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## Listening to the Debate on Reforming Law School Admissions Preferences

Richard H. Sander

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## Listening to the Debate on Reforming Law School Admissions Preferences

# LISTENING TO THE DEBATE ON REFORMING LAW SCHOOL ADMISSIONS PREFERENCES

RICHARD H. SANDER<sup>†</sup>

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The debate over affirmative action in higher education has entered a new era. For decades the argument was largely ideological, between those who thought racial preferences were intrinsically a betrayal of the color-blind ideals of the civil rights movement, and those who believed that a sudden shift from Jim Crow to official color-blindness would leave the upper reaches of America segregated and impervious to change. In sharp contrast, the emerging debate is empirical and pragmatic. Few proponents of affirmative action believe it should go on indefinitely; most proponents acknowledge that preferences carry with them some undesirable side-effects. Few of those who oppose racial preferences are really comfortable with the idea of minority numbers dwindling towards zero at any elite institution. These are circumstances in which it is possible for angry debate to evolve into discussion, where empirical findings matter and where policy alternatives can be candidly compared. Under such hopeful conditions, the premium on combat skills declines and the value of listening goes up.

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<sup>†</sup> Professor Law, University of California, Los Angeles. I am deeply indebted to Michael Jussaume, Yana Kucheva, and Flori So for outstanding research assistance and analysis in this piece, and to Richard Kahlenberg and Stuart Taylor for thoughtful comments on a draft, and to Tal Greitzer for his typically remarkable assistance in editing.

My opening piece in this symposium, *Class in American Legal Education*<sup>1</sup> (hereinafter *CALE*) argued that the institutional quest for “diversity” in American law schools has produced quite substantial racial diversity but very little socioeconomic diversity, and that most law schools follow a double standard, using very large preferences to compete for the pool of affluent minority candidates, while creating substantial barriers to students from poor, working class or even “middle class” backgrounds.<sup>2</sup> My hope was to provide enough data, in enough forms, to make many of the empirical claims transparent and provide the tools for readers to draw their own conclusions.

The eleven commentators, in their ten response essays, have done just that, providing varied and often insightful perspectives on how law schools should take account of “class.” Many good questions are raised, along with some thoughtful answers. Some of the contributors agree with and expand upon the central points in *CALE*. Others agree with some reservations. About half of the contributors are concerned (mistakenly) that my essay is really a Trojan horse for ending racial preferences. Nearly all the contributors, however, agree that the absence of socioeconomic diversity in American law schools has been too long overlooked, and are willing to consider seriously steps to reform current preference systems. Nearly everyone also put forth ideas that should undoubtedly be part of the reform mix. That is a very good start. In this reply essay, I try to synthesize many of these ideas into a specific proposal for the reform of preferences systems, and show how the various contributors’ ideas fit together. There are in some cases deep differences and incompatibilities among the essayists here (see Parts III and IV of this essay if you doubt that), but beneath the rhetoric there is also a lot of common ground.

I have four goals in this essay—which thus has four parts. In Part I, I provide some background helpful in thinking about the most common critique of *CALE*: that addressing “class” diversity should be completely divorced from discussions of racial diversity and existing race preference systems. I see instead a natural evolution where we learn from the successes and problems of race preferences, and reform preference systems to better achieve the underlying goals of diversity, social mobility, and fairness. The three sections of Part I each illustrate a different aspect of this theme.

In Part II, I advance a specific proposal for reforming law school preference and financial aid systems, and then consider the ways in which the proposal captures—or at least attempts to capture—the key values and ideas of each contributor. At the end of Part II, I present data that addresses the “feasibility” question—in particular, whether there are

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1. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2011) [hereinafter *CALE*].

2. See generally *id.*

enough promising students from low-SES backgrounds to make law school SES diversity possible.

Part III responds to specific criticisms advanced by the symposium participants. And Part IV takes up the state of the law school “mismatch” debate, and why the evidence for mismatch provides in itself a sufficient, though not necessary, basis for supporting the types of preference reforms outlined in Part II.

#### PART I. SOME FURTHER NOTES COMPARING RACE AND CLASS

Most of the participants in this symposium agree that “class” should be more central to law school diversity efforts. A central disagreement concerns how such efforts should co-exist with racial preferences. Part II offers an answer to this question, but Part I prepares the ground. First, I discuss recent work by two very thoughtful black writers who have distinct but complementary takes on how the meaning of race is changing in contemporary America. Then I critically examine the two most common justifications for giving “race” preeminence in law school affirmative action: the “discrimination” argument and the “viewpoint diversity” argument. In both cases, recent research and the added perspective of “class” are helpful in thinking about these issues afresh.

##### *A. Prelude: A Time for Reassessment*

Academics can sometimes be quite insular, especially in specific fields that can lose touch with real-world trends and developments. Over the past sixteen years or so—since the mid-1990s when modern challenges to affirmative action began with *Hopwood v. Texas*<sup>3</sup> and Proposition 209—many in higher education have focused on defending the status quo, and when unconstrained by outside rules, their rules have tended to either be static or to have moved in the direction of further solidifying the status quo.<sup>4</sup> In the meantime, however, the world that American minorities face has changed substantially, even dramatically. Many thoughtful observers outside the academy see this change plainly. In this section, I want to provide some sense of this new perspective.

A particularly thoughtful contribution, touching on many of the themes of this symposium, is Eugene Robinson’s recent book *Disintegration: the Splintering of Black America*.<sup>5</sup> Robinson is one of the nation’s leading black journalists; his reporting and commentary for the *Washington Post* won a Pulitzer Prize in 2009. In his book, Robinson

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3. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

4. For example, in the years since the Supreme Court’s holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003), law school racial preferences have become larger and even more mechanical than before. Richard H. Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in *NEW DIRECTION IN JUDICIAL POLITICS* (Kevin McGuire, ed., forthcoming 2012).

5. EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* (2010).

insightfully analyzes the emergence, over the past generation, of four distinct black communities in the United States.<sup>6</sup> “Mainstream” blacks are those in the middle- and upper-middle class, a group that has, as Robinson documents, expanded dramatically since the Civil Rights revolution.<sup>7</sup> “The Emergent” include both black immigrants, the children of those immigrants, and interracial blacks, groups who together now constitute over twenty percent of the nation’s black population.<sup>8</sup> Immigrant blacks tend to arrive with strong educational credentials—the strongest, according to Robinson, of any immigrant group<sup>9</sup>—and see America not as a land of discrimination, but as a land of opportunity (hence their decision to immigrate). Interracial blacks often similarly see race through a non-traditional prism—a matter of choice rather than inescapable identity.<sup>10</sup> “The Transcendent” are the black elite, who are not only extraordinary achievers in their own right, but also enjoy a special glow from their racial identity.<sup>11</sup> Oprah Winfrey, Tiger Woods, Morgan Freeman, and of course Barack Obama are all Americans of remarkable talent, but they also enjoy a special reverence that is connected to their racial identity.

This leaves “the Abandoned”—the half of the black population that remains intensely isolated in urban ghettos or the rural South, that has extraordinarily high poverty rates, where unemployment is pervasive, incarceration is common and stable two-parent families are the exception.<sup>12</sup> Robinson argues that the rise of the other three black Americas has intensified the plight of the Abandoned in several ways. The development of fair housing policies made it possible for Mainstream blacks to leave core ghettos, leaving those communities populated by the Abandoned, sans the middle-class amenities, stores, and institutions that gave many mid-century ghettos considerable vibrancy.<sup>13</sup> Some conservatives point to the three successful black Americas as a rationale for ignoring the fourth, blaming its problems on internal pathologies. Many Mainstream blacks do not share the identity of interests with the Abandoned they once did, so the latter group has lost some of its most important advocates and spokesmen. And white liberals are likely to be more comfortable with easy policy measures that help the Mainstream than with

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6. See generally *id.*

7. See generally *id.*

8. See generally *id.*

9. See *id.* at 165–66.

10. See *id.* at 179–90. Americans self-identifying as multiracial numbered 3.9 million in 2000, and 5.3 million in 2009, thus growing at four times the rate of the United States population as a whole, and growing faster in proportionate terms than any other racial group. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 10 tbl.6 (2011).

11. See ROBINSON, *supra* note 5, at 139–62.

12. *Id.* at 107–38.

13. These ideas were earlier developed by William Julius Wilson in *THE TRULY DISADVANTAGED* (1987), and are empirically investigated and elaborated in Yana Kucheva & Richard H. Sander, *The Misunderstood Consequences of Shelley v. Kramer*, (July 16, 2010) (unpublished manuscript) (on file with author).

the much harder work of tackling the tough problems that dominate the world of the Abandoned.

