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Reflections on Class in American Legal Education

REFLECTIONS ON *CLASS IN AMERICAN LEGAL EDUCATION*

RICHARD LEMPERT[†]

INTRODUCTION

Professor Richard Sander's *Class in American Legal Education*¹ is an almost unique effort to examine empirically the social class origins of American law school students and to relate law student class origins to law school stratification, the class structure of American society and the potential law school applicant pool. His effort, and the special attention he gives to the class composition of elite law schools comes perhaps at a fortuitous time in the history of American legal education. The law degree, like the medical degree, has long been a route for upward mobility in American society. But the access of recent immigrants and others who were poorly off to the medical degree was substantially limited almost a century ago following the *Flexner Report*,² which largely eliminated those medical schools willing to admit almost anyone who could pay tuition. Although elements of the bar and legal education pushed hard to emulate the "success" of the medical profession by closing down proprietary schools and other perceived weak sisters of professional education, their success was at best limited.³

There is, however, some question about the continued viability of this route to higher status for people born into lower social classes.

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1. Richard H. Sander, *Class in American Legal Education*, 88 Denv. U. L. Rev. 631 (2011).

2. ABRAHAM FLEXNER, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1910).

3. The Carnegie Foundation supplied the law school world with its own version of the *Flexner Report*, the *Reed Report*, but its impact was quite different from that of the Carnegie critique of medical education, which in less than a decade resulted in more than half the nation's medical schools closing, the consolidation of medical education within universities, and the disappearance of proprietary medical education. This may have been because Reed, to the disappointment of the law's professional establishment, saw law as two-tiered rather than unitary profession and supported rather than called for the termination of part-time legal education. See ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 55-56 (1921). Moreover, the timing of Reed's report undercut the more *Flexner*-like recommendations of an American Bar Association Committee chaired by Elihu Root, a distinguished corporate lawyer, diplomat and Nobel Peace Prize Winner. See ELIHU ROOT, REPORT OF THE SPECIAL COMMITTEE TO THE SECTION OF LEGAL EDUCATORS AND ADMISSIONS TO THE BAR OF THE AMERICAN BAR ASSOCIATION (1921). Training for the bar through apprenticeships did, however, almost entirely disappear during the 20th century.

Although life at the bottom of the legal profession has never been easy,⁴ and although forty and fifty years ago many people who sought law degrees as evening or part time students or at proprietary law schools dropped out before graduating or graduated and either failed the bar or soon gave up on legal careers, many others experienced at least a modicum of success and enhanced social status, especially as compared to their parents' generation. This was possible because legal education at many institutions was low cost, and the world students graduated into was one in which individual clients and local business owners sought out individual or very small firm (often partnerships in name only) lawyers. If not all night, part-time and proprietary law school graduates enjoyed professional success and if even among those who succeeded success was often precarious, nevertheless anyone who graduated law school and passed a bar exam could hang a shingle out and make it or not on his⁵ ability, effort and initiative.

This world has changed dramatically over the last half century, and the cost of a legal education at even the least prestigious law schools has sky rocketed. At the same time opportunities for graduates of low prestige law schools seem to have plummeted, at least in weak economic times.⁶ Thus, there is reason to think that if law schools are to remain a major conduit to middle class status for those of lower class origin, attendance at higher tier law schools, including the most elite schools, will only grow in importance.

Professor Sander's core finding will surprise no one: as compared to the nation's population students from lower SES backgrounds are underrepresented in law school student bodies, and this underrepresentation is greatest at the nation's most elite law schools. It could hardly be otherwise given what we know about how educational opportunities at all levels vary with socio-economic status and the barriers that costly education imposes. Professor Sander has made an admirable, one might say almost heroic, effort to go beyond these core propositions, or to at least to put some accurate numbers on them, as he has searched broadly for relevant research and data and tried to make creative adjustments in the available data to allow informative analysis. He is also careful through-

4. See, e.g., JEROME E. CARLIN, *LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING* 168 (1994).

5. These graduates were overwhelmingly male. See Judith S. Kaye, *Women Chiefs: Shaping the Third Branch*, 36 U. TOL. L. REV. 899, 899 (2005) (noting that before and during the 1960s, women's presence in law schools was miniscule).

6. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, January 9, 2011, at BU1, available at <http://www.nytimes.com/2011/01/09/business/09law.html?src=me&ref=general>. Those who graduate near the bottom of higher prestige law schools are also reporting difficulties in finding law jobs, though there have been reports that some law schools are serving as employers of last resort for hard to place students until the time for reporting law graduate employment rates to U.S. News has passed.

out his article to acknowledge weaknesses in his data and the places where assumptions must bridge empirical gaps.

Professor Sander's core findings are undoubtedly correct. That his work does not succeed in advancing our knowledge greatly or in providing important new information to guide policy analysis, which is my assessment of his effort, is hardly his fault. As Professor Sander recognizes, the problem he is attacking is a difficult one, the data are unfortunately both sparse and imperfect, and there are often no obviously or indisputably correct ways to treat the data. With respect to the policy implications of his findings, and in particular whether law schools should engage in affirmative action for students from lower class backgrounds, there are additional issues. I will address these issues, which for me are the most interesting aspect of the project, after first discussing a number of conceptual and methodological matters that make the task of shedding empirical light on class in American legal education so difficult and limit the confidence we can have in the specifics of Professor Sander's analysis and thus limit what we can learn from it. By and large the problems I shall illuminate do not result from errors by Professor Sander; they are the nature of the beast. With currently available data any analysis would be bedeviled by them.

I. CONCEPTS AND GOALS

The most fundamental questions raised by the task Professor Sander has set himself are conceptual rather than statistical because conceptual clarity is needed to determine what data and statistics relate to which matters of concern. For me the starting point in thinking about the concept *class* is to ask why we might want to make special efforts to increase diversity within law schools by increasing enrollments of students with underrepresented characteristics or backgrounds, including, in particular, class, ethnicity or race. I see two sets of reasons that speak to different educationally-related and social values. One I would call the "individually-oriented fairness set." Students from lower SES backgrounds and minorities are more likely than advantaged whites to have been handicapped in their pursuit of higher education. Often their K-12 educations have been inferior to those of better off whites, and the cost of higher education is a greater barrier for them than for students whose parents are better off. In addition, cultural disadvantages may have led to lower grades or otherwise adversely affected the credentials lower class whites and minorities can offer a law school admissions officer.⁷ If applicants disadvantaged by class or race seem to be not quite as attractive as other applicants, the appearance may be misleading. Their "objectively" measured accomplishments may reflect as much lawyerly poten-

7. See PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION: IN EDUCATION, SOCIETY AND CULTURE* 160, 209 (Richard Nice trans., 1977).

tial or innate ability as that suggested by the more impressive dossiers of advantaged white students as well as a history of harder work and greater achievement. Also included in the fairness set is the historic role of legal education as an enabler of social mobility. Applicants from lower class backgrounds and from certain racial and ethnic groups have not been dealt a fair hand in life when it comes to their ability to succeed in educational and material ways. Increasing class and race diversity within law schools by targeted outreach and recruitment and by preferring applicants from disadvantaged backgrounds to somewhat better credentialed applicants from more advantaged backgrounds can mean evaluating comparative credentials more fairly and compensating for the unfair distribution of initial advantage.

The other set of values that may lead us to desire broader inclusion I see as "social" or "other-directed" in nature. Chief among these is the idea that greater diversity among a school's matriculants increases the richness of every student's education. This view holds that the more diverse a student body is, the more diverse the experience and points of view exchanged in classroom discussion⁸ and informal conversation, and the greater and more diverse the opportunities for law-related extracurricular involvements.⁹ Law school diversity is also thought to serve society because it leads to a more diverse legal profession. Lawyers tend to serve distinct groups, often in specialized ways, and lawyers can serve as community leaders and role models even when they are not acting as attorneys. Lawyers from underrepresented groups are likely to contribute differently in these ways than lawyers from the white majority.¹⁰

Although these benefits of diversity reflect values that many people share, they are not all equally legitimate as justifications for affirmative action programs. Although there appears to be no legal impediment to a school in good faith taking account of one applicant's educational disadvantages when comparing his or her credentials to those of another applicant with an eye to judging lawyerly potential, a willingness to work

8. In addition, a student's identity may affect how his or contribution to a discussion is received. The same anti-war statement will be received differently if it comes from an Iraqi war veteran rather than an anti-war activist, and the impact of a statement questioning or supporting race-based affirmative action will similarly differ depending on whether the speaker is black or white.

9. These conclusions have not to my knowledge been the subject of rigorous empirical examination, although anecdotal evidence, such as the plethora of journals reflecting gender or ethnic themes and reports by professors of how their classrooms have been affected by diversity, can be easily found.

10. A study of the University of Michigan Law School alumni found that lawyers tended disproportionately to serve clients of their own ethnic group and that Michigan graduates did substantial pro bono work and often occupied leadership positions in communal or political settings, with minority law school graduates being more involved in pro bono and leadership activities than whites. Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 436-37, 440, 453-58 (2000).

hard or a person's native ability, the *Bakke* case¹¹ suggests that for state schools that did not in the recent past invidiously discriminate going beyond this and seeking to promote racial balance to correct past injustice or to promote minority social mobility is unconstitutional.¹² *Bakke* would appear to similarly rule out justifications for affirmative action based on such concerns as better serving members of minority communities, providing role models for minority youth, or filling leadership or other positions that would benefit from a minority occupant.¹³ What is currently constitutional, and in this sense the favored justification for affirmative action, are preferences based on the contributions a diverse student body brings to every student's education.

These limitations apply to raced-based affirmative action. Social class is not, however, a suspect classification, and there is no reason to think that a class-based system of affirmative action, which gave preferences to applicants based on class-related disadvantages, would run afoul of the Constitution. Moreover, it is not unreasonable to think, as some do, that correcting for accidents of birth and providing socially disadvantaged groups with a head start to upward social mobility, is a morally superior grounding for affirmative action than the justifications the Court admits. Still it is important to bear in mind, and I shall come back to this later, that the judicially favored justification for existing affirmative action programs lies in the presumed educational value of racial and ethnic diversity, with perhaps some recognition after *Grutter*, that the social benefits of a more diverse legal profession are also in some measure constitutionally cognizable.

II. OPERATIONALIZING SOCIAL CLASS: LIMITATIONS OF THE DATA

This digression into justifications for the law of affirmative action relates to how Professor Sander has conceptualized social class, or been forced to conceptualize it, given the data available to him. Thus to understand what we can learn from his article, it is important to appreciate the decisions he made regarding the measurement of social class and the limitations of what he was able to do. To a large extent this simply involves fleshing out the concerns that underlie the caveats Professor

11. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 301–02 (1978) (stating that preferential classifications have never been approved absent a determination of past discrimination).

12. Although the Court has not directly addressed the issue, it is likely that the Civil Rights Act will be read to prevent private schools from engaging in affirmative action programs that would be unconstitutional if done by state schools.

