educational Mismatches in Law Schools? (May 7, 2010), *available at* http://econ.duke.edu/~hf14/ERID/Williams.pdf. One of the leading critiques of the mismatch theory, published by Katherine Barnes in the Northwestern Law Review, turned out to be filled with erroneous numbers. *See generally* E. Douglass Williams, Richard Sander, Marc Luppino & Roger Bolus, *Professor Barnes and Law School Mismatch*, 105 NW. U. L. REV. (forthcoming 2011). When done correctly, her analysis is entirely consistent with the mismatch hypothesis. *See id.* The other major critiques of the mismatch effect all turn out to have methodological problems, which, when corrected, produce results showing generally large mismatch effects. *See generally* Williams, *supra*. Williams's research also documents substantial mismatch effects among Hispanics receiving large admissions preferences. *Id.*

rences would tend to be smaller, since they are less used and since the credentials gap between low- and high-SES students is smaller than the credentials gap between blacks, American Indians, and Hispanics on the one hand, and whites on the other.[100] And lessening the intense competition for racial minority students would necessarily lessen the size of preferences used to admit them. Second, serious consideration of SES preferences by law schools should foster better data collection and research on admissions practices and their effects. This could encourage more candid and fact-based institutional reflection in an arena where, currently, there is little or none.

Then there are the legal considerations. Differential treatment based on race is generally unconstitutional—with good reason, of course.[101] Preferences for members of racial minorities were tolerated in some contexts in the 1970s and 1980s,[102] but a series of Supreme Court decisions so narrowed the permissible scope of race-conscious practices in the 1990s that many constitutional scholars predicted at the turn of the century that affirmative action in universities was doomed.[103] The Supreme Court's split decisions in *Gratz v. Bollinger*[104] and *Grutter v. Bollinger*[105] proved this prediction wrong, but they seemed to leave only the smallest of windows through which universities could use racial preferences.[106] The preferences needed to be based on an overall assessment of the individual in which race was weighed against other diversity contributions, not a mechanical process where race was often the determinative factor.[107] Preferences needed to be "narrowly tailored"—that is, used as a last resort for producing a diverse class, not a first resort.[108] "Racial balancing" was prohibited, and institutions needed to have some plan for phasing out the use of race over time.[109]

Observers will naturally disagree about the extent to which universities have complied with these standards, but the evidence is fairly overwhelming that law schools do not. As the Missouri example illustrates, law schools apply radically different academic standards to different racial groups and race is often the predominant basis on which students

100. *See* Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 24 (2010).

101. *See* U.S. CONST. amend. XIV, § 1.

102. *See generally* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

103. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–39 (1995) (mandating the application of strict scrutiny to racially-based affirmative action cases); Neal Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 677–78 (1996) (describing the doomsday-like reaction to *Adarand*).

104. 539 U.S. 244 (2003).

105. 539 U.S. 306 (2003).

106. *See id.* at 334–35.

107. *Id.* at 334.

108. *See id.*

109. *See id.* at 323, 343.

are admitted. SES factors play little or no role in admissions which is particularly relevant in the light of the "narrow tailoring" requirement.[110] The UCLA experiment demonstrates that law schools can achieve very diverse educational environments without relying on race at all.[111] Law schools do engage in racial balancing, in the sense that they use preferences to the extent they need to achieve consistent enrollment levels of racial minorities from year to year (and tailor the size of the preference to the race of the applicant based on these same enrollment goals). And I am aware of no law school that has a meaningful plan to phase out the use of race in admissions over the timetable suggested by Justice O'Connor in her *Grutter* opinion.[112]

SES preferences do not suffer from any of these problems. They are not constitutionally suspect. Administered reasonably, they should be multi-dimensional; they should vary from individual to individual depending on the degree of disadvantage. More generally, since the groups they favor are diffuse and "invisible," the focus of spectators on whether a school achieves particular numerical goals is likely to be less intense; thus, the campus politics of SES preferences are less likely to lead to a legally-suspect process.

So far as I am aware, there is no current challenge in the federal courts to law school admissions practices, based on their inconsistency with the *Grutter* guidelines. But such a challenge is surely just a matter of time, and when it comes, the empirical evidence of problematic behavior by law schools—if nothing changes in the meantime—will be overwhelming. From a purely practical point of view, it behooves law schools to give SES-based alternatives to diversity goals some genuinely serious consideration.

VII. CLOSING THOUGHTS

In the age of Obama, there is abundant evidence that upper-middle class minorities have made dramatic gains over the past fifty years, and experience genuine access to mainstream American institutions. There are still significant problems for these groups—most of them related to continuing high levels of racial housing segregation and the persistent test-score gap—but in most ways the landscape has been transformed since 1960. This is not so for low-SES households of all races. While racial inequality has steadily diminished, economic inequality has steadily increased. The United States in modern times has tended to be one of the more economically divided countries in the developed world; but in recent decades it has drifted towards levels of inequality rarely seen out-

110. See text accompanying notes 65 and --. If a school (1) relies heavily on its academic index in admissions; and (2) admits all blacks and no whites in a particular index range, then logically race is completely determinative of admissions decisions in that range.

111. *See* Sander, *supra* note 11, and text accompanying notes 82-86.

112. *Grutter*, 539 U.S. at 343.

side the underdeveloped world. And this drift has occurred with a remarkable sense of complacency and inevitability.

American legal education reflects this complacency. It congratulates itself on its diversity achievements while creating incredibly un-diverse student bodies. It fosters escalating tuition rates while providing little or no need-based financial aid. It pursues admissions policies that reinforce, rather than mitigate, the disturbing lack of access of low-SES Americans to higher education.

I have tried to suggest some of the reasons why this is wrong, and why the current legal academic systems are becoming more and more out of touch with the realities of the American social and legal landscape. The time is more than ripe for organized efforts to reflect on the diversity programs of legal academia, to foster better data collection and dissemination, and to develop fresh perspectives and proposals that can make diversity efforts maximize student opportunities and improve the health, and the conscience, of law schools.