Robinson was not aware of the research in *CALE* when he wrote his book, but my findings illustrate his thesis. The benefits of law school affirmative action policies flow overwhelmingly to upper-middle class blacks, and disproportionately to the Emergent. The rhetoric of legal educators suggests that affirmative action seeks to help the Abandoned into the mainstream, but the actual representation of poor and working-class blacks is miniscule, and law school policies tend to aggravate this bias rather than counter it.

Interestingly, even though Robinson's empirical focus is not on racial preferences (he focuses on general patterns of social life, mobility, and employment, not on higher education), he recognizes that reforming affirmative action is an important part of any strategy to address the plight of the Abandoned.<sup>14</sup> He suggests that there are three key steps towards a progressive strategy.<sup>15</sup> The first is to recognize that the problems of the Abandoned are distinct and of a greater order of magnitude than those affecting other blacks. The second is to pursue large-scale initiatives that are focused, not on race itself, but on the problems that the Abandoned experience in disproportionate numbers, such as industrial unemployment, inner-city decay, and inadequate education. (Robinson commends Obama for taking significant steps along these lines; Obama has characterized and shaped many of his most important initiatives in race-neutral terms even though they are targeted at key problems facing the Abandoned.<sup>16</sup>) The third is to make a key gesture to the concerns of many Americans that racial preference programs have evolved into a poorly-targeted, special interest boondoggle:

Obama has an important card that he can play: means-testing of affirmative action programs. He can declare that from now on, the black Mainstream should be on its own—in exchange for the political leeway to concentrate money and attention on the Abandoned. . . . [For this to work he] would need support . . . from other black leaders and opinion-makers—from members of the Congressional Black Caucus, for example, as well as big-city mayors, the major civil rights organizations, and other important actors. For African-American officeholders, this would require considerable courage. . .<sup>17</sup>

*CALE* provides a lot of empirical support for the intuition behind Robinson's policy recommendations on affirmative action. Traditional preference programs are increasingly out-of-kilter with the social reality on the ground. Not only does this lead to neglect of those most disadvan-

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14. ROBINSON, *supra* note 5, at 208–14.

15. See generally *id.* at 191–221.

16. *Id.* at 217–19.

17. *Id.* at 219.

taged, it also exacts a significant and growing political price because the policies have shrinking legitimacy in most people's eyes.

Another fascinating reassessment of the American racial scene has come recently from Ellis Cose, a black journalist and social observer best known for his 1993 book *The Rage of a Privileged Class*.<sup>18</sup> In *Rage*, Cose examined in detail a seeming paradox: while a growing number of blacks were, by the early 1990s, successful and even "privileged," they still felt surrounded by subtle and less-than-subtle indicators of continued racism and discrimination, small bars so pervasive that many felt almost as though they were in caged exhibits intended to show off America's willingness to tolerate them.<sup>19</sup> In his new book, *The End of Anger*,<sup>20</sup> Cose documents a dramatic evolution over the past two decades. "Few people of any race would claim that full racial equality has arrived in America," he writes.

Still, so much has changed since *Rage* was published. It's not that discrimination has stopped or that racist assumptions have vanished. But they are not nearly as powerful as they once were. Color is becoming less and less a burden; race is less and less an immovable barrier. Some forty-four percent of blacks now claim to believe that blacks and whites have an equal opportunity of getting ahead--compared to thirty percent twelve years ago . . . . And in the lifting of that oppressive weight, many blacks have finally felt free to breathe—and to believe.<sup>21</sup>

Cose reports some astonishing shifts in black attitudes. In 2009, 69% of blacks agreed with the statement that Martin Luther King's vision of a racially just America had been fulfilled. In 2010, in the midst of a deepening recession, a CBS poll found that nearly half of all blacks said they thought America's next generation would be better off than those living today (compared to only 16% of whites).<sup>22</sup> A majority of the corporate and professional blacks Cose interviewed thought they were on an equal footing in their workplace with their white peers, and nearly as many believed there was no racial glass ceiling at their workplace. His interviewees recurrently see "a world in which race seriously affects opportunities for blacks and Hispanics, but (and this is a crucial 'but') not strongly enough to prevent them from getting where they want to go."<sup>23</sup>

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18. ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS: WHY ARE MIDDLE-CLASS BLACKS ANGRY?* (1993).

19. *See generally id.*

20. ELLIS COSE, *THE END OF ANGER: A NEW GENERATION'S TAKE ON RACE AND RAGE* (2011) [hereinafter *THE END OF ANGER*].

21. *Id.* at 8.

22. *Id.* at 3.

23. *Id.* at 12.



Although Cose does not cite Robinson, and though *The End of Anger* is quite a different book from *Disintegration*, the resonance of certain themes is unmistakable. Cose's interviewees redound in the celebration of successes among the black middle class, but they also express great alarm over the ground being lost by poor and working-class blacks (Robinson's "Abandoned"). As one black Harvard MBA observes,

I am much more optimistic about the future of my children than I am about the future of all black children, two-thirds of whom are born in poverty . . . . I think the opportunities are being made [available] to a smaller and smaller population of blacks and that our lower class is growing and becoming more permanent.<sup>24</sup>

Others perceive a broader social divide increasingly defined by class and economic inequality rather than race.

Cose does not embrace specific policy strategies, but near the end of his book he writes,

One of the most clear-headed thinkers I know in the field of social policy is John Powell, director of Ohio State University's Kirwan Institute. He believes fervently that the time is ripe for a new social vision, that the old language of opportunity and inequality, so much of which is narrowly focused on race, needs to become significantly broader. A new movement for social justice, as he sees it, would recognize the broad nature of America's unfinished business and bring various groups together in the embrace of what he calls "targeted universalism."

As an example, he offered the following:

Some people invited me to talk about health care. [And] I started out by saying, 'How many of you know a relative, friend, family member, who doesn't have insurance?' About half the people raise their hands. 'How many people do you know who have lost their insurance because they have a serious illness?' Within two questions or three questions, you get everybody . . . . And I said, 'We should do something about this. This problem that affects your community, affects your family, actually affects the black and Latino community even more so.' At that point, nobody walks away. So now the black and Latino community is in the conversation, but it's in the conversation in a way that they can empathize with. What we often do—and this is why we shouldn't start with just disparities—is that we say, 'there's this huge gap between blacks and whites, and we need to fix it.' Well, if I'm talking to a white audience and that's the start of my conversation, they're not in the conversation.<sup>25</sup>

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24. *Id.* at 23.

25. *Id.* at 281–82.

I don't know whether either Powell or Cose have applied this logic to affirmative action policies, but as Robinson points out, the logic fits particularly well on that issue.

As a third example of emerging views among left-of-center intellectuals concerned with issues of inequality, consider the types of stories that have recently cropped up in *The New York Times* and *The Washington Post*. Several times in the past year, the *Times* has run stories on the increasingly multi-racial character of America, and the seeming obsolescence of traditional racial categories. A particular pertinent example of this coverage came on the front-page of the June 14, 2011 *Times*:

At the beginning of the college application season last fall, Natasha Scott, a high school senior of mixed racial heritage in Beltsville, Md., vented about a personal dilemma on College Confidential, the go-to electronic bulletin board for anonymous conversation about admissions. 'I just realized that my race is something I have to think about,' she wrote, describing herself as having an Asian mother and a black father. 'It pains me to say this, but putting down black might help my admissions chances and putting down Asian might hurt it. My mother urges me to put down black to use AA to get in to the colleges I'm applying to . . . I sort of want to do this but I'm wondering if this is morally right.' Within minutes, a commenter had responded, 'You're black. You should own it.' Someone else agreed, 'Put black!!!!!!! Listen to your mom.'<sup>26</sup>

While the fellow students writing comments on College Confidential may not have appreciated Natasha's moral dilemma, the two reporters of the story certainly did, and so will most *Times* readers. They will also internalize this and other fresh evidence of a morally-wayward preference system. A few weeks earlier, the *Times*'s newest Pulitzer-Prize-winning columnist, David Leonhart, wrote another prominent article, this one dealing with the failure of most American colleges to achieve even a semblance of socioeconomic diversity.<sup>27</sup> Meanwhile, the *Washington Post* reported on a poll the *Post* conducted with the Kaiser Family Foundation, which found that both black and white residents of the District of Columbia see, by large margins, "income" rather than "race" as the critical divide in the city—a remarkable change in what was long regarded as one of America's most racially polarized cities.<sup>28</sup>

These varied sources suggest that the world-views of people thinking about race and inequality in America are undergoing significant

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26. Susan Saulny & Jacques Steinberg, *On College Forms, a Question Of Race, or Races, Can Perplex*, N.Y. TIMES, June 16, 2011, at A1.