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003), in reaffirming *Bakke*, might be read as opening the door to the last of these justifications since Justice O'Connor, who wrote the opinion, specifically mentioned the special value that minority lawyers have for the military and business. However, as Professor Sander notes, the continued constitutionality of educational affirmative action is itself precarious. This is an issue on which the pre-existing views of the Justices seem more influential than any legal or empirical arguments lawyers might bring to bear. Four of the current Justices would most likely welcome the opportunity to ban affirmative action while a fifth, Justice Kennedy, has a position whose nuances are hard to discern.

Sander appropriately provides. The need for such exegesis does not mean there is anything inherently right or wrong about how Professor Sander chose to operationally measure social class. It is simply to recognize the noisiness of the data, the way it fuzzes numerical relations and the need for caution in drawing firm empirical or policy conclusions.

To begin with a conceptual matter, it is important to recognize that Professor Sander's measure of social class, an index of the socio-economic status (SES) of law school students relative to the general population, relates directly to only the first, or individualistic, set of justifications for affirmative action given above. Individuals who, by Professor Sander's SES measure, are in the lower social classes have roots that are likely to have disadvantaged them relative to applicants of higher social origins. They may also differ from their more advantaged counterparts in that for them professional education is a way to achieve social mobility, a goal that may not greatly concern those who have already arrived.¹⁴ But, as I shall argue below, students who add diversity only because of their low-SES backgrounds are not necessarily likely either to enrich substantially the educational environment of the schools they attend or, after law school, to serve as social and political leaders, role models or exceptional givers back.

Turning to more technical issues, although Professor Sander's index may be the best he can do given the available data, it not only has shortcomings as a measure of relevant social class characteristics but it would also be less than ideal if its sole purpose were to measure socio-economic status as the term is used in the social sciences. Social class, as Professor Sander recognizes, is a complex concept not easily captured even when a researcher has richer information than the AJD data set provides. In classical Marxism, it involves an individual's relationship to a society's means of production, which is associated over the long run with a common set of interests and a common world-view. This is why occupation figures prominently among the measures used to capture social class. However, social class reaches beyond occupation to encompass other matters that relate to social status, including, in particular, education, income and wealth. More broadly conceived, and in common parlance, social class is confounded with social status. Class membership, including the assignment of people to classes, is associated with such variables as family heritage, religion, power and influence, friendship circles, cognitive style and a range of cultural preferences. Despite Marx's views and research practice in defining SES, this last set of variables may relate more closely to how people see their social class and the class placement of others and to the attitudes they hold than occupation, income or educa-

14. Except for the bluest of bloods everyone may, of course, rise in social status, but for those who come from well-educated, well-off families a professional education does not without much more mean a rise in social status.

tion. Although variables like religion, friendship circles and cultural preferences are correlated with the variables used to measure SES, they are likely to relate more closely to the attitudes and ambitions students bring to law school and life than SES as Sanders measures it.

Thinking of class in the larger sense and, in particular, as an inherited status which similarly affects attitudes from generation to generation, one problem with using parents' SES to measure student social class is that the nation has experienced substantial recent immigration, and those who came as young immigrants or as the children of immigrants are now applying to and graduating from law school. Even if levels of SES, as commonly measured by occupational status, education and income, are consistently associated with differences in aspirations, values and attitudes among American families that go back at least two or three generations as well as with different chances of social mobility, similar relationships may not hold for recent immigrants and their children.¹⁵ Indeed, immigrants who had to flee their homelands because they were on the wrong side of social conflicts may, even if they had less than high school educations, have been part of local or national aristocracies in their home countries. A school that sought to give a boost to the children of lower class origins might find, as UCLA did in an effort Professor Sander discusses, that they were largely advantaging immigrants' children who differed substantially from white, black and Hispanic Americans with respect to most class-linked variables even though they all seemed of the same class when viewed through the lens of SES. Being unable to account separately for the children of immigrants might lead to inflated estimates of the proportion of law students of lower class background while underestimating the law school acceptance rates of lower class applicants as a proportion of their presence in the applicant pool.¹⁶

Putting aside the limitations of SES as a measure of class and accepting the convention which leads most demographers to treat SES as our best indicator, it is still the case that data limitations mean that Professor Sander's SES measure is a noisy one and less than ideal. To begin with, it lacks data on income, one of the three measures integral to the

15. SES scores may also mislead when they place rural and urban families in the same social class.

16. For example, assume a school had 200 applicants, 40 of whom came from families whose SES scores placed them in the bottom quarter of all American families and that of these 40, ten came from families that were intergenerationally lower class while 30 were immigrants' children whose families, despite occupying low status and low paying jobs in the United States, had backgrounds of privilege quite distinct from the backgrounds of families we think of as lower class. If the school admitted 100 students, 10 of whom were immigrants children and 6 of whom were intergenerationally lower class, it would appear from the SES measure that 16% of the entering class came from lower class origins when, I would argue, only 6% did. At the same time, relative to their representation in the applicant pool, it would appear that only 37.5% of applicants with lower class origins were admitted compared to 52.5% of students from more advantaged backgrounds. However, 60% of the intergenerationally lower class gained acceptance under this hypothetical scenario. I am not saying these kinds of effects will occur, but the data are such that we cannot exclude this possibility.

conventional SES scale.¹⁷ Working with what he has, Professor Sander uses four responses to operationalize SES: each respondent's report of each parent's education and occupation. Information on all four measures was, however, available for only about 28% of the AJD national sample or about 38% of those for whom there was usable data. Professor Sander thus felt compelled to calculate an SES measure so long as information on at least two of the four measures was available.¹⁸

The cases with absent information have various configurations of useable data. In more than a third of them only occupation or only education defines the SES index. Perhaps most striking is that there are only nine instances, one involving a father and eight involving mothers, in which all we know is one parent's occupation and education.¹⁹ This suggests the possibility that missing data may create relevant sample biases since if respondents were raised in single parent families, one might expect them to know that parent's education and occupation far more frequently than they would know the absent parent's accomplishments, and single parent families are known to be, on average, of lower SES than families where both parents are present. It could be that my fear of reporting bias is groundless or that almost no one in the AJD sample was raised in a single parent household, but it seems more likely that missing information means Professor Sander's sample excludes a disproportionate number of AJD respondents in the lowest SES brackets. Particularly likely to fall in this category are the 143 respondents who reported only their mother's occupation. Because an SES variable cannot be constructed for these cases, Professor Sander's analysis is likely to underestimate the proportion of law students in the lower reaches of the national

17. Also missing is information on family wealth, which is not included in most studies that use SES as a variable not because it is conceptually unimportant but because reliable wealth data is hard to come by. Indeed, conceptually wealth may be the most important indicator of a family's social class. In its absence, occupation is generally taken to be the best single measure of social class among the SES index variables because occupational prestige is thought to do most to locate a person's position in the social hierarchy. I discuss why the absence of income and wealth data is especially unfortunate given all that Professor Sander seeks to accomplish in the text of note 23 *infra*.

18. Professor Sander reports that about a quarter of his sample cases lacked information on either three or all four of the indicators and so were excluded from his analysis. See *Class, supra* note 1, at 634. Note also that the parental SES data are frozen at a point in time, but people's occupation and educational achievements change over time. To the extent these SES variables reflect class differences by more than definition, a law student's class roots may be different than a current status report may make them appear. A person working as a retail clerk may have been running a successful business until an economic down turn when his child was a junior in college, or a mother who worked as a teacher's aide most of her adult life may recently have completed a bachelor's degree and been hired as a regular teacher.

19. Other categories that are almost empty in the usable sample of almost 3000 are cases where we know both parents' occupations and one parent's education (8) and cases where we know one parent's occupation and the other parent's education (5). Particularly puzzling is that although there were 375 respondents who chose to report only their father's and mother's education or about half the number who reported only their two parents' occupations, there was no respondent who reported just one parent's education although there were 534 respondents who reported just one parents' occupation. Something seems wrong here.

SES distribution. Race-specific analyses will also be affected if poorly-off single parent families are disproportionately members of minority groups, as we have some reason to believe.²⁰

In addition to sample biases that may stem from the disproportionate exclusion of respondents from single parent families and other biases that may infect an index that is based on more information for some cases than for others, there is the possibility of general non-response bias since many in the study sample chose not to participate, and among participants more than 900 did not provide sufficient information to construct an SES index.²¹ It is easy to suppose that students whose parents had low prestige occupations or were least accomplished educationally were most reluctant to report, and this tendency could have been greatest among those attending more elite law schools who may have measured their parental heritage against the high status backgrounds of most of their peers. If so the proportion of low SES law students in all law schools and in elite law schools in particular will have been underestimated in the data Professor Sander presents. I cannot evaluate this possibility. Although I do not think it so serious as to undermine Professor Sander's core results, I expect that sample biases introduce statistical noise into an already conceptually noisy measure.²²

It is unfortunate that Professor Sander was unable to include in his SES index measures of family wealth and income.²³ As he recognizes, the exclusion of financial information poses particular problems for the location of black respondents on the SES scale and hence for evaluating their contribution to class diversity within American law schools.²⁴ AJD data indicate that with respect to wealth and/or income black law graduates are worse off than whites. Only 6% of black AJD respondents graduated from law school with no educational debt. This compares to

20. I am grateful to Professor Sander for providing me with the detailed breakdowns regarding variable availability that I report in this paragraph. I should add that he recognizes in his paper the possible overstatement of black SES that could result from the absence of usable data from students raised in single parent households. *Class*, *supra* note 1, at 652.

21. Responses were received from about 51% of those in the nationally representative sample and from about 43% of those in the minority oversample, where one might expect lower SES attorneys to be disproportionately represented.

22. See *infra* notes 31–35 and accompanying text for further discussion of sample bias.

23. Professor Sander recognizes this and notes that in the Census PUMS data an index reproducing his measure of SES correlates somewhere between .4 and .45 with household income. *Class*, *supra* note 1, at 638 n.25. Although this correlation is, no doubt, highly significant in the statistical sense, it does not denote a particularly close relationship or one which justifies dismissing concerns regarding the implications of the absence of income information for the validity of operationalized SES. A correlation between the study's SES index and household income of between .4 and .45 means that the SES index explains only sixteen to twenty percent of the variance in household incomes in Professor Sander's PUMS subsample. Moreover, this may be an overestimate of the correlation in the AJD data because the PUMS on spousal occupation and education is likely to have been more complete than it is in the AJD sample.