27. David Leonhart, *Top Colleges, Largely for the Elite*, N.Y. TIMES, May 25, 2011, at B1.

28. Chris L. Jenkins, Theola Labbe-DeBose & Peyton M. Craighill, *Class, Not Race, a Divider For Many in D.C.*, WASH. POST, Jun. 19, 2011, available at [http://www.washingtonpost.com/local/dc-residents-see-class-not-race-as-citys-great-divider/2011/06/17/AGZdU9bH\\_story.html](http://www.washingtonpost.com/local/dc-residents-see-class-not-race-as-citys-great-divider/2011/06/17/AGZdU9bH_story.html).

change. In particular, black intellectuals who are spending time talking to people outside academia have observed a striking evolution in America's racial scene and a growing urgency to address the problems of low-income minorities in a broader context of addressing the exclusion of low-income Americans from the mainstream of American life. The idea of rethinking traditional affirmative action policies, in light of the findings in *CALE*, is therefore of something more than passing interest; it is, rather, particularly timely because it goes to the heart of social and attitudinal changes in contemporary America.

### *B. Discrimination and Outcomes*

There is no question that racial discrimination continues to be a common event in America. For some symposium contributors, the existence of racial discrimination is in itself a sufficient justification for not even touching the subject of racial preferences in law school. The logic goes something like this: "If racial discrimination exists, all minorities are substantively and seriously injured. Preference programs help to offset these injuries, and directly combat discrimination." This sort of reasoning has been repeated so often as to take on the aura of an incantation. Let us scrutinize the argument a bit.

Consider, first, the observation quoted earlier from Ellis Cose's work: "race seriously affects opportunities for blacks and Hispanics, but (and this is a crucial 'but') not strongly enough to prevent them from getting where they want to go."<sup>29</sup> A more analytic way of putting this point is that individual acts of discrimination may increase search costs without necessarily, or even materially, affecting final outcomes. If, for example, a black job applicant has a 20% chance of encountering racial discrimination, that does not mean that she will have 20% lower earnings, or 20% less employment; it means that she will need to submit 20% more job applications, on average, to achieve the same results as a white job applicant.

This insight helps us understand findings from the social science literature. The Urban Institute conducted perhaps the most famous of the job market "audit" studies in the early 1990s. Ten pairs of carefully-trained "testers" (with one black and one white tester in each pair) applied for hundreds of jobs advertised in Chicago and Washington, D.C.. Out of 438 completed audits, 62 produced job offers for both testers, 65 produced offers only for the white tester, and 23 produced offers for only the black tester.<sup>30</sup> (The other 288 audits produced offers for neither tester.) A way of summarizing these results is that out of every ten

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29. See COSE, *THE END OF ANGER*, *supra* note 20, at 12.

30. MARGERY AUSTIN TURNER, MICHAEL E. FIX & RAYMOND J. STRUYK, *URBAN INSTITUTE, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING* (1991).

searches, the white tester received 2.9 job offers, while the black tester received 1.9 offers. Another very well-known study that appeared about the same time, by economist June O'Neill, found that when one controlled for human capital qualities (something very few labor market studies do), the "earnings differential" between black and white workers virtually disappeared.<sup>31</sup> These findings are not incompatible: the presence of some job discrimination implies higher search costs for blacks, but not necessarily lower earnings.<sup>32</sup>

Of course, discrimination in itself is an evil to be combated. For me that is not merely a moral sentiment; I have spent a good deal of my working life fighting discrimination, and I believe I have done a lot to increase the enforcement of fair housing laws. My general point is that we often extrapolate from evidence of discrimination to other conclusions that are not necessarily justified.

Discourses on discrimination tend to focus on *racial* discrimination. In fact, the tendency of people to make fine distinctions about "others" and extend accordingly differential treatment is extraordinarily pervasive. This is particularly well-illustrated in a recent study that examined how people react to the brands of clothing others wear.<sup>33</sup> The researchers found that a woman asking strangers to participate in a survey had four times the response rate when she wore a Tommy Hilfiger sweater as when she wore an identical sweater with no label. Volunteers who went door-to-door seeking charitable contributions raised nearly twice as much when they wore shirts with designer logos as when they wore identical shirts with no logo.<sup>34</sup>

"Fashion" discrimination may seem relatively benign; we are not tied to our clothes, thank goodness—though fashion certainly correlates

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31. June O'Neill, *The Role of Human Capital in Earnings Differences Between Black and White Men*, 4 J. ECON. PERSP. 25 (1990). O'Neill observes, "The black-white hourly earnings ratio is 82.9 percent before adjusting for any characteristics . . . after adjusting for region, schooling and potential work experience . . . the ratio rises to 87.7 percent. The addition of the AFQT raises the ratio to 95.5 percent, at which point close to three-quarters of the gap is explained. Adding actual work experience virtually closes the gap." *Id.* at 40.

32. Note that perhaps the most in-depth study of racial discrimination patterns ever conducted—the National Housing Discrimination Study of 2000 conducted by The Urban Institute, found very low levels of net discrimination. See generally THE URBAN INSTITUTE, THE HOUSING DISCRIMINATION STUDY 2000 HDS (2000). See The "net" rate of discrimination experienced by blacks seeking to establish the availability of rental housing was about 4%; the net rate of "segregation" steering by real estate agents towards black testers was also about 4%. In other, more subtle or subjective aspects of housing search, net discrimination rates are higher, but the general pattern is one of astonishing progress, even relative to the prior national discrimination audit studies of 1989. See MARGERY AUSTIN TURNER, STEPHEN L. ROSS, GEORGE C. GALSTER & JOHN YINGER, THE URBAN INSTITUTE, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 3-2, 6-7 (2002).

33. Rob M.A. Nelissen & Marijn H.C. Meijersa, *Social Benefits of Luxury Brands as Costly Signals of Wealth and Status*, 32 J. EVO. & HUM. BEH. 343 (2011).

34. One defect in this study is that it was not "double-blind"—that is, the people seeking donations or survey participants presumably knew whether they were wearing a logo, and that may have influenced their behavior in subtle ways.

with socioeconomic status, and the logo study buttresses Eli Wald's argument that class is "visible" and has effects in daily interactions.<sup>35</sup> But there are many in-born characteristics, unrelated to race, that are associated with widespread discrimination. In recent years, social scientists have shown that labor market outcomes are strongly associated with the height,<sup>36</sup> weight,<sup>37</sup> and physical attractiveness<sup>38</sup> of individuals. The patterns vary some across groups—being tall seems to matter somewhat more for males, and being slender matters more for women (of all ages)—but the associated wage differences are large. There is still a good deal of debate over the nature of the causal link—partly because large-scale audit studies have tended to focus on factors like gender and race, and neglect these other variations—but there is considerable evidence that a significant part of the earnings differential is due to discrimination.<sup>39</sup> I suspect that most readers can think of situations where the height, weight, and attractiveness of others have affected their own behavior, even in relatively formal circumstances.

Since discrimination based on physical characteristics is linked to lower earnings, it is reasonable to infer that it is sufficiently pervasive so as to not be easily avoided by longer and more intensive searches. Discrimination in this realm is plausibly associated with worse personal outcomes; a short man may experience discrimination so pervasive that it directly reduces his life chances. For blacks and Hispanics growing up in affluent circumstances, it is much more doubtful that such discrimination as they experience is sufficient to substantively affect their long-term outcomes. Studies of college graduates based on cohorts after 1990, if they control for such human capital factors as school eliteness, test scores, and college grades, not only do not show earnings deficits for

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35. See Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861, 865 (2011).

36. Timothy A. Judge & Daniel M. Cable, *The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model*, 89 J. APPLIED PSYCH. 428 (2004). Note, however, that some commentators think that at least part of the difference in height outcomes is attributable to differences in cognitive ability, and others think that height effects are mediated by adolescent experiences related to height. See N. Persico, A. Postlewaite & D. Silverman, *The Effect of Adolescent Experience on Labor Market Outcomes: The Case of Height*, 112 J. POL. ECON. 1019 (2004); Anne Case & Christina Paxson, *Stature and Status: Height, Ability, and Labor Market Outcomes*, 116 J. POL. ECON. 499 (2008).

37. John Cawley, *The Impact of Obesity on Wages*, 39 J. HUM. RESOURCES 2 (2004); Dalton Conley & Rebecca Glauber, *Gender, Body Mass, and Socioeconomic Status: New Evidence from the PSID*, 17 ADVANCES IN HEALTH ECON. & HEALTH SERVS. RES. 253 (2007).