24. See *Class*, *supra* note 1, at 652.

19% of white graduates.²⁵ Moreover, black respondents' families were, on average, able to contribute only about 9% of the cost of their children's legal education, compared to an average contribution of 19% by the families of white respondents.²⁶ Hispanics were more like blacks on these dimensions and Asians more like whites, with the most notable statistic being that Asian families contributed, on average, 28% of the cost of their children's legal educations.²⁷ The data also indicate that although law students may be relatively better off than Americans in general, it is a mistake to think of law schools as domains of upper class privilege. Eighty-four percent of all law students graduated with some debt, and the median debt among those who owed money was about \$70,000.²⁸

Professor Sander makes an extraordinary effort to map his two SES indicators for law school graduates onto the SES distribution of the general population, but error inescapably affects this effort as well. As Sander notes, the AJD education data cannot be directly mapped onto the Census data because the two efforts classify educational achievement in different ways, and to map one onto the other he must rely on assumptions that, no matter how plausible, are necessarily imperfect. Moreover, even if the Census and AJD coded educational achievement identically, difficulties in accurately situating AJD respondents against all Americans would still exist if education is of interest only as a presumed indicator of social class. The problem is that similarly coded educational achievements may have wildly different class implications. From a social class standpoint, there is most likely a wide gap between a person whose parents have Harvard or Yale degrees and one whose parents are Liberty University or Berea College graduates. Even high school degrees can represent different achievements and career opportunities. One high school graduate may have had a rigorous education that prepared her well for the world of work, while another's degree may represent a series of social promotions. Moreover GED certificates are counted as high school diplomas. Imperfect measures are a fact of social science life. In the context of Professor Sander's study, they are likely to fuzz distinctions between his quartiles.

The mapping of AJD parent occupations onto census categories is less problematic than the education mapping since Professor Sander reports that the AJD occupational data were coded by census categories allowing a direct comparison. Issues exist, however, not with respect to the mapping but with their implications for social class. Professor Sander

25. GITA Z. WILDER, RACE AND ETHNICITY IN THE LEGAL PROFESSION: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY 58 tbl.36 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/race_and_ethnicity_monograph.pdf.

26. *Id.* at 59 tbl.37.

27. *Id.*

28. *Id.* at 58, 60 tbls.36 & 38.

assigned scores intended as relative class rankings to occupation using CAMSIS codes based on year 2000 U.S. Census data. This is not an unreasonable choice, but CAMSIS coding has its problems.²⁹ For example, for both men and women farming, fishing and forestry occupations are well within the bottom 10% of all occupations and below the status ascribed to counter attendants and cafeteria workers. Yet one might expect that the world views of these groups would be quite different and that within the group of farm, fishery and timber workers there would be considerable differences depending on their relationship to the land and to their employers (e.g. working on a family farm or as a migrant laborer). Moreover, the code for farm, fishery and timber workers is more than 100 places below that for hunters and trappers whom we might expect to be of lower class origin than some in the farm and fishing occupation categories.

More than 150 occupations above farm workers, one finds the score for farmers and ranchers and somewhat above them the score for male but not for female ranch and farm managers. Totally apart from whether these relative rankings make sense, the AJD questionnaire included only tiny spaces in which respondents could write their parents' occupation. Consider the challenge and room for error when a father's occupation is reported as "farming." If coding is direct to CAMSIS codes, the father could be placed in the bottom 10% of occupational SES or at about the 60th percentile depending on whether the coder assumed the father was a farm worker or a farm manager. Coding first to census categories and then to CAMSIS codes does not solve the problem because similar assumptions must be made in deciding which census code best fits.

For men the top occupation on the 569 occupation list and the second highest for women is psychologist, which outranks physicians and surgeons and astronomers and physicists, and is nearly 100 positions higher than financial managers. Economist and lawyer are both in the top few percentiles, although the prestige of lawyers in different subspecialties varies widely.³⁰ It may raise few eyebrows to find that economist ranks higher than lawyer, but it is surprising to find both about seventy places above mathematicians and statisticians. At the top end of the scale as at the low end puzzling ambiguities and inconsistencies are also present. Among men those best described as "miscellaneous social scientists, including sociologists" are among the top ten in occupational status, but if the code chosen is "sociologist" by itself the rank is 23 places lower. Among women, however, "sociologist" is the more prestigious category. It ranks 28 places higher than "miscellaneous social scientists including sociologists."

29. See discussion *infra* note 31.

30. See generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982) (analyzing the social differentiation among different types of lawyers).

Further ambiguity and error is introduced when AJD occupational codes are converted to population percentile rankings by reference to the CAMSIS scores of a randomly selected subsample of the 5% PUMS sample. Simply put the assumption that higher CAMSIS scores reflect higher social status does not seem always to hold. For example, I find it difficult to believe that female audiologists who would be in the 99th percentile after Sander's CAMSIS score conversion are of higher status than female physicists (97th percentile), nuclear engineers (95th percentile), CEOs (93rd percentile), or aircraft pilots (83rd percentile).

I don't rehearse these difficulties to criticize Professor Sander for using CAMSIS codes in his analysis, for any coding system has its weaknesses, and CAMSIS codes were created to better capture class distinctions.³¹ Rather I mention them because they add another dimension of uncertainty to the results Professor Sander provides.

An additional reason to be weary of the specifics of Professor Sander's analysis is selection bias. The AJD sample is limited to those who not only graduated from law school but also passed the bar exam. This means that law school drop outs and those who graduate but do not pass the bar exam are not included in the analysis although they figure in

31. There are other problematic aspects but a detailed discussion would take us far afield and soon, I expect, pass the limits of my knowledge. Simply put CAMSIS coding is a novel way of assigning status values to occupations based on interaction patterns of people who, more often than not, have different occupations. Theoretically these patterns should be based on occupation pairs involving friends, neighbors and relatives, but often data constraints mean that the only pairs that can be created are those of husbands and wives. Code creation becomes problematic when data sources include many couples where only one spouse is working or where there exist what are called "pseudo diagonals" (strong but misleading husband-wife associations as when a husband may be categorized as an agricultural proprietor and a wife as an agricultural laborer.) CAMSIS codes, which were originally established for occupations in the U.K., can and have been established for different countries as in the U.S. Census data based rankings that Professor Sander employs, but they can also be created for particular data sets. Moreover, they are claimed by their creators to represent occupational status directly and not be limited to specifying the relative status of different occupations. An additional complication exists in combining husband and wife occupations into a common index, since they are not on the same scale. Thus those who adapted the scale to the 2000 census data which Professor Sander uses caution:

[I]t is a little misleading, albeit a *commonly made mistake*, to analyse [sic] a mixed gender population through CAMSIS scores which are the male scale scores for the men and the female scale scores for the women. The occupational scale indexing used for men and women is invariably the same, further giving the impression of equivalent meanings. However the CAMSIS methodology assumes different systems of relative positions prevail within the male and female occupational structures, and hence implicitly that equivalent titles are not necessarily the same between genders.

Accessing and Using CAMSIS Scale Scores, CAMSIS: SOCIAL INTERACTION AND STRATIFICATION SCALE, <http://www.camsis.stir.ac.uk/useofscores.html> (last visited May 6, 2011) (emphasis in red in original). Professor Sander converted CAMSIS codes by gender to percentiles as normalized against the 5% PUMS subsample, perhaps to deal with this issue, but using standard scores or the husband's score is the recommended procedure. I am unclear how Professor Sander assigned his percentile scores or what the implications of his assignment across genders are. He reports in a methodological appendix that for women he assigned a 99th percentile rankings to codes of 75 and above, yet in the CAMIS ranking data he kindly provided me, a CAMSIS score of 75 for women seems to be at the 94th percentile. For a useful summary of how CAMSIS scores are assigned and cautions in using them, see *id.*

the proportion of students from different social classes who are admitted to law schools and affect a law school's class composition so long as they remain law students. Drop outs and graduates who do not pass the bar would cause no problems if they were distributed randomly with respect to social class, but it seems likely, almost to the point of certainty, that students of lower SES are disproportionately represented in these groups. Bar Passage Study data, which both Professor Sander and I have used, indicates that financial considerations are an important reason for law school dropout,³² and as Professor Sander's article indicates lower status students disproportionately populate the nation's lower status law schools, which are the schools that have the highest failure rates on state bar exams.³³ For these reasons alone, Professor Sander's data are likely to underestimate the degree to which students from lower status backgrounds are admitted to and attend law school. Underestimation for this reason is, however, likely to be minimal in the data relating to America's most elite schools. Regardless of background, almost all students at these schools graduate, and pass the bar if they take it.³⁴

A second sample-related problem stems from the two stage stratified random sample that is the basis for the AJD survey. Although it does a good job of replicating the nation's population of young attorneys along such lines as gender, practice setting crudely determined, and racial composition,³⁵ it may not do as good a job in replicating social class

32. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 436 (2004); see also David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1886 n.111 (2005).

33. Sander, *supra* note 1, at 637–39 & tbl.1.

34. Not everyone who graduates law school takes the bar exam. Some move directly into positions, like teaching or business management, where they can take advantage of their legal education without having to qualify for legal practice. Yakowitz estimates that 150,000 people have taken the bar and never passed, but her estimate is admittedly crude. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 15–17 (2010). She also drops a gratuitous footnote calling into question data that I and two coauthors published, which indicated that 94% of University of Michigan Law School graduates (a claim based on respondents to a survey we conducted which we believe with little loss of accuracy can be generalized to the population of Michigan Law School graduates had passed at least one bar exam.), and suggests the truer figure is closer to 85%. *Id.* at 5 n.14 (citing Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000)). I do not know how Yakowitz arrived at her number, but it is wrong. Reports by state bars back to Michigan for the period 2006–2008 indicate that the overall bar passage rates of Michigan students during these years was a bit more than 96%, and this is an underestimate since some bar takers were on their second or third attempt. Moreover, bar passage standards have tightened since the years when we conducted our study. I expect Yakowitz may have been misled by Michigan's bar passage rates in California, reputedly the nation's most difficult bar. These rates during the period for which I saw official data are closer to her estimate, but only a small fraction of Michigan's graduates ever attempt the California Bar. I also know there were some earlier years when Michigan's California bar passage rates were at or near the best of any law school, no doubt a function of the students who took jobs in California.

35. RONIT DINOVITZER ET AL., *AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 90 (Janet E. Smith et al., eds., 2004). To get the most accurate estimations the sample should be adjusted with weights the project provides. Professor Sander's data is unweighted,

distributions. For example, no state from the Deep South is included in the sample³⁶ nor are smaller cities in states like New York, Illinois, and California, which are represented by samples drawn from their major legal centers.³⁷ It is possible that unrepresented areas like these are places where lawyers with lower class backgrounds are particularly likely to be found and that the sampling units designed to capture some of this variance do not do adequately rectify the imbalance.

I do not want to make too much of this last point. Indeed, I do not want to make too much of any of the above points, nor am I making them to criticize Professor Sander's efforts. For the most part, these data shortcomings are hard to avoid and hard to control, and at numerous points in his article Professor Sander cautions against putting too much stock in the exact numbers he arrives at. I have tried to flesh out his cautions and added a few of my own to emphasize that the imprecision Professor Sander alerts us to may be considerable. For example, Professor Sander's data suggest that only a minuscule proportion of students at the nation's elite law schools come from lower SES backgrounds. Yet the University of Michigan's Dean for Admissions reports that 30% of students entering the school in the summer or fall of 2010 had one parent with no more than a high school education and that 13% of the students had no parent who had gone beyond high school.³⁸ These numbers may have been mentioned because they are atypical. Since this is the first time I recall seeing such information I have no idea whether Michigan's 2010 entering class is atypical in this respect. Yet even if the data are atypical, the message still stands. Professor Sander's work should be read more for the forest than for its trees. The numbers he reports may be off by a little or a lot.