38. Daniel S. Hammermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AMER. ECON. REV. 1174 (1994); Markus Mobius & Tanya Rosenblat, *Why Beauty Matters*, 96 AMER. ECON. REV. 222 (2006).

39. See Mobius & Rosenblat, *supra* note 38, for experimental evidence on the causal role of physical attractiveness.

blacks and Hispanics; instead, they tend to show earnings *advantages*, especially for blacks.<sup>40</sup>

Thus, if preferences are meant to counterbalance societal discrimination, then current preferences are very poorly calibrated. Where is the evidence that contemporary, well-educated blacks suffer more consequential discrimination than those with socially disfavored flavors of height, weight and beauty? I have no doubt that race imposes very substantial burdens when it interacts with low SES and limited educational opportunity. But if so, we should be focusing not on race alone, but on the intersection of race and class.

Table 1, below, is helpful in getting a sense of the relative role that education and race play in determining earnings levels in contemporary America.

Table 1  
Median Family Income by Race and Education of Household Head  
Married Couples with Heads from 35-44 Years Old, 2009

<i>Education of household head</i>	<i>Asian</i>	<i>Black</i>	<i>Hispanic</i>	<i>Non-Hispanic Whites</i>
Less than high school diploma	\$36,000	\$35,200	\$37,000	\$46,600
High School	\$50,000	\$52,030	\$49,000	\$66,000
Bachelor degree	\$102,000	\$95,000	\$88,300	\$108,500
Graduate degree	\$130,000	\$110,000	\$114,000	\$129,000

Source: Author's calculations from the 2009 American Community Survey

This table reveals several interesting things. Most obviously, educational levels matter enormously in determining earnings, at least for families whose primary earner is approaching his or her peak earning years. Families headed by someone with a bachelor's degree earn from more than two to almost three times as much as families headed by someone who has not completed high school. Indeed, looking at this table it is hard to avoid the conclusion that education dwarfs race as a determinant of earnings. It is also important to note that black/white and Hispanic/white income differences decline with greater education: the black family income "deficit", relative to whites, is 24.5% for high school dropouts; 21.2% for high school graduates; and 12.4% for college graduates. The gap widens again a bit (to 14.7%) for those with graduate degrees, but this plausibly is due to mismatch effects, which are more pervasive at the graduate school level than at the bachelor's level, and work to systematically lower the earnings of minorities with graduate

40. For one particularly relevant example, see Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 463-64 (2004) [hereinafter *Systemic Analysis*], and accompanying text.

degrees.<sup>41</sup> (Consider, for example, the vast numbers of blacks who complete law school—a graduate degree—but never pass the bar.<sup>42</sup>) Indeed, it is more than plausible that if one better controlled for human capital characteristics, such as grades, professional certifications, work history, and schools attended, the analysis would show no black-white or Hispanic-white deficit in the bottom two rows of Table 1.<sup>43</sup>

It follows that educational attainment is an incomparably more important determinant of affluence than is race. And, as one could infer from the analyses in CALE, socioeconomic background is a more important determinant of one's educational attainment than is race. To show this point more directly, consider Table 2, which shows (for a cohort of twelve thousand students who would be, if they completed high school, in the class of 1992) educational attainments for high-SES blacks, compared with low-SES blacks and low-SES whites.

Table 2  
Rates of Attaining Particular Educational Outcomes  
by SES Quartile and Race Among Participants in the National Educational Longitudinal Survey, 1988-2000

Outcome	Percent of Blacks in each SES group with the given outcome:		Whites in the Bottom SES Quartile with the given outcome:
	Top Quartile	Bottom Quartile	
Attain a bachelor's degree	41%	6%	6%
Complete a graduate degree	5.5%	0.2%	0.4%
Attended an elite college	7%	0%	0.2%
Proportion of bachelor recipients who obtain graduate degree by age 26	1 in 7 or 8	1 in 30	1 in 12

Source: Author's calculations from NELS database

There is another, perhaps even more forceful, way of grasping this point. If one examines any of the large, longitudinal databases of teenagers and young adults created during the past twenty years, and asks what factors strongly predict college attendance, controlling for student background, test scores, academic preparation, and other relevant factors, one

41. Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006); Sander, *supra* note 40, 456-68 (2004); Linda Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289 (1995).

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

43. Differences in black and white incomes often appear much starker when one does not control for family composition, but it is important to do so, since the issue here is how human capital is rewarded in the labor market. The reasons for the very large proportion of unmarried blacks are undoubtedly complex, ranging from the high incarceration rates of black men to the attitudes of black women towards interracial marriage. See RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011).

will find that being black is a strong positive predictor while low-SES is a strong negative predictor. As best we can tell, black high school graduates are about 30% more likely than comparable whites to attend college, while high school graduates in the bottom SES quintile are about 80% less likely to attend college than high school graduates from the top SES quintile.<sup>44</sup>

In sum, I think the social science evidence is consistent with the more casual empiricism of Eugene Robinson and Ellis Cose: affluent blacks, and the children raised in those families, are doing pretty well. They may encounter occasional discrimination, but it is hard to show that this translates, for them, into worse outcomes in their lives. Disadvantages they may experience are not in the same league as those facing low- and moderate-SES families and their children.

Recall that I launched on this discussion to evaluate the following argument: “If racial discrimination exists, all minorities are substantively and seriously injured. Preference programs help to offset these injuries, and directly combat discrimination.” For the reasons outlined in this section, I think the first statement is incorrect: affluent minorities may encounter discrimination, but it is doubtful that this has a material effect on their economic and professional life outcomes. Now consider the second claim, that preference programs combat discrimination.

Set aside for the moment the mismatch issue (though only for a moment—I revisit mismatch in some detail in Part IV). Set aside even the growing evidence that artificially boosting students into more elite schools hurts, rather than helps, their long-term earnings.<sup>45</sup> Consider the simple logic of the idea that systematic and very large racial preferences effectively combat racial stereotypes and discrimination.

My finding in *Systemic Analysis*,<sup>46</sup> that large preferences generally translate into poor academic performance, remains undisputed by the critics. The finding has been duplicated by other recent research in law schools and higher education generally.<sup>47</sup> With the current scale of preferences at elite colleges and professional schools, about half of blacks end up in the bottom ten percent of the class; about half of Hispanics end up in the bottom twenty percent of the class. Particularly in law school,

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44. Jay D. Teachman, Kathleen M. Paasch, Randal D. Day & Karen P. Carver, *Poverty During Adolescence and Subsequent Educational Achievement*, in CONSEQUENCES OF GROWING UP POOR 382–418 (Duncan & Brooks-Gunn, eds., 1997), and author’s analysis of data from the National Educational Longitudinal Study.

45. Richard H. Sander & Jane Yakowitz, *The Secret of My Success: How Status, Prestige, and School Performance Shape Legal Careers*, J. EMP. LEGAL STUDIES (forthcoming 2011). This article substantially elaborates on my earlier work on the interaction of law school grades and school elitism on post-law-school earnings.

46. Sander, *supra* note 40, at 425–36.

47. See Peter Arcidiacono et al., *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, (Duke University, Working Paper, 2011).



these performance deficits are not meaningfully due to anything other than preferences; that is, performance improves in direct proportion to the reduction in preferences.<sup>48</sup>

Probably the most pernicious stereotypes about African-Americans have to do with intellectual capacity and work ethic.<sup>49</sup> As a method of combating these stereotypes, it is hard to imagine a worse policy than deliberately putting blacks into graduate-level classrooms in which they are at an enormous competitive disadvantage. The students (including the beneficiaries themselves) are not entirely aware that large preferences are at work. If minority students disproportionately end up with the worst grades in the class, how can this not be reflected in perceptions of classroom performance? Even though black first-year law students tend, if anything, to spend more hours on their homework than do their white counterparts, will they not seem disproportionately unprepared when called upon in class? Will they not disproportionately ask questions that suggest they do not get the point of the case under discussion, and will they not be perceived as more likely to detour class discussion in to repetitive explanations of the obvious? And, when the shock of first-semester grades undermines the morale and engagement of minority law students, will these effects not simply be intensified?

One of the saddest aspects of the diversity debate is the utter failure of the diversity lobby to seriously confront this issue—or for that matter, to even acknowledge that the issue exists. Advocates instead ignore, underplay, or gloss over the grade gap.<sup>50</sup> This is even odder given the emergence of “stereotype threat” as a common explanation of poor mi-

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48. See Richard H. Sander, *A Reply to Critics*, 57 STAN L. REV. 1963, 1972–73 (2005). The data reported in Tables 2 and 3 show that the GPA improvement for black “second-choice” students closely mirrors the reduction in the credential gap between those students and others in the same tier.

49. Lawrence D. Bobo & Ryan A. Smith, *From Jim Crow Racism to Laissez-Faire Racism: The Transformation of Racial Attitudes*, in BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA 199 (Katkin, Landsman & Tyree eds., 1995). This article presents 1990 survey evidence showing that 56% of whites rated blacks as less intelligent than whites, and over 60% rated blacks as lazier than whites. The survey method had respondents rate various racial groups on a series of scales, and then compared the average scalar ratings, rather than asking respondents to make direct comparisons. Bobo and Smith also note that whites have moved sharply away from “biological” explanations for racial differences and towards “cultural” explanations.

50. See, e.g., Richard O. Lempert, David L. Chambers & Terry K. Adams, “*From the Trenches and Towers*”: *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000). In their in-depth analysis of affirmative action at the University of Michigan Law School (UMLS), the authors nowhere mention the abysmal academic performance of UMLS blacks, 60% of whom had GPAs in the bottom tenth of their class during the period they studied. In *The Shape of the River*, Bowen and Bok to their credit do discuss the problem of poor academic performance of minorities in college. But they misleadingly imply that low grades are mostly connected to some sort of racial underperformance, rather than the use of preferences by colleges. Even more misleadingly, when they talk about minority performance they only give “average” class rank (the 23<sup>rd</sup> percentile for elite college blacks, according to them). Given the highly skewed distribution of minority GPAs towards the bottom of the distribution, an average is very misleading—an “average” 23<sup>rd</sup> percentile probably translates to a 10<sup>th</sup> percentile median. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 72 (1998).

nority performance in test settings.<sup>51</sup> If one believes stereotype threat is a serious issue, isn't it obvious that large-scale preferences are likely to exacerbate the threat?<sup>52</sup> Apparently not to affirmative action partisans, who have long shown a capacity to simultaneously advocate logically inconsistent positions.

Instead, partisans have put forward research attempting to show a variety of educational and attitudinal benefits of affirmative action programs. Much of this research is contradictory on its face. Consider, for example, the only study of which I am aware that attempts to show educational benefits from diversity in law schools.<sup>53</sup> In the study, Orfield and Whitla surveyed students at Harvard Law School and the University of Michigan; a key question asked respondents how many *close* friends they had of another racial or ethnic background. A vast majority (over 90%) of the white respondents responded that they had "three or more" close friends of another racial/ethnic background, which the authors noted with satisfaction and took to be evidence of the positive effect of affirmative action programs. But nearly two-thirds of the black respondents and nearly three-quarters of the Latino respondents reported two or fewer close friends of another racial/ethnic background. These varying statistics are logically irreconcilable. The two schools both had enrollments, at the time the surveys were conducted, that were about 77% white. If we conservatively assume that the mean student who said she had "three or more" close friends of another race had four such friends, and estimate the total number of interracial friendships per one hundred law students, we find that the white students claimed a total of 293 close interracial friendships, while blacks, Hispanics, Asians, and American Indians claimed a total of 50 such friendships. Even if we implausibly assume that **none** of the interracial friendships of blacks, Hispanics, Asians, and American Indians were with members of other minority groups, the

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51. Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY AND SOC. PSYCH. 797 (1995). I am a stereotype-threat skeptic, for three reasons. First, most of research showing stereotype-threat research has been done in laboratories; tests in real-world settings have not produced comparable results. See Michael J. Cullen, Chaitra M. Hardison & Paul R. Sackett, *Using SAT-Grade and Ability-Job Performance Relationships to Test Predictions Derived from Stereotype Threat Theory*, 89 J. OF APPLIED PSYCH. 220 (2004). Second, in law school at least, entering credentials accurately predict first-year GPA performance for minorities. See Sander, *supra* note 48, at 1968. (Research I have completed since *Reply to Critics* is even more compelling, demonstrating that blacks and whites have *indistinguishable* first-semester grades when we control for entering credentials and undergraduate college.) Third, again in law school, the black-white performance gap is the same or larger in legal writing classes as in timed exam classes, even though the former should not evoke the stereotype threat effect. See Sander, *Systemic Analysis*, *supra* note 40, at 424.

52. Some research has at least examined how self-perceptions about affirmative action affect stereotype threat, finding that students who believe they have received large preferences are more vulnerable to the threat effect. See Colette van Laar, Shana Levin & Stacey Sinclair, *Social Identity and Personal Identity Stereotype Threat: The Case of Affirmative Action*, 30 BASIC AND APPLIED SOC. PSYCH. 295 (2008).

53. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in GARY ORFIELD & MICHAL KURLAENDER, *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 143 (2001).

white respondents would still appear to be exaggerating their “close interracial friends” by a factor of six!<sup>54</sup>

All that the extant pro-diversity literature has demonstrated to date is that college students (and especially those oh-so-bright law students) manage to pick up quickly on the diversity ideology that pours forth from deans whenever students are assembled; the students readily infer the danger of not enthusiastically echoing this ideology whenever the opportunity arises.

An example of the type of research that could help us better understand the actual racial dynamics fostered by affirmative action is a study of law school study groups. A good deal of anecdotal evidence suggests that these groups tend to be segregated along racial lines.<sup>55</sup> It is possible that this simply reflects discrimination or racial preferences, but it is also possible that this reflects the desire of law students to join study groups with academically strong members. Individuals who give signals in or out of class that they are struggling with the material are likely to be shunned in the competition for good study groups. Worse, if students decide that academic strength is correlated with race, then black and Hispanic students may be shunned based on their race—an example of how large preferences could lead directly to invidious discrimination. By examining not only the extent of segregation in study groups, but also how the level of segregation varies across schools using different levels of racial preferences, one could gain genuine insight into how preferences affect racial attitudes and behavior. There is already some significant circumstantial evidence that a real problem exists. Cross-sectional research shows that participation in a study group tends to raise a student’s first-year law school performance; this makes sense, since talking in some depth about classes with a cross-section of peers can help an individual “get” the subtle nuances of how law school pedagogy works. But Hispanic and especially black students do not share these benefits; when they participate in study groups, their grades are unaffected and sometimes even hurt.<sup>56</sup> This is consistent with minority students ending up in

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54. Further evidence that the Orfield/Whitla survey was merely summoning up PC responses comes from an analysis done by the eminent sociologist Thomas Espenshade, who asked college students (in a survey that had no visible “diversity” agenda) to list their five closest friends; the survey administrators then coded the race of each identified friend. These results showed (a) no logical inconsistency in the number of interracial friendships and (b) far lower levels of interracial friendship than those produced by the Orfield-Whitla survey. Personal communication from Dr. Espenshade (March 2007).

55. See generally Kevin Deasy, *Enabling Black Students to Realize Their Potential in Law School: A Psycho-Social Assessment of an Academic Support Program*, 16 T. MARSHALL L. REV. 547 (1991); Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students From Isolation to Autonomy*, 26 ARIZ. L. REV. 667 (1994).

56. Matt Moore, *Ailing Method, Essential Motive: An Examination of Two Strategies to Improve Core Legal Learning Among Underrepresented Minority Law Students* (2005) (unpublished manuscript) (on file with author).

largely segregated study groups comprised of students who tend to be academically weak.

The idea of doing research on what causes law school study groups to have differential benefits across racial lines, like the idea of studying whether large racial preferences foster racial stereotyping, are not particularly original suggestions. Indeed, they are obvious questions if one gives a little thought to racial dynamics at a contemporary law school. They have not been studied because they imply an ability to look at diversity issues honestly that does not exist in legal academia (or graduate schools of education), and perhaps exists nowhere in contemporary higher education. Until such obvious inquiries are undertaken, it is folly to believe claims that preference programs effectively combat discrimination, or to defer to the judgment of school administrators in assessing the benefits of large-scale preferences.

### C. *Viewpoint diversity*

The preeminent justification for race-based affirmative action in higher education, as articulated in Supreme Court decisions, is the rationale of providing viewpoint diversity on college campuses.<sup>57</sup> An important question, but one rarely asked in anything other than a rhetorical manner, is how much current preference programs contribute to viewpoint diversity, particularly if the diversity is being provided by upper-middle-class students from various racial groups. How much do upper-middle-class minorities add to the viewpoint diversity in the classroom? Would low-SES students of various races add more?