III. THE AMERICAN CLASS STRUCTURE

A fundamental concern is how best to categorize students by class. Professor Sander treats social class as a continuous variable that spans an equally spaced 100 point range, which he divides into four quartiles and sometimes further subdivides for in his analyses. Dividing a sample into SES quartiles for purposes of analysis and treating SES as a continuum is an approach sometimes found in efforts to associate SES with particular beliefs and outcomes. Social scientists have, however, many competing

and while this might introduce a bit more noise, it appears that using unweighted data changes little. GABRIELE PLICKERT & RONIT DINOVTZER, AFTER THE J.D.: FIRST RESULTS REPORT, TECHNICAL ADDENDUM 1 (2007), available at http://www.americanbarfoundation.org/uploads/cms/documents/weighted_ajdreport_9.6.07.pdf.

36. See PLICKERT & DINOVTZER, *supra* note 34, at 4 (indicating that the border state of Tennessee, Florida and the cities of Houston and Atlanta were chosen for inclusion).

37. *Id.* (indicating that New York City, Chicago, Los Angeles and San Francisco are areas sampled).

38. Sarah Zearfoss, *A Snapshot of the Entering Class: 5 Things About the New 1Ls*, LAW QUADRANGLE, Fall 2010, at 1.

views about the American class structure, and they divide Americans into different classes in different ways. Dennis Gilbert, for example recognizes six classes.³⁹ He suggests that 12% of the American population inhabit the underclass, 13% are working poor, 30% are working class, 30% are lower middle class, 14% are upper middle class and 1% belong to the top tier capitalist class.⁴⁰ William Thompson and Joseph Hickey place about 20% of Americans in the lower class, 30% in the working class, a similar proportion in the lower middle class, 15% in the upper middle class and 2% in the upper class.⁴¹ Leonard Beeghley's estimates are poor 12%,⁴² working class 40–45%,⁴³ middle class 46%,⁴⁴ rich 5% and superrich .9%.⁴⁵ John Goldthorpe, who developed the CASMIN classification scheme which is widely used in comparative class analysis, identified seven major occupational class groupings, some of which he broke down into subcategories.⁴⁶ If this variation is not enough, when it comes to class consciousness results are wildly different. According to a National Opinion Research Center poll, when asked to self identify their class status, only 5% of Americans responding said lower class, 45% said working class, 46% said middle class and 4% said upper class.⁴⁷ These divisions have remained relatively stable in the years since 1972.⁴⁸

If I were to continue searching for statistical portraits of class in the United States, I would find additional definitions and further different ways of measuring class and assigning people class status. Most, like those mentioned above, would not divide Americans into four quartiles, but would see the class structure as one in which there was a small portion of Americans at either extreme and bulges in the intermediate class or classes.⁴⁹ Although Professor Sander's classification scheme may,

39. Dennis Gilbert, *The American Class Structure in an Age of Growing Inequality* 13 (7th ed. 2008).

40. *Id.* at 13–14.

41. William E. Thompson & Joseph V. Hickey, *Society in Focus: An Introduction to Sociology* 216–17 (1994).

42. Leonard Beeghley, *The Structure of Social Stratification in the United States* 239 (4th ed. 2005).

43. *Id.* at 213.

44. *Id.*

45. *Id.* at 160.

46. GORDON MARSHALL, *IN PRAISE OF SOCIOLOGY* 16 (1990). These groupings are: I) Higher-grade professionals, administrators, and officials; managers in large industrial establishments; large proprietors; II) Lower-grade professionals, administrators, and officials, higher-grade technicians; managers in small industrial establishments; supervisors of non-manual employees; IIIa) Routine non-manual employees, higher grade (administration and commerce). IIIb) Routine non-manual employees, lower grade (sales and services); IVa) Small proprietors, artisans, etc., with employees; IVb) Small proprietors, artisans, etc., without employees; IVc) Farmers and smallholders; other self-employed workers in primary production; V) Lower-grade technicians; supervisors of manual workers; VI) Skilled manual workers; VIIa) Semi-skilled and unskilled manual workers (not in agriculture, etc.); and VIIb) Agricultural and other workers in primary production.

47. Jack Metzgar, *Politics and the American Class Vernacular*, *WORKINGUSA*, June 2003, at 73 tbl.4.

48. *Id.*

49. Most class researchers would, however, acknowledge that any categorical breakdown of class is imperfect, and there can be considerable heterogeneity among those placed in the same

albeit with some error, situate the year 2000 cohort of law school graduates vis-à-vis the American population in general along an SES continuum, it may do a considerably poorer job in capturing the social class characteristics of law school graduates as these relate to self-identification and world views.

Suppose that Professor Sander had complete information not only on the two items he includes in his SES index but also on the income and wealth of his respondents' parents and that there was an incontrovertible way to create from these variables a true SES score that could be used to map applicants onto the SES distribution of the American population in general. One would then be able to perfectly assess the degree to which the SES of year 2000 law graduates matched that of the American population in general as well as how the match varied depending on the status of the law schools attended. Quartile breaks along the SES continuum would be one convenient way of illustrating variance. But by many operational as well as conceptual definitions of class, the resulting picture would not present a true portrait of the prevalence of students with different class backgrounds in America's law schools. Too many students would be in the top and bottom categories and there would be too few students in the middle. Moreover, differences in class assignment have analytic consequences, particularly when the effort is to understand why the class origins of law school graduates, and in particular graduates of the more elite law schools, differ so substantially from the overall distribution of class in America.

Thus in seeking to explain why a disproportionately small proportion of all law school graduates and a minuscule proportion of elite law school graduates have backgrounds that place them in the bottom quartile of the American class distribution, Professor Sander identifies the role of potential feeder schools and the class origins of their enrollees as contributing factors.⁵⁰ If, however, Professor Sander had constructed his lowest class group using Beeghley's estimate of the percentage of Americans who are poor or Gilbert's definition of the underclass, he would have found an even smaller proportion of law students came from the bottom of the class structure, but it is likely that he would have also

social class by whatever coding scheme is used. In Professor Sander's classification scheme, unlike some other possible schemes, it is obvious that those who place near the bottom of his third quartile are closer to those in the bottom quartile than they are to those at the top of their class quartile. Although this information is lost when categorical classifications by quartile are used, it would not be lost in other forms of quantitative analysis. In fact, there is no single best way to assign people to positions in a class structure. The most appropriate assignment depends on the purpose behind the assignment. If, for example, the classic Marxian view of class pertained, and class consciousness was defined by relationship to means of production, then heterogeneity within a class on dimensions like education and income would not matter if class consciousness was the key variable. Despite the heterogeneity on other dimensions, people who stood in the same relationship to means of production would share the same, common class consciousness. However, even for the classic Marxian theorist the world is seldom so neatly organized.

50. Sander, *supra* note 1, at 648 tbl.6.

found that a greater proportion of this shortfall was because students from these backgrounds seldom made it to or through college. By the same token, graduates whose SES credentials placed them in the range where Professor Sander's lowest quartile and Gilbert's working poor overlapped would not appear to be as underrepresented as one might surmise from the quartile breakdown. Similarly Sander's second highest quartile as well as part of his top tier would, using Gilbert's allocation of people to class, be filled by students from lower middle class backgrounds, the kind who seem to have suffered greatly from the post 2008 economic collapse and hardly an elite group in American society. Thompson and Hickey would similarly see about 40% of Professor Sander's top tier as inhabited by students from the lower middle class. At the extreme, if rather than use any sociologist's or economist's scheme, we chose to locate a student's class roots by self-identification, then Professor Sander's bottom two tiers would be filled almost entirely by students from working class backgrounds and his top two tiers would be bastions of middle class enrollment, assuming that self-identification overlapped completely with Professor Sander's SES measure. But it would not. Thus one would find students whose parents self-identified as working class scattered throughout Professor Sander's top two tiers, and some who self-identified as middle class would be in the lowest SES class quartiles.

I am not advocating for Beeghley's, Gilbert's or any other class classification scheme. I am not necessarily suggesting that these are better schemes for class analysis than the SES quartile distributions Professor Sander uses. I am saying that the picture one gets of class of representation in American law schools turns on the brush one paints with. There are many different brushes out there, many if not most of which are quite different from the brush Professor Sander employs. These schemes differ not just in the proportion of people allocated to different spheres, but also conceptually. Professor Sander treats class location as a continuous variable on which Americans can be given percentile rankings. Others would dispute this.

Perhaps the most important point is that however one subdivides an SES continuum into class locations, there is a difference between SES as an operational measure of class and class as a concept.⁵¹ Class typically denotes commonalities of interests, viewpoints, cultural understandings and practices that go beyond SES. SES is a measure of social-economic status that is often used to assign people to classes for want of any better measures, but it is not the same thing. Discrepancies between the operational and conceptual definitions can matter, as they might, for example,

51. Professor Sander is far from alone in eliding this difference. Researchers, including text book writers and top scholars, often treat SES as if it exhausted the meaning of social class, perhaps because SES more than class lends itself to continuous measurement and percentile distributions.

if one seeks to increase the number of low SES students in American law schools in order to increase the number of students whose views diverge from most of their classmates. It may be that Professor Sander chose to use CAMSIS coding to minimize the gap between operation and concept.⁵²

IV. EXPLAINING LOWER CLASS UNDERREPRESENTATION

Before turning to what I regard as the most interesting and important issue raised by Professor Sander's piece, namely, whether America's law schools should strive for greater class diversity, there are several other aspects of his piece that invite discussion. The first has to do with explanations for the underrepresentation of lower SES students at America's law schools in general and at its most elite law schools in particular. In this connection, Professor Sander identifies law school admissions practices that in his view may not only fail to give lower SES applicants a diversity boost but may in fact disadvantage them.⁵³

Professor Sander's list includes legacy preferences, a failure to consider differential grade inflation associated with an undergraduate school's public-private status and perhaps its overall eliteness, and a subtle preference for people with "interesting records," such as volunteer services or travel abroad.⁵⁴ I would add some additional considerations. One is the sense of accomplishment that being able to attract students from the most elite undergraduate schools may have for admissions officers, an advantage above and beyond any corrections for undergraduate institution that a school may use to adjust an admissions index. If this occurs, underrepresentation of lower SES students at the nation's most elite colleges and universities will exacerbate their underrepresentation at America's law schools. Students from low SES backgrounds and law school applicants from non-elite colleges are likely to be further disadvantaged by the influence of letters of recommendation. They are less likely than applicants from more advantaged backgrounds to be able to secure letters from a law school alumni contributors, legislators, Congressmen or other political figures, or professors whose distinction is recognized by an admissions officer or who are well practiced in the art

52. The CAMSIS coding methodology was designed to tighten the link between occupational position and social status by using associational information to create its operational prestige scores, reflecting the notion that class identities are reflected by and rooted in relationships. As I described above, there exist limitations to the CAMSIS codes, including limitations that emerge when the only information on personal associations that is available is for husband-wife pairs, as well as the counterintuitive nature of a scale in which the status of an occupation can vary substantially depending on the gender of the holder. See *supra* note 31 and accompanying text. (This is not always problematic since occupational status, however measured, may be differently sorted by gender, but the differential sorting is also likely to be more than occasionally in error.) Nevertheless, I regard Professor Sander's use of CAMSIS codes as one of a number of ways in which he has attempted to make the best of what, from a data quality/availability standpoint, is a bad situation.

53. Sander, *supra* note 1, at 658-59.

54. *Id.*

of writing elite school recommendations. A last and more recently important factor is the increasing tendency of law schools to prefer somewhat older applicants and applicants with advanced degrees. People who are reasonably well off may be able to afford several years out of the labor market to pursue advanced degrees or may be able to leave a job that is paying the bills to get a law degree, but those less well off are more likely to graduate college in debt and to find that quitting a paying job, even one with far more limited career prospects than the law, is a financial impossibility.

My litany of further disadvantages which lower SES applicants may suffer from in the law school admissions process bolsters Professor Sander's suggestion that net of other factors admissions officers may actually give a boost (affirmative action if you will) to students who have overcome disadvantaged backgrounds, and the boost may be greater than Professor Sander indicates.⁵⁵ Indeed, given that, as Professor Sander notes, most law schools collect little if any data reflecting class origin, the boost may actually be substantial in the minority of cases where class origin, perhaps revealed in a student essay, is known. Any boost, however, would not be "net of other factors," and it might simply offset subtle biases that work against the lower class applicant.

Although Professor Sander presents data on the "SES Eliteness of Undergraduate Students"⁵⁶ to suggest a baseline for his analysis of the underrepresentation of low SES students in American law schools,⁵⁷ he lacks the data needed to illuminate what might major sources of this disparity; namely, the rate at which college graduates from different socioeconomic strata apply to law school and the degree to which professions/occupations are hereditary. Thus one reason why students whose parents have graduate/professional degrees are overrepresented in law schools as compared to both the general population and those receiving baccalaureate degrees may be because children of lawyers are strongly overrepresented among law school applicants. The only data I have seen that bear on this come from work by Seymour Warkov that Professor Sander has cited to show the persistence of class effects.⁵⁸ These data are

55. Sander, *supra* note 1, at 657 tbl.10. Only one of five differences tested by Professor Sander would, by convention, be considered even marginally significant, but the finding of marginal significance must be discounted when there have been five independent tests. Thus the best conclusion to draw from Sander's data is that, in the sample he examined, there is no substantial evidence of reliable differences in standardized index scores associated with parental background. If the slight advantage suggested in the data for those whose parent possesses a professional or doctoral degree is real, it may reflect the ability of a student with a lawyer parent to get letters of recommendation from school alumni or other influentials, and what may be a greater likelihood among students from families with doctoral degrees to themselves pursue advanced academic degrees before applying to law school.

56. *Id.* at 661 tbl.2.

57. *Id.* at 648-49 tbls.6 & 7.

58. *Id.* at 642 tbl.3. Sander draws his data from the book *Lawyers in the Making* by Seymour Warkov and Joseph Zelan published in 1965. I could not acquire a copy of this book but have drawn on the data analysis that forms the basis for the book: SEYMOUR WARKOV, *LAWYERS IN THE*

fifty years old, and the situation today may be vastly different. Hence I do not claim current empirical support for the possibility that a significant portion of the current underrepresentation of lower SES students relative to their proportion of undergraduate degree holders is due to their disinterest in applying to law school and their failure to follow up on possible intentions to apply, but it was a significant factor half a century ago, and the situation may be similar today.

Warkov found, for example, that 41% of those who began their college careers interested in going on to law school came from families with professionally-headed households compared to 20% of those who began college aspiring to other careers.⁵⁹ Thirty-five percent of these aspiring lawyers came from families with earnings above \$15,000 compared to 12% of those who began college with other future job preferences,⁶⁰ and 46% of the fathers of those who aspired to legal careers were college graduates as opposed to 21% of those with different occupational interests.⁶¹ Moreover, switching career aspirations during college and following through on law school attendance exacerbated rather than ameliorated these differences, as did low LSAT scores and poor academic performance, both of which were directly related to Warkov's SES measures. It is a shame that similar data are not available today, and I expect that no one regrets this more than Professor Sander. But such data are not available, so we have no good information about the degree to which the underrepresentation of students from low SES backgrounds is, after controlling for their underrepresentation among college graduates, attributable to disinterest in legal careers among low SES college graduates rather than other causes.

V. ALLEVIATING THE DISPARITY

Professor Sander offers three suggestions for enhancing the class diversity of America's law schools and its elite law schools in particular. The first is to minimize those aspects of the admissions process that disadvantage low SES applicants and to stimulate applications from students with lower SES backgrounds. It is, however, not at all clear that a law school interested not just in class diversity but in diversity of all sorts would be well served by ignoring the kinds of information and considerations that Professor Sander and I have listed as possible reasons why lower SES students may present weaker profiles than higher status applicants with similar GPAs and LSAT. Students with interesting experiences, like working with an NGO in the Sudan, can add greatly to the

MAKING: THE 1961 ENTRANTS TO AMERICAN LAW SCHOOLS (1963), *available at* http://www.norc.uchicago.edu/NR/rdonlyres/7D0DE824-FD6E-46CA-B72D-AEFF1DEBB6F1/0/NORCRpt_96.pdf. This analysis may contain more tables than what were published so I do not know if the information that follows was available to Professor Sander.

59. Warkov, *supra* note 58, at 3-4 & tbl.1.2.

60. *Id.* at 3, 5 tbl.1.3.

61. *Id.* at 3, 5 tbl.1.4.

diversity of perspectives and information in a law school class as can older students and those with advanced degrees. Similarly, letters of recommendation can have important added value in distinguishing between the similar “hard” credentials of two applicants. Although giving too much credit to inflated grades has nothing to commend it, as Professor Sander notes, it is easy to overstate these effects⁶² and, I would add, to understate the difficulty of correcting for differences.⁶³

Professor Sander’s second suggestion to increase the law school representation of lower SES students is greater need-based financial aid. This certainly will not hurt, and for other reasons as well moving toward more need-based aid has much to commend it.⁶⁴ However, I do not believe that within the realm of the possible increased financial aid can do much to alleviate the situation. Black law students today, as Sander notes, do better than students of other ethnic groups, when it comes to receiving scholarship support in lieu of loans, but compared to students of other ethnicities a higher proportion of black students graduate with

62. Sander, *supra* note 1, at 659.

63. Stuart Rojstaczer and Christopher Healy (whose article Professor Sander cites at his footnote 75) find reliable distinctions between average grade inflation in schools of different types (e.g. public-private), but the amount of inflation varies within school types, so that a satellite public school may have grades that are more inflated than those at an elite private college or flagship public university. See Stuart Rojstaczer & Christopher Healy, *Grading in American Colleges and Universities*, TCHRS. C. REC., Mar. 4, 2010, at 2–3. Additionally, grade inflation varies by fields within universities and these differences will often be greater than grade inflation variation across college and university types. *Id.* at 3. Moreover, if this is not complex enough, it could be that within fields broadly defined grade inflation varies by major. For example, Rojstaczer and Healy’s data indicate that grade inflation is greatest in the humanities where after controlling for likely student ability grades tend on average to be .4 higher than in the natural sciences and .2 higher than in the social sciences. *Id.* A Classics major in a particular school may, however, have grades that are less inflated than the grades of most other humanities majors and of some or all natural science majors depending on the school and its professors. Admissions officers whom I have known have had a sense of the degree of grade inflation by school and by major, or at least of the law school relevant abilities that grades reflect. Indeed, where admissions officers have dealt with numerous students from a handful of feeder schools over a sufficiently long period of time, some have developed a sense of grade inflation not just by school and by major but sometimes also by professor, along with a professor-specific sense of “letter of recommendation inflation,” or, on occasion, deflation.

64. My recollection is that when I first started teaching, most law school financial aid, to the extent it existed at all, was need-based and the expectation of repayment was presented as a moral rather than a legal obligation. Later competition for the most able minority students resulted in financial aid packages for the apparently most able that had a significant non-need component. Still later, competition for students with the kinds of credentials that boosted U.S. News rankings led to a broadening of non-need-based awards to all students. These shifts were also supported and perhaps fostered by the increasing availability of student loans, which meant that students willing to take on debt could attend law school even without scholarship aid. At some elite schools, like my home school the University of Michigan, recognition that whether or not a loan was easily met depended on the career path a law student chose or was forced into, meant that some of what might have been scholarship aid was channeled to loan forgiveness programs that evaluated need for assistance as it in fact existed after graduation. Originally, this was done to enable law school graduates to take relatively low paying public interest jobs. However, since the need for loan repayment assistance depends on income level and not employment type and from a reluctance to evaluate different careers by reference to their social value post law school, earned income became the key to post-graduation financial assistance. I believe much the same trajectory characterizes the history of financial support at many of the nation’s wealthiest and most selective law schools.

debt, and the amount they owe is on average greater.⁶⁵ Unless substantial new need-based support were available to law schools, including those below the most elite levels, I expect the situation would be the same for those from lower SES backgrounds as it is for today's black students.⁶⁶

This leaves admission preferences, or affirmative action, as the most promising means for increasing the proportion of students from low SES backgrounds in America's law schools, especially the more selective/elite institutions. To show what can be accomplished, Professor Sander offers evidence from an experiment with class-based affirmative action that he was instrumental in developing for UCLA Law School after the passage of California's proposition 209 threatened to decimate UCLA's minority law student population. He characterizes the experiment's results as a "success" and as "remarkable."⁶⁷ I cannot adjudicate the truth of his characterization, but I can report that I was part of a group that was given a briefing about the results of this experiment, and the briefer regarded the experiment as anything but a success. To begin with, the UCLA admissions office apparently did not adequately account for the increased yield that would result from extending offers to the affirmative action beneficiaries and so enrolled, if I recall correctly, almost 100 students more than they would ordinarily admit.⁶⁸ Moreover, the students admitted through this program were overwhelmingly Asian, who benefited from the fact that their parents who were often immigrants raised in other cultures, who had limited formal education and resided in relatively impoverished if culturally rich immigrant communities. Although the potential loss of most of its black student population was the prime motivator of the plan for many faculty, including (I have been told) Professor Sander, only five black students enrolled for the following fall term,⁶⁹ and Hispanic enrollment was also way down. Because of these outcomes the faculty decided to discontinue the experiment.