To investigate how attitudes vary across race and class, I consulted data from the General Social Survey (GSS).<sup>58</sup> The GSS is a biennial, national survey of about two thousand adults; through ninety-minute, face-to-face interviews, the survey seeks to gather core demographic data from respondents (race, occupation, education, etc.) as well as attitudes and opinions on a wide variety of political and social issues. The GSS has a unique status among opinion surveys because of the care with which it is conducted and the ability to trace the evolution of attitudes on important issues as far back as 1972. Based on the demographic information collected on respondents, the GSS assigns each respondent a socio-economic score, using a process similar to the method I used in *CALE* to measure SES. With this variable, I assigned each respondent to one of five roughly equal SES quintiles; I could then divide respondents by both race and class, and examine variations in attitudes across these cells. I

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57. *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003).

58. The General Social Survey website, found at <http://www.norc.org/GSS+Website/>, has a wealth of information about the survey and its methodology.

emphasize that the analysis presented here is intended to be suggestive rather than conclusive.<sup>59</sup>

Table 3  
How social perspectives vary across lines of race and class General Social Survey, 2008 [?]

<i>Issue positions</i>	<i>Percent of each group agreeing with position:</i>			
	<i>Blacks, bottom two SES quintiles</i>	<i>Blacks, top two SES quintiles</i>	<i>Whites, bottom two SES quintiles</i>	<i>Whites, top two SES quintiles</i>
Immigration to the U.S. should be reduced (“a little” or “a lot”)	41%	34%	59%	49%
Books by anti-American Muslim clerics should be removed from public libraries	70%	47%	62%	37%
Women should not be allowed to have abortions for any reason	59%	47%	60%	51%
Homosexuals should have the right to marry (“disagree” or “strongly disagree”)	48%	55%	41%	36%
Favor the death penalty for murder	53%	45%	75%	68%

Source: 2008 GSS, analyses by Yana Kucheva and the author

Table 3 draws on the GSS to tabulate views across class and racial lines on several controversial social issues. To achieve a reasonable sample size for blacks, I combine the bottom two and top two SES quintiles. The cleavages along race and class lines are not deep on many issues, suggesting that factors other than SES and race explain much individual variation in attitudes (for example, religion and region are probably as probative or more probative on many social issues than race and class). Still, this rather simple analysis suggests that both race and class matter, and interestingly, they seem to matter to differing degrees on different issues. For example, class divisions are larger than race divisions on questions concerning abortion and free speech. But on other

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59. Note, for example, that since I use only a single year of GSS data, the sample sizes for the black cells are measured only in the dozens. Some of the literature cited in this section provides examples of more sophisticated methods that sociologists routinely use to reach more definitive conclusions about attitudinal patterns.

issues, such as gay marriage, race divisions are more significant than class divisions, while on still others, such as immigration, both class and race have significant effects on outlook.

If we put race, class, and other individual characteristics into a regression analysis, social and educational factors often dominate race. For example, an analysis of GSS data from the 1990s found that educational level—in particular, college education—was the dominant factor explaining variation in attitudes towards immigration policy; “effects of race, income, and fear of crime appear to be negligible.”<sup>60</sup> Larry Bobo and Frederick Lacari similarly found education quite important, and race non-significant, in explaining patterns of political tolerance for outlier groups.<sup>61</sup> Law students with low SES will themselves have college degrees by the time they reach graduate school, but they are far more likely to have family members and friends without college educations than are students from high-SES backgrounds. Moreover, even when the type of viewpoints expressed in surveys differ by only ten percentage points across different classes, this can easily belie a much deeper difference in assumptions and modes of argument. It makes sense that a wide range of experiences and attitudes will be missed in law school discussions if only a negligible proportion of students come from the bottom half of the class distribution.<sup>62</sup>

Sociologists who have examined attitudinal differences within the black population have found conflicting evidence about the depth of a “class” divide within the black community on major social and racial issues.<sup>63</sup> But they do consistently report a greater tendency among upper-middle-class blacks to favor race-conscious policies and to see racial inequality as a structural characteristic of American society.<sup>64</sup> Poor and working-class blacks are more likely to favor race-neutral policies that broadly increase opportunity and social mobility. Some observers have been puzzled by these patterns, but they fit well with much of the research discussed here and in *CALE*. After all, if racial preferences in higher education are the single most salient “race-conscious” policy, this is certainly one that primarily benefits affluent blacks, and it is not surprising that working-class blacks would have no great passion for the

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60. Charles R. Chandler & Yung-mei Tsai, *Social Factors Influencing Immigration Attitudes: An Analysis of Data from the General Social Survey*, 38 SOC. SCI. J. 177 (2001).

61. Lawrence Bobo & Frederick C. Licari, *Education and Political Tolerance: Testing the Effects of Cognitive Sophistication and Target Group Affect*, 53 PUB OPINION Q. 285 (1989).

62. Even recreational activities vary more across working-class groups of different races than among middle-class groups of different races. Floyd et al., *Race, Class, and Leisure Activity Preferences: Marginality and Ethnicity Revisited*, 26 J. LEISURE RES. 158 (1994).

63. Sean-Shong Hwang, Kevin M. Fitzpatrick & David Helms, *Class Differences in Racial Attitudes: A Divided Black America?*, 41 SOC. PERSP. 367 (1998).

64. Jason E. Shelton & George Wilson, *Race, Class, and the Basis of Group Alignment: An Analysis Of Support for Redistributive Policy Among Privileged Blacks*, 52 SOC. PERSP. 385 (2009); Zoltan Hajnal, *Black Class Exceptionalism: Insights from Direct Democracy on the Race Versus Class Debate*, 71 PUB OPINION Q. 560 (2007).

policy. And as Eugene Robinson points out, broad initiatives aimed at poverty or poor schools, without regard to race, are likely to have more impact upon the lives of the “Abandoned” than limited race-conscious policies.

The attitudinal data also suggests that the attitudes of upper-middle-class blacks, to the extent they diverge from those of affluent whites, match closely the world-views of the typical law professor: very liberal on issues of individual rights and immigration, progressive but not very specific on economic justice issues, somewhat hostile to law enforcement, supportive of race-conscious affirmative action. More generally, in my observation of the environment of a fairly elite law school (UCLA), I am struck by how little viewpoint diversity actually finds its way into class discussion. Students seem to sense the prevailing world-view, and they are reluctant to challenge it on matters touching fundamental values that spark emotional chords. On issues such as gay marriage and abortion, invitations to discuss the topic often produce no dissent to the prevailing law school worldview (favoring both).

A long-standing critique of law school from the left is that American professions excel at reproducing themselves, and more specifically legal education elites reproduce themselves in the student bodies they create.<sup>65</sup> To the extent this is true, it does not seem that contemporary affirmative action policies create much of an exception. We like to talk about viewpoint diversity, but there is little critical assessment of how much such diversity actually exists. Expanding SES diversity would probably help to introduce some less conventional viewpoints into law school classrooms, and this would be a good thing.

## PART II. STEPS TOWARD REFORM IN LAW SCHOOL ADMISSIONS

If in Part I I have tried to set the race vs. class debate in a broader perspective, Part II is about concrete specifics. Section A details a roadmap for the reform of law school preferences. Section B compares this roadmap with the values articulated by the symposium contributors, and suggests that there is a good deal of common ground in this debate. Section C works through the question of whether there really are as many potential low-and-moderate SES law students as I have supposed.

### *A. A Tentative Proposal*

When I published my initial analysis of the “mismatch” effect in 2005,<sup>66</sup> many of those in the then-highly-polarized debate assumed that if I was finding some serious, counterproductive consequences of law

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65. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (2004); see also RICHARD ABEL, *AMERICAN LAWYERS* 48–73 (1989).

66. Sander, *Systemic Analysis*, *supra* note 40.

school racial preferences, I must therefore be on the abolitionist side of the preferences debate. This assumption was often made, to my initial surprise, by both supporters and opponents of racial preferences, even though the piece took no explicit policy position and suggested that a very promising solution to the mismatch problem was to reduce, rather than eliminate, the size of existing preferences.<sup>67</sup>

That same pattern shows up, even more strikingly, in this symposium. A sizeable number of the commentaries on my main piece assume—and often build extensive discussions upon the belief that—I see socioeconomic and racial preferences as an “either/or” proposition, or even that my “true” agenda is the abolition of racial preferences. This is simply not the case. I have been asked about my policy views on affirmative action dozens of times—at legislative hearings, in radio interviews, before national commissions—and I have consistently eschewed abolitionist positions. In other contexts, I’ve strongly advocated for race-conscious strategies when they are well-justified by empirical findings.<sup>68</sup>

But as my principal essay makes clear, I also do not believe that “class” and “race” preferences should be considered in isolation. First, I think it is self-evident that racial preferences, as currently pursued by American law schools, have some very serious problems; it would be foolish to construct new preference programs that were not mindful of the need to avoid similar problems. Second, it is important to understand how and why racial preferences are no substitute for “class” preferences, and to realize how thoroughly and hypocritically the legal education establishment ignores class-based issues while claiming to pursue genuine diversity. Third, as I shall explain in this section, I think it is quite constructive to link the two types of preferences as a matter of policy.