VI. THE QUESTIONABLE VALUE OF CLASS DIVERSITY

This brings me to what I regard as the most interesting issue raised by Professor Sander's article: whether law schools have good reason, and in particular good diversity reasons, to increase the proportion of their entering students who come from lower SES backgrounds. I am *dubi-*

65. WILDER, *supra* note 25, at 58 tbl.36.

66. There is also the question of whether we would be doing lower SES students any favors by encouraging more to attend law school. See Segal, *supra* note 6 (noting the financial difficulties faced by law students graduating with high debt and low job prospects).

67. Sander, *supra* note 1, at 662-63.

68. Part of the excess was due to the fact that the school was still enrolling better off white students through the summer to keep its U.S. News rankings up.

69. The five black students were originally spread across UCLA's four first year sections. The students, I have been told, came to the dean the day before classes began and asked to be placed in the same section since they felt that the pressures of being the only black in a sea of White and Asian faces would put too much pressure on them. Their request was granted, meaning that one first year section had meaningful black representation and the other three sections had none.

tante. Moreover, regardless of the case that can be made for social class diversity, I believe that it pales next to the case that can be made for social and ethnic diversity.⁷⁰ In addressing the unconditional and comparative cases that can be made for social class diversity, I shall concern myself only with the situation of the nation's most selective law schools (Professor Sander's top two tiers). Even if those from lower class backgrounds are underrepresented in less selective law schools, they are still present in numbers sufficient to provide substantial class background diversity.⁷¹ I shall also ignore actions other than affirmative action to increase class diversity, some of which I would be happy to see.⁷²

Earlier I suggested three kinds of reasons that might be offered in defense of affirmative action. The first are fairness reasons. Background

70. I agree with several of the points that Professor Sander makes in comparing class-based and race-based affirmative action. I regard as most likely true his suggestions that to attain similar "minority" representation, when the minority is those of low SES, preferences would not need to be as steep as they are when the preferred group is a racial or ethnic minority. (I use the hedging words *most likely* only because I am unsure of the implications of class-based differences in law school attendance and because much depends on how one defines class. I don't think I would as readily assign a place in the lower class to the children of immigrants from many Asian and some other countries even if by the SES measures Professor Sander uses they are in the lower ranks. If instead of this measure we were considering students from families with deeply sunk lower SES or class roots, like Appalachian whites or urban unskilled laborers, I am not at all certain that the preferences needed to admit a representative proportion to law schools of varying strata would be any less than they are for other minorities, and I would not be surprised if they were in fact greater.) I also agree that in the current political climate class-based preferences would be better received by the public than race or ethnicity-based preferences and that since class is not a suspect classification, class-based affirmative action would, at least given the current Supreme Court, rest on firmer constitutional grounds. I also agree that in today's increasingly multi-racial nation there are challenges in identifying who is Hispanic, Native American or black, for purposes of affirmative action, but I believe that class too has its ambiguities and problems of definition and that we are fooling ourselves if we think that crude SES measures define America's lower classes. Where I completely part company from Professor Sander is on his claims of black disadvantage resulting from affirmative action by the nation's more elite law schools and in his suggestion that mismatch is at the core of the problem. Professor Sander and I (and coauthors) along with others who have looked at a range of data have gone back and forth for some years now on these issues. I remain convinced that Professor Sander's mismatch thesis is largely if not entirely unsupported and is, if anything, least applicable to the nation's most elite law schools. I have no desire to rehearse this particular dispute here, but refer the reader to our mutual contributions to the debate and to works cited therein. *See generally* Sander, *supra* note 32; Chambers, Clydesdale, Kidder & Lempert, *supra* note 32; Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005); Richard Lempert, William Kidder, Timothy T. Clydesdale & David L. Chambers, *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's - A Reply to Critics* (Univ. of Mich. Law & Econ., Olin Working Paper No. 06-001, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886382##.

71. Black and Hispanic law students are similarly underrepresented relative to their population proportions in almost all the nation's law schools, but a "critical mass" for diversity purposes has never been defined as a proportional presence equal to the group's population proportion.

72. There are actions schools could take which would have as an expected outcome an increase in lower SES representation, but they do not involve preferences, in the sense of admitting a student of lower SES ahead of a higher SES student with a higher LSAT/GPA index score. Professor Sander has identified some of them. One example is eliminating legacy advantages. A second, which would require funding at a level that I think no law school can afford but which a few wealthy undergraduate colleges manage: it is to run a needs blind admissions system and guarantee students that if admitted their needs will be met mainly with scholarship aid. A third is to broaden recruitment to include active outreach not just to a group of select feeder schools but to undergraduate schools which those from lower SES backgrounds are disproportionately likely to attend. I think each of these approaches has much to commend it, but each has financial costs that must be recognized.

factors may mean that some people have a harder time than others in getting to the point where they could contemplate a career in the law and become eligible for admission to law school. Moreover, a disadvantaged background may have created obstacles to achievement such that a person's efforts and intelligence do not yield credentials that are as impressive as those that a similarly skilled more advantaged person can present. For example, a student who has had to work almost full time while in school to pay her college tuition may have grades below those of fellow students whose parents paid their way even though she is smarter and worked harder than others throughout her college career. Or one student's LSAT score may be below another's because her parents could not afford an LSAT prep course, or because among her friends and acquaintances there was no one to tell her that taking a course prep might better her chances of being admitted to a top tier law school.

Second are educational enrichment reasons. A student body containing people from diverse backgrounds, with diverse interests and views, is likely to provide everyone with a richer education than they would get at a more homogeneous institution. More points of view will be expressed in the classroom, more students will have specialized knowledge that illuminates legal problems, the richness and diversity of extracurricular educational opportunities will be greater and students will gain a broader view of the world from meeting and befriending people who are unlike them.

Finally, diversity among law school graduates, and among the graduates of the more selective law schools in particular, may have important social benefits. Segments of society may have greater access to lawyers and access to better trained lawyers than they would have if law school populations were less diverse, with people like them more seriously underrepresented. More *pro bono* work may be done. The views and interests of disadvantaged social groups may be more adequately represented at the highest levels of business, government, the military and in society in general. Role models may lead young people observing law graduates like them to aspire higher, and they may open doors that might previously have been closed to them.

Of these reasons, only the first seems likely to be enhanced greatly by affirmative action programs that give preferences to applicants from lower SES backgrounds. Even here, however, matters are not simple. To begin with we should recognize that to some extent preferences for applicants in this first category should not be considered affirmative action. For example, as an aid to judging a person's capacity for success in law school and beyond, a formula which increased an applicant's GPA by a tenth of a point for every ten hours they worked each week as undergraduates or which increased LSAT scores by a quarter of a standard deviation for those who did not take a prep course might do a better job of predicting than a formula that ignored these factors. Similarly, the

initiative and strength of character demonstrated by a student who had numerous financial and cultural obstacles to overcome to even attend college, much less law school, might indicate someone who will contribute more to her fellow students and to the legal profession than a student whose superior GPA and LSAT scores correctly predict to a better law school GPA.

Admissions officers and admissions committee members recognize these and similar considerations; indeed it is not much of a stretch to say they live for them. It is the ability to evaluate the “whole student” that makes their life interesting and means the task of deciding whom to admit cannot be delegated to a computer. When personal history leads to the belief that a student has academic capabilities not captured by her GPA or LSAT score, or when an applicant stands out for special accomplishments,⁷³ admissions officers and committees have no compunctions about preferring such applicants to those with somewhat better “numbers.” Hence to the extent that students from lower SES backgrounds are admitted because hurdles they have overcome suggest that other aspects of the credentials they present do adequately capture their capabilities, affirmative action is not playing a part in the decision.

Affirmative action, or admitting someone who would not be admitted but for her status along a certain dimension,⁷⁴ occurs when one presumes disadvantage because an applicant has a certain class background or believes that even if an applicant’s LSAT/academic index accurately portrays the student’s academic ability relative to competing applicants the student deserves a thumb on the scales because her background handicapped her in her efforts to become as strong academically as competing applicants. Thus a person whose local schools provided an inferior K-12 education is likely to be less well educated than someone who be-

73. At Michigan, for example, the list of such students could go on and on. It would include an Olympic gold medalist, a physician in his 50s who was a leader of the AMA, a concert pianist, a top chess player, and the like.

74. By this definition beneficiaries of affirmative action include in many schools people of a certain race or ethnic background, most commonly blacks, Hispanics and Native Americans, some legacy admits and in the case of public colleges and universities some in-state residents. It would also not surprise me, although I have no data, if some religiously supported institutions give preferences to applicant’s who share the institution’s religious views. The possibility of religiously based affirmative action has not been examined because the schools that may practice this are private, and data relating to their applicant and admissions pool is not available for study, and we don’t speak of affirmative action in the case of legacy admits or in-state residents because the preferential admission of students in these categories has long been regarded as non-problematic. (This view is being challenged with respect to legacy admits.) Also it is generally believed that preferences accorded legacies and in-state applicants are not as great as those enjoyed by the beneficiaries of race or ethnicity-based affirmative action. This is, I am sure, true on the average, but there are cases where some legacies, or in-state students with powerful governmental backers, have enjoyed preferences as large as those enjoyed by most minority students. Moreover, at Michigan which is the school I know best, the distance between the index credentials of the average in-state admit and those of the bottom 10th percentile non-resident admits has often, and perhaps over the past two decades always, been greater than the distance between the bottom 10th percentile resident admit and the average minority admit.

fore college attended high performing public or elite private schools, and a person whose grades suffered because she had to work full time in college may in fact have learned less, be less able to adroitly apply her native intelligence and be less ready for law school than someone who, because her parents paid her way, had more time for learning. Fairness considerations might still lead to a preference for the applicant from the poorer background because she achieved more and has more promise, not absolutely but relative to the hand life dealt her.

Some might argue that although it is appropriate to consider whether a person's background indicates that she will perform at a higher level than her admissions index might predict, it is not the business of law schools to compensate an applicant, in even a small way, for the fact that because of class-based or other inherited disadvantage she is, insofar as we can tell, less educationally and intellectually accomplished than a competing applicant. I am not in this group and am not troubled by decisions to offset to some degree the effects of structurally rooted educational disadvantage for reasons of fairness and equality promotion.⁷⁵

Problems arise, however, because applicants identified as low SES by available measures may not be those whom the fairness/equality case for affirmative action justifies admitting, nor may they be people who because of their cultural or educational disadvantage are better prospects for legal education than their admissions index scores indicate.⁷⁶ For

75. The open question is what does "to some degree" mean. I can't state this more precisely but I can say that I don't find the fact that the UCLA experiment which Professor Sander describes advantaged those defined as low SES applicants by the equivalent of about 40 LSAT index points troublesome.

76. This is particularly likely if the SES index, like the one Professor Sander uses in his study, omits information on family wealth and parental income. The problem of overinclusiveness is common to all sorts of affirmative action but can only be determined with reference to specific justifications. To take an innocuous example, affirmative action at state schools for state residents can be justified on the ground that the parents of such applicants have been paying state taxes in support of their colleges and universities for years in order to be able to better educate their children. But an in state preference will be granted to a person who moved to the state eighteen months before applying to law school and who has paid little if any state taxes. Alternatively the justification could be that the state needs a highly educated work force to prosper and state residents educated in state are more likely to remain residents after graduation than those who move to the state solely to get an education. If only tax equity justified residency preferences including the recent mover in the applicant pool benefiting from residence-related affirmative action would be an example of overinclusion. If the sole justification were the "stay and work" justification and if recent movers are as likely to remain residents after graduation as those raised in state, then including the recent mover in the group eligible for residency-based affirmative action would be consistent with the affirmative action justification. Professor Sander at several points in his article suggests that race and ethnicity-based affirmative action programs suffer from serious problems of overinclusion. He points out, for example, that minority admits at elite law schools have SES credential distributions that are relatively close to those of the average white, Sander, *supra* note 1, at 651 tbl.8, and are overwhelmingly intraracially elite, *Id.* at 21 tbl.9. He also faults programs at schools like Harvard for treating as black for affirmative action purposes applicants from the West Indies or of West Indian parentage and students who may call themselves black but have one or more white grandparents. *See id.* at 665 & n.92. With respect to the latter groups, I would argue that so long as society characterizes such students as black regardless of their personal histories or how they racially self-identify, the equity justification for affirmative action cannot be totally rejected, and the two other affirmative action justifications I discuss below remain.

example Professor Sander reports that his attempt to give an affirmative action boost to low SES applicants helped mainly applicants of Asian descent. Most of them I expect were children of immigrants who came to America in search of better lives for themselves and their families. Like the children of Jewish immigrants of who came to this country between the late 1880s and the 1920s, their parents were by occupational, income/wealth and parental education measures at the bottom of America's class structure. But their families had not been nested there for generations, and their attitudes and opportunities are unlikely to have been the same as those of families whose heritage is working the unskilled trades and always being near the bottom of the social ladder. Indeed, for some Asian and other immigrant families the implications of the SES variables used as indicators of social class may have been the opposite of what they were taken to imply. In the United States, for example, achieving only a high school education characterizes people found in the nation's two lowest SES quartiles. In some countries completing high school may mean that the person is just a notch below the countries' educationally most elite. Similarly a family that is impoverished upon immigrating here may have been wealthy in their homeland, and their attitudes may have been and remained those of upper class individuals.

Asian (and other) immigrant families, like Jewish immigrant families before them, are likely to have seen education, and especially professional education, as a route that would lift their children, and through their children themselves, out of poverty. Moreover, like the generation of Yiddish speaking Jews, their isolation as a community through language and culture may have offered them access to informal sources of credit and entrepreneurial opportunities that other low SES Americans lack.⁷⁷ In addition, immigrant families often have relatives who preceded them here and have achieved some measure of financial success and intergenerational mobility. These relatives may serve both as role models and as sources of financial support for nieces, nephews and cousins who might be seen, if SES is the measure, as coming from families near the bottom of America's class structure.

Professor Sander questions the appropriateness of including Caribbean-born and multi-racial blacks in black-oriented affirmative action programs. He writes that although it may be true "that Caribbean-born blacks, or blacks with both white and black parents . . . 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."⁷⁸ The same can be said of many of those who would qualify as lower class by measured SES, including not just

77. The AJD data indicate that Asian students received 28% of their support while attending law school from their families. Whites on average received only 19% of their support while in law school from their families and blacks only 9%. WILDER, *supra* note 25, at 59 tbl.37.

78. Sander, *supra* note 1, at 665.

Asians and other immigrants, but some native-born whites as well.⁷⁹ Why should they be grouped demographically with children from families that have a history of poverty?

Professor Sander explains the disproportionate presence among Harvard's black enrollees of students who are foreign born, multiracial or the children of immigrants by the fact that blacks with these characteristics have higher test scores than blacks who grow up in this country. An analogous outcome is for the same reason likely to be true of the beneficiaries of low SES affirmative action if SES is conventionally measured.⁸⁰ Thus class-based affirmative action programs might most help those students who are least disadvantaged by their class origins. A program that more closely targeted students with backgrounds that suggest an enmeshed lower class heritage would, however, have a smaller pool of potential admittees and would most likely have to provide relatively large preferences to substantially boost target representation.⁸¹

The kinds of equity considerations I mention above are, despite the difficulties that exist, not only the ones that most easily justify class-based affirmative action, but also ones best suited to the use of parental SES as an indicator of student social class. When it comes to contributing to diversity within law schools and to social contributions beyond law school, class-based affirmative action may add little of value and far less than affirmative action for members of historically disadvantaged minority racial or ethnic groups. One reason for this lies in the gap between SES as a measure of social class and social class as a concept reflecting distinct perspectives and experiences.⁸² As will often be true of immigrant's children, SES may only imperfectly reflect the attitudes and

79. In making this point, I have focused on students of Asian heritage since they were the group predominantly benefited by the short-lived UCLA experiment, but not all whites who are in the country's lower SES ranks at the time they apply to law school come from families that have occupied these ranks all their lives. For example, while a student is in college one parent may have become unemployed and the other may have been laid off from a well-paying highly skilled position and been only able to find work as a low paid unskilled clerk.

80. Professor Sander's indicators, with income and perhaps family wealth added, might be the only reliable indicators of social class that a law school could acquire. Professor Sander also used census tract data in his UCLA experiment, but low average income census tracts may have pockets of better off residents.

81. One can still cite equity considerations to argue that students disadvantaged by their family's low SES status deserve a social mobility boost even if their parent's low SES does not closely relate to what one might regard as class-linked perspectives and experiences. But refusing to entertain affirmative action as a mobility booster does not necessarily thwart social mobility; it simply extends and delays it. Thus many Jews of my parents' generation went to law school, often at night, and became the lawyers who populated the lower ranks of the bar. Despite their professional degrees many fared poorly in economic and other ways. But their children were often able to attend better law schools or follow other entrepreneurial and professional paths that enabled them to move into careers that placed them well within the ranks of America's upper middle class. To look at the first generation only, upward mobility attributable to professional training was for many, except to the extent mobility was defined by professional degrees, not much greater than that enjoyed by the children of push cart fathers who opened their own shops. Over two generations, however, mobility was substantial and lower SES origins were left far behind.

82. See *supra* text accompanying notes 14-16.

experiences that make for distinct class-based experiences and perspectives.⁸³ Thus an elite law school that wished to maximize the diversity of attitudes, values and experiences within its student body might find that gains from class-based affirmative action would not be great.

Indeed I think “not be great” overstates likely gains in viewpoint diversity. Students choose to go to college; they choose within limits set by financial and other constraints which college to attend, and they choose to apply to law school. Even putting aside the questionable assignment to the lower class of immigrants’ children and the children of parents who have moved from higher SES families of origin to the lower regions of the SES scale, students from lower class backgrounds who apply to the more elite law schools may have attitudes and perspectives that are quite different from the perspectives of those with apparently similar class roots who did not attend college or, if they did go to college, did not apply to law school.⁸⁴ Indeed, students from lower class backgrounds who apply to and attend elite law schools may by the time they reach law school have largely shed their lower class identities. Elite law schools, for example, draw a disproportionate number of their enrollees from elite undergraduate colleges, and, in particular from Ivy League or similarly prestigious institutions. A student of lower class origins who enters Yale or Princeton necessarily differs in class-relevant ways from age mates of similar SES and may by the time he graduates have attitudes, aspirations, speech habits and mannerisms more like his Eli or Tiger classmates than like those of the people he grew up with. Recruiting from Ivy League and equally elite undergraduate institutions may, from a diversity perspective yield meager returns no matter what a student’s class origins or the current SES of a student’s parents. Lower class graduates of elite schools will not stand out in the law school crowd and may not only have already have shifted their attitudes to be more like those of their more privileged peers but will also have shared with them many of their most important recent life experiences.⁸⁵

83. I do not think there is one set of experience or viewpoints that characterizes all or even most members of a particular social class or of a racial or ethnic group for that matter. Nor do people who fall into the same social class as defined by SES necessarily have the same interests much less political, religious or other preferences. It is possible, however, to link statistically attitudes and experiences with class location and to find systematic differences between classes in how these are distributed.

84. I know of no good current data that would shed reliable empirical light on this matter. The Warkov data discussed at note 58 *supra* suggests this supposition is reasonable.

85. I do not mean to suggest that all differences between lower class and more privileged law students will be wiped out by a shared elite education. Commenting on an earlier version of this piece, Deborah Malamud pointed out that the family situation of the low-SES law student will not rapidly change and that a student’s continued involvement with family may shape her attitudes and behavior. I am sure she is right and that this example is not unique. Moreover, people differ. I have no doubt that some students from lower class backgrounds with elite undergraduate educations make distinct contributions to a law school’s education environment which students from more advantaged backgrounds could not or would not make. Similarly, to qualify an argument below, there are no doubt students from low SES backgrounds who go on to high paying, high status careers but who

The situation is not the same for most beneficiaries of race and ethnicity-based affirmative action. A black student may wish his blackness were invisible in a law school crowd, but it cannot be, and this is true even for students of mixed race raised mainly by a white parent.⁸⁶ Whatever one's interior racial or ethnic identity, others will assign a racial and sometimes an ethnic identity regardless. Black students whose views and identities are like those of most of their white counterparts still contribute uniquely to a school's diversity because their views are likely to be interpreted in the context of their race, often adding to a discussion in ways that differ from what would have been added had white students said the same things.⁸⁷

Moreover, whatever a black student's self-identity or however much his opinions are like those of white law students, he will have experiences as a student that he would not have had if he were white. Lower SES students will, by contrast, blend into the student body, and in most settings students find themselves in they will be responded to according to race, gender and/or age rather than according to class status. Take dating as an example. The sight of a black law student dating a white law student may trigger involuntary staring or even intentionally insulting behavior. This will occur regardless of how similar the daters' class backgrounds. But, except perhaps in family contexts, no heads will turn if an upper class white student is out with a student from the bottom of the SES pecking order. Casual observers will simply not know. If this example seems trivial, consider that no one has ever posited a crime of "driving while lower class," but blacks regardless of social status have testified to the "crime" of "driving while black." The relevance of the latter experience to discussions of criminal procedure is obvious.

A good test of the contribution that different bases for affirmative action make to educational diversity is to note the various extracurricular learning opportunities that exist in law schools. Numbers of the more specialized journals that exist at Michigan and other law schools have

because of their own backgrounds not only remain concerned with the situations of low SES individuals but also work to better their conditions. Nevertheless, I still maintain that with respect to diversity standpoint an elite law school is likely to get fewer benefits from admitting more lower SES students than one might expect and fewer benefits than those gained by ensuring the presence of a critical mass of minority law students. I believe the same will be true of post-graduation societal benefits. Moreover, I would not be surprised if a large proportion of low SES students bring nothing in the way of an educational or societal diversity payoff. I recognize, however, that these are empirical claims, and we lack empirical evidence.