For purposes of making discussion concrete, it is valuable to think about specific policy formulations. I do not believe we yet know enough to determine what exact policies would best achieve any particular set of goals one might articulate, so I would like to consider this section as something of a thought experiment. Suppose some significant number of schools endorsed, or were constrained to adopt (by law or by accreditation bodies) the following requirements in awarding admissions preferences:

1) Racial preferences are not limited in size, so long as the average size of a racial preference given by a law school does not exceed the av-

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67. *Id.* at 482–83.

68. On eschewing abolitionist positions, see, e.g., my comments in a January 2005 debate: “I want to keep reminding participants [in the mismatch debate] that one can make enormous progress in addressing this problem short of abolishing preferences.” Legal Affairs Debate Club, January 14, 2005, available at [http://www.legalaffairs.org/webexclusive/debateclub\\_sander0105.msp](http://www.legalaffairs.org/webexclusive/debateclub_sander0105.msp). On my advocacy of race-conscious strategies in addressing housing segregation, see generally Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874 (1988).



erage size of its socioeconomic preferences. In determining socioeconomic preferences, schools should not only be permitted, but encouraged, to use factors which recognize the intersections of class and race, such as the level of poverty in the neighborhood one lived in during high school, whether one is raised in a single-parent family, and the academic strength of one's high school.

2) Any student admitted to a law school with credentials below the average of the law school's matriculants must be given a disclosure report with the school's admissions letter. The disclosure report provides objective information on the following: (a) the average law school GPA earned by matriculants at that school with the applicant's credentials; (b) the graduation rate of matriculants at that school with the applicant's credentials; (c) the bar passage rate of graduates of that school with the applicant's credentials; and (d) the median and mean earnings, and rate of occupation as a lawyer, for graduates of that school with the applicant's credentials.

3) At least half of the financial aid given by any law school must be need-based, unless the school can demonstrate that dependent students from families with incomes below the national median are able to complete their law degree at the school without, on average, adding more educational debt than those students assumed during their undergraduate college careers.

4) Law schools should offer courses and research fellowships explicitly aimed at "pipeline" problems—that is, how academic preparation gaps can be reduced across racial and socioeconomic lines, and how mobility and representation can be fostered in the absence of admissions preferences. Graduates working on these problems should be given especially generous loan forgiveness terms.

These four practices directly address many of the most serious weaknesses in current law school preference systems, and they also create incentives with further beneficial effects. Consider some of the properties of this system:

- *Flexibility.* Practice 1 gives schools great discretion and flexibility in the design of preference systems. The school can choose the size and focus of their racial and class preferences, so long as the size of the preferences are measured, and so long as the average size of race preferences does not exceed those used for class.

- *Measurement.* Practice 1 also pushes schools to develop some system of defining the size of preferences they use. This addresses a basic defect in the law governing preferences. Both Justice Powell in *Bakke v. University of California*, and Justice O'Connor in *Grutter v. Bollinger*,

evaded the hard choices implicit in their decisions by phrasing preference doctrine in very vague terms.<sup>69</sup> As I suggested in *Systemic Analysis*, and as Ian Ayres and Sydney Foster forcefully elaborated two years later, the governance of racial preferences is not viable—and strict scrutiny is not meaningful—in the absence of concrete methods of measuring preferences and evaluating their costs relative to their benefits.<sup>70</sup> A number of viable methods of measuring and comparing preferences have been advanced.<sup>71</sup>

- *Narrow tailoring*. Practice 1 gives substance to the general constitutional understanding that the use of race should be narrowly tailored to the ends sought—in other words, that race should only be used as much as is vital to achieve its compelling justification.<sup>72</sup> Consider: both race and class help diversify the classroom; class diversity is currently more lacking than race diversity; viewpoint diversity is, plausibly, at least as enhanced by greater class diversity as by race diversity; class diversity addresses more salient, and more neglected, mobility and opportunity problems in our society. And class-based preferences are not suspect—for good reason—in the way that racial preferences are.<sup>73</sup> Practice (1) is thus a logical way for a school to achieve narrow tailoring in a meaningful way.

- *Transparency*. Practice 2 is an enormous step towards giving applicants the facts they need to make rational choices about (and between) law schools—an issue that has received great attention this year in the related context of law school data on employment prospects.<sup>74</sup> Students should not only have accurate employment data for the school as a whole; they should have good information on their individual prospects for graduating, passing the bar, and getting a good job. The sort of school-wide data available today is sufficient for students with credentials at or above the school median, but it is misleading and deceptive for students admitted with preferences. Especially in an era of rising law school costs and a weak market for law graduates, elemental fairness requires that students have good information.

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69. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003). Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in *NEW DIRECTIONS IN JUDICIAL POLITICS* (Kevin McGuire, ed., forthcoming 2012).

70. Sander, *Systemic Analysis*, *supra* note 40, at 390–410; Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007); see also *Fisher v. Univ. of Texas*, 631 F.3d 213, 249–51 (5th Cir. 2011) (Garza, J., concurring).

71. A discussion of these methods, and the logical necessity of such criteria to implement strict scrutiny, is in Ayres & Foster, *supra* note 70; Sander, *supra* note 4.

72. *Grutter*, 539 U.S. at 326–28.

73. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

74. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, available at [www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html](http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html); Elie Mystal, *A Resigning Law Dean Spills the Beans on the Fleecing of Law Students*, ABOVE THE LAW, July 29, 2011, available at <http://abovethelaw.com/2011/07/a-law-dean-resigns-and-spills-the-beans-on-how-his-university-has-been-taking-advantage-of-law-students/>.

- Transparency also addresses—and resolves—the mismatch question, by transforming it from an academic debate into a simple matter of choice. If students admitted with very large preferences to a higher-ranked school learn, through disclosure, that their prospects at that school seem worse (at least in some respects) than their prospects at a lower-ranked school, they can evaluate the tradeoff for themselves. If a significant number of students begin to reject more elite schools for less-elite ones, this will cause the more elite schools to re-evaluate their practices. Moreover, simply disclosing the often-dismal facts about outcomes for students receiving large preferences will push schools to make useful reforms to their own curricula, such as improved academic support or the development of better predictors of long-term success. Better data also helps schools properly calibrate preferences, by focusing their attention on the tradeoff between preference size and student outcomes.

- *‘Need’ over zero-sum competition.* Most law school financial aid is spent to recruit very high-credential students, or to compete for minority (but affluent) applicants. Both efforts are essentially zero-sum enterprises; one school’s loss is another’s gain. Practice 3 pushes schools to devote a significant part of their financial aid towards a positive-sum effort: improving access for applicants of limited means. This helps to put financial aid in legal education on a more principled basis; as nearly all the commentators agree, it is better on moral grounds for schools to use financial aid to help those in need and increase opportunity, rather than (through merit-based aid) using aid as merely another strategy for inching up the *US News* rankings. Practice 3 also helps to guard against the possibility that law schools will cynically comply with Practice 1 by making offers of admission to students who have little chance of being able to afford to accept, in the absence of any aid. In other words, it helps to insure that schools actually devote some portion of their growing resources to foster genuine diversity.

- *Focusing on the pipeline.* Practice 4 follows Professor Kiel’s suggestion that law schools direct genuine effort toward the underlying problems that cause racial and class enrollment disparities—generally known as the “pipeline” problem. This resonates with Justice O’Connor’s holding in *Grutter* that law schools should have strategies for reducing their dependence over time on racial preferences. Practices (1) and (3) reinforce this focus on expanding the pipeline, by making it more difficult and costly for law schools to solve their “diversity” problem by the simple expedient of racial preferences. (Practice 2 also makes it harder for schools to shift the costs of preferences onto unwitting students.) Of course, these efforts may have a very small impact relative to the size of the problem. But the effort is important in itself, and the expe-

rience of schools such as the University of California suggest that pipeline initiatives can make a large difference.<sup>75</sup>

• *Moderating preferences.* Though none of the four practices mandate that schools curtail racial preferences, each of them is likely to have that effect over time. This should warm the hearts of those who are skeptical of racial preferences on a variety of moral and legal grounds, including, of course, an apparent majority of American voters and a majority of Supreme Court Justices. But that should not be in itself a reason for those who support preferences to reject this approach. These practices all go to the heart of the best motivations behind preferences—to foster mobility, inclusion, and genuine diversity—while recognizing that racial preferences must have some logical end point. The practices each push schools to be more thoughtful about their preference policies, a sort of introspection that in recent years has been sadly lacking.