86. Barack Obama's, *Dreams from My Father*, which chronicles his development of a black identity provides as good an example of the push toward blackness as I can think of. Recently, however, there has been some pushback, as more young people of mixed heritage are asserting a multiracial identity. Susan Saulny, *Black? White? Asian? More Young Americans Choose All of the Above*, N.Y. TIMES, Jan. 30, 2011, at A1.

87. For example the views of a black student who thinks affirmative action for blacks is unconstitutional will contribute uniquely to a discussion because unlike the same views expressed by whites, supporters of affirmative action will be unable to dismiss the black student's views as just racism.

racial or ethnic themes or are devoted to issues, like immigration, that are a special concern of a particular racial or ethnic group. Courses have been created with a similar impetus, and student groups organized along racial or ethnic lines bring in speakers to talk about issues that specially concern them. But participation in such activities and events is not limited in either theory or practice to students from the racial or ethnic group that was an activity's primary driver. Thus at Michigan and other law schools, organized groups of black, Hispanic and Native American students have added to every student's educational opportunities.

I do not know how many students from the lower quartile of the SES distribution have attended Michigan in a typical year, but I am confident there have been more low SES students than students of Native American heritage, and given Michigan's in-state preferences and blue collar and rural populations along with a substantial Muslim immigrant population I expect that in most years there have been at least as many low SES students as there have been black or Hispanic students.⁸⁸ Yet the school has never started a low SES law journal, nor have there been groups organized along SES lines to invite speakers to the law school or to ask for the creation of new courses. I also do not recall ever hearing a non-minority student explicitly reference a personal experience associated with his family's poverty or low SES.⁸⁹

The situation is likely to be similar when we turn to the third justification for affirmative action at elite law schools: giving back, or the contributions a school's graduates make to the community and the larger society following graduation.⁹⁰ If Michigan graduates typify the graduates of elite schools, there is strong evidence that lawyers of a given ethnic background (including Asians and whites) disproportionately serve people of their own race, whether they are dealing with them as individual clients or as business contacts.⁹¹ Moreover, affirmative action eligible minority graduates tend to be more deeply involved in community service and politics and do more pro bono work than white alumni.⁹² It is

88. If black and Hispanic students from low SES backgrounds count for class diversity as well as racial/ethnic diversity I expect there has often been greater numbers from the nation's lowest SES quartile.

89. It is possible that making social-economic status salient by adopting an affirmative action program for students in the bottom quartile of the SES scale would by making SES salient lead to the creation of groups that would organize to achieve these ends, but unlike the situation with blacks, Hispanics or Native Americans there has been no serious call for the creation of such preferences either within or external to the law school community. I am, of course, here talking personally and anecdotally. No doubt there are occasions where students reference personal experiences stemming from an impoverished background. Perhaps had I taught welfare law rather than evidence I would have heard such stories, but even then I expect a good portion of them would have come from minority students.

90. Let me remind the reader that I am talking about moral/policy justifications for affirmative action and not simply those justifications that the law as currently interpreted recognizes as compelling state interests.

91. See Lempert, Chambers & Adams, *supra* note 10, at 438 tbls.18 & 19.

92. *Id.* at 457–58 tbls.26 & 27.

doubtful whether elite law school graduates from lower SES backgrounds would show a similar disproportionate tendency to serve people like them if for no other reason than the fact that most elite law school graduates go into business or other large law firm practices, corporate counsel's offices or government attorney positions.

Moreover, minority graduates do not attend elite law schools expecting to leave their race behind. If anything, they may think that the elite law school credential will help elevate them to leadership status within their race and as representatives of their race in the larger community. But low SES students who attend elite law schools are seeking and will obtain a credential that will allow them to transform their class identity from low to high and guarantee that their children will have a better head start on life than their parents were able to provide for them.

There are also societal benefits from role modeling and minority identity that the beneficiaries of race- or ethnicity-based affirmative action provide but which beneficiaries of a low SES affirmative action program would be unlikely to provide. In part this is due to visibility. It is likely that virtually all black youth perceive President Obama, Attorney General Holder and others among his key law-trained advisors as black, but how many low SES youth know (or care) which of the President's cabinet members or advisers began life in the lower rungs of society? By the time these people have acquired sufficient status and connections to be appointed to high visibility positions, they are no longer people of low SES, and when a politician trots out his humble roots it seems to be more as a matter of political theatre than a disclosure that will inspire lower SES youth to think they can escape their status. In addition, as the business and military amicus briefs in *Grutter* argued, well trained and educated minorities can be crucial to the success of an operation that involves soldiers or other people of color. It is hard to imagine a similar need for well-educated leaders whose specific advantage is that they came from families of humble origin.

In short, I think that most of the values and considerations that justify affirmative action for discriminated against or otherwise disadvantaged ethnic groups do not exist or, if they do exist are not nearly as strong when applied to students from low SES backgrounds. The overlap is greatest when equity and fairness are the rationale, but even here issues arise that might give us pause about instituting such programs, often issues that have analogies in the unease some express about race and ethnicity-based affirmative action. I do not, however, oppose outreach to, and informal affirmative action for, students of low SES, especially by elite law schools. But I do not think formal programs are necessary, and I do not think the case for low SES affirmative action is nearly as strong as

the case that can be made for affirmative action in aid of groups disadvantaged by racial and ethnic discrimination.⁹³

CONCLUSION

I hope it is clear from what I have written that I admire Professor Sander's effort to shed empirical light on the class composition of the student bodies in America's law schools. At the same time I think the amount of light he can shed is severely limited by the nature and quality of the data he had available and by the distance between SES as a measure of social class and the concept of social class that is best suited to considering the value and extent of class diversity in legal education. I have tried to show the limits of what the data can tell us by fleshing out some of the reasons why readers should take seriously the cautions Professor Sander provides throughout his article.

Specifically, I think the core findings Professor Sander reports, that students from families of low SES are underrepresented in American law schools relative to their population proportion and that this underrepresentation is most substantial in America's most elite law schools, are sound, but that the specific numbers he provides cannot be relied on. I also believe that some of his subsidiary findings, such as his effort to determine applicant pool effects on SES representation or his attempt to assign law graduates of different races and ethnicities to different social classes are problematic due to missing sample data, his operationalization of social class by an SES index that is less than ideal and other conceptual and data quality issues.

Moving from his empirical results to his more discursive commentary, I think Professor Sander has provided plausible reasons why the ordinary law school admissions process may bias and diminish the admissions chances of applicants from low SES backgrounds, and I have added to the reasons he gives. As Professor Sander suggests, a plausible result of these biases is that even if law school admissions officers seek consciously to advantage applicants from disadvantaged backgrounds, as they well might, low SES applicants on balance gain little if anything from their status. Finally, I take a different view than Professor Sander of the relative gains from racial/ethnic as opposed to SES diversity and on justifications for affirmative action. I think a similar case for affirmative action may be made on fairness grounds, but I think that in terms of educational and societal benefits racial/ethnic diversity, especially at elite law schools, has far more to offer.

93. Some who oppose race-based affirmative action think that discrimination and its effects are a thing of the past. This is not so. For a summary of recent findings and data, see Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009*, 44 *LAW & SOC'Y REV.* 431, 440–55 (2010).

The data Professor Sander has to work with are flawed and limited, but he has not pushed the data as far as he might. Specifically, he might provide empirical answers to some of the questions I raise. For example, I am concerned that his SES index is less reliable when it is based on two measures rather than four. He might test this by comparing the SES distribution of students for whom he has four measures with the distribution of students for whom he has only two, and by seeing if regardless of measure the association between SES and school presence by school status is the same.⁹⁴ More interestingly, the AJD data allow Professor Sander to test my supposition that racial and ethnic diversity are more likely to be associated with attitudinal breadth in elite law schools than SES diversity. The AJD asked several questions designed to tap respondents' opinions, and Professor Sander could explore whether within law school strata opinion differences are systematically associated with class, race, ethnic or gender divisions.

Regrettably, for those interested in pursuing Professor Sander's inquiry into the role social class plays in the production of lawyers, the quality of legal education and the sorting of students into schools of different status, available data are unlikely to allow us to move much beyond what Professor Sander's current study provides.⁹⁵ What is needed is a longitudinal study, like the one Warkov conducted 50 years ago,⁹⁶ which follows a large sample of students from secondary school, through college and law school, with questions aimed at determining the role that social class plays in the choice of law as a career, in law school choice among those committed to a legal career and ultimately in the production and job sorting of attorneys. Such a study could also explore the effects of race and gender and determine how various status effects are conditioned by the interplay of other variables. If Professor Sander's foray into

94. If there are differences, they will not necessarily mean that using an SES index composed of only two measures distorts a true picture, for it could be that the number of available measures is itself an indicator of SES. If this were the case, one might, for example, expect those whose scores were based on only two variables to contain a higher proportion of the respondents of low SES than one finds when four measures are available. Still, it would be a comfort if the relationships Professor Sander reports were robust to differences in index construction.

95. There are some data sources that might be explored to see if they offer anything of value. The most prominent are the Panel Study of Income Dynamics, the Wisconsin Longitudinal Study and the Longitudinal Study of Youth.

96. WARKOV, *supra* note 58. In his reply Professor Sander responds at several points to my critique and at one point, in his discussion of mismatch, to issues of little relevance to the issues central to this symposium. Not only do I find aspects of Professor Sander's response insulting, but also portions of his reply ignore relevant information, make empirical claims that I could not replicate with that I believe are better data, and are in my view seriously flawed in their assumptions and reasoning. These are strong claims, but unfortunately the *Law Review* does not have space to allow me to justify them here. However, a detailed justification is available at <http://www.denverlawreview.org/>. The reader should know that I shared most of the claims I make regarding Professor Sander's mismatch discussion insofar as it accuses me of misstating facts with him, and I asked him to delete that portion of his article. He has not done this nor has he chosen to correct the flaws I point to.

the thicket of social class and the American law school stimulates such a study, he will have made an important contribution.⁹⁷

97. In his reply Professor Sander responds at several points to my critique and at one point, in his discussion of mismatch, to issues of little relevance to the issues central to this symposium. Not only do I find aspects of Professor Sander's response insulting, but also portions of his reply ignore relevant information, make empirical claims that I could not replicate with that I believe are better data, and are in my view seriously flawed in their assumptions and reasoning. These are strong claims, but unfortunately the *Law Review* does not have space to allow me to justify them here. However, a detailed justification is available at <http://www.denverlawreview.org/>. The reader should know that I shared most of the claims I make regarding Professor Sander's mismatch discussion insofar as it accuses me of misstating facts with him, and I asked him to delete that portion of his article. He has not done this nor has he chosen to correct the flaws I point to.