*B. Consensus Approach: The Contributors and the Proposal*

The reform strategy I have outlined is intended not only to build on the general problems identified in *CALE*, but also to respond creatively to the widely varying perspectives of the symposium contributors. Is it possible to find reasonable areas of consensus that connect the values of thoughtful observers, even if they require some compromise on favored policies? That is my inquiry in this section.

Table 4 summarizes my interpretation of three key aspects in each of the ten commentaries in this issue. For the sake of brevity I have, of course, oversimplified the work, and I apologize for that. But there are some genuine benefits to a direct side-by-side comparison of the authors.

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75. In the wake of Proposition 209, the University of California adopted innovative, large-scale outreach efforts to improve the rate at which disadvantaged students could qualify for university admission. See, e.g., KARL S. PISTER, UC OFFICE OF THE PRESIDENT, UC OUTREACH: SYSTEMWIDE PERSPECTIVE AND STRATEGIC Plan (1998), available at <http://www.ucop.edu/ucophome/commserv/outreach/outpdf/outreach.pdf>. Within a few years of implementation, the number of blacks and Hispanics admitted to the UC undergraduate system exceeded the numbers achieved under the old, racial preference system. It is plausible that improved outreach played a significant role.

Table 4  
A Summary of the Commentators and Their Goals

<i>Author</i>	<i>Central message</i>	<i>Reforms endorsed</i>	<i>Consonant elements of my proposal</i>
Bowen	It is a mistake to entirely supplant a "race" discourse with a "class" discourse.	(1) Taking account of both class and race in admissions; (2) Expanding need-based scholarships; (3) Better data on demography of law school admissions	Substantive features are quite similar; like Bowen, I favor taking wealth into account in assessing SES; not clear how "large" a preference Bowen favors for particular groups.
Holley-Walker	Law schools should foster SES diversity, but not at the expense of racial diversity.	(1) Taking account of both class and race in admissions; (2) Better data and research on what policies have biggest effect on both the class diversity of entering classes, and on retention.	H-W might well have concerns about any modification of racial preferences, but the spirit of my proposals (blending SES and racial preferences, and increasing transparency and evaluation) harmonize well with her normative suggestions.
Kahlenberg	We should remedy the neglect of "class" in admissions policies; a good deal of other research is consonant with Sander's basic findings.	(1) Moving towards "class" rather than "race" preferences; (2) Greatly improving financial support for low-SES students.	Kahlenberg might view my proposal as not going far enough, but he is very likely to consider each component as a step in the right direction.
Kiel	Debates about law school admissions policies overlook the fundamental importance of the pipeline; we must seek long-term improvement in the quantity and quality of both low-SES and URM applicants.	Law schools should (1) include themes of fixing the pipeline in institutional thinking and rhetoric; (2) foster research and focused interventions related to the pipeline problem; (3) modify admissions systems to foster SES diversity.	Very close consonance between Kiel's values and those animating my reform proposal; as discussed in accompanying text, my reforms would also push schools towards more serious investment in the pipeline issue.
Lempert	Sander interestingly highlights the lack of SES diversity in law schools, but there are many underlying challenges in properly understanding "class" that make facile reforms unwise.	Further research is desirable, but for now we know too little to intelligently improve upon our current practices.	Lempert is perhaps, among all the commentators, most comfortable with the status quo.

<i>Author</i>	<i>Central message</i>	<i>Reforms endorsed</i>	<i>Consonant elements of my proposal</i>
Malamud	Sander helpfully nudges scholarship and policy towards greater awareness of SES issues, but his critiques of racial preferences are counterproductive.	Elite law schools should  (1) increase at the margin low-SES recruitment and admissions;  (2) reform financial aid policies to improve focus on “need” and low-to-middle SES applicants.	I think my proposal reflects values Malamud supports, but she clearly favors a much more incremental approach.
On-wauachi-Willig & Fricke	While “class” diversity in law school is desirable, it is not so easily achieved as Sander suggests and is not a substitute for racial diversity.	Law school admissions should take greater account of SES diversity, and strive to eliminate subtle sources of bias against low-SES applicants.	The type of SES preferences suggested in my proposal fit well with the nuances O-W & F care about, though it’s doubtful they’d support any change in racial preferences.
Reeves	Comparisons of SES and racial preferences or policies are intrinsically incoherent.	Greater SES diversity is good, but it should emphasize the intersections race and class.	The use of “intersectionality” in my construction of SES preferences should appeal to Reeves.
Wald	Low-SES students are as vulnerable to stigma and mismatch as are URM students, and new initiatives should be undertaken with eyes wide open.	Law schools should modify admissions policies to increase SES diversity, and should rigorously evaluate preference programs, and implement more aggressive and imaginative academic support programs, to ensure that both low-SES and URM admits succeed.	Wald’s proposals mesh very closely with my own. In particular, we both emphasize the responsibility of law schools for student success (which in my view also requires schools to be honest about the risks entailed with preferences).
Weedon	Race-related disadvantage has an increasingly economic cast; shifting admissions policies towards an SES focus thus has much to commend it.	Implicitly, Weedon favors at least a partial shift from race-based admissions preferences to SES-based preferences.	Weedon’s normative prescription seems to fit very well with my recommendations.

I don’t know how many of the commentators would endorse the proposals I’ve advanced, but I do know that the four practices I’ve outlined reflect a genuine effort to grapple with the problems in our current preference system while listening to the values expressed by the contributing authors. Professors Weedon, Wald, Kiel, and Mr. Kahlenberg are probably those most dissatisfied with the current system; they share my basic assumption that current practices are fundamentally flawed, and most of the reforms I suggest are more or less akin to the types of reforms they advance, too. Professors Bowen, Holley-Walker, and On-wauachi-Willig, and Ms. Reeves and Ms. Fricke, all acknowledge that the lack of socioeconomic diversity is a problem, and they support a variety of strategies to try and increase it. For them, a common concern is that “class” preferences supplant racial ones; each of them emphasizes,

in one way or another, that race creates special barriers in society, and that racial diversity has a uniquely important role in legal education. I think they tend to overestimate this point (as I have elaborated in Part I) and underestimate the costs of racial preferences (as I will discuss in Part IV), but I nonetheless have some sympathy for their argument. Moreover, I think the values they emphasize can be reflected in reform proposals that give schools considerable leeway in using racial preferences, while structuring the implementation in a way that erodes the most damaging practices. I also believe that I recognize the intersections of class and race, and, as Practice 1 emphasizes, it is important to design socio-economic preferences in ways that capture the special SES disadvantages experienced by many nonwhites (particularly blacks).

Many of the symposium contributors believe that better information and thoughtful research are necessary and important; both my transparency proposal (Practice 2) and the “pipeline” initiative (Practice 4, borrowed directly from Professor Kiel) foster just this sort of information and purposeful investigation. Section C of this Part, *infra*, discusses what we know about the pipeline in more detail.

For many of the symposium contributors, and no doubt for many readers, any disquiet about the lack of SES diversity (or the other problems I’ve suggested exist in the current system) is overshadowed by a general contentment with things as they are, and a belief that outside forces are unlikely to preempt the discretion of law schools to make reforms when and if they choose. How one feels about my proposal, in other words, may depend significantly on how much outside pressure there is to change. Faced with a Prop 209-like ballot initiative that seeks to ban racial preferences altogether, or with a Supreme Court poised to apply the philosophy of *Seattle School District* or *Adarand* to higher education preferences, my proposal would probably be appealing to many who otherwise would prefer the status quo.

I don’t think law schools can afford to be complacent. The rising cost of law school and the weakness of the legal market create pressure for reform. Evidence of the mismatch effect continues to mount (see Part IV). Because of this, the legitimacy of a preference system that is entirely focused on race, and creates barriers to low-SES students, will continue to erode. A broader conversation about reform is not only the right thing to do; it is the smart thing to do.

### *C. Is Class Diversity Feasible?*

Some of the commentators suggest that class-based preferences are impractical because there are too few low-SES students available for law schools to admit. As I noted in *CALE*, it is certainly true that pipeline issues play a large role in the dearth of socioeconomic diversity in legal education. But if law schools shift from being part of the problem to being part of the solution, there is little danger of shortages, even if class-

based preferences are far smaller (as they should be) than those currently used in race-based affirmative action.

It is helpful to think of the “pipeline” problem as having five distinct aspects:

a) The narrowing effect of social inequality in the formative years—that is, the ways that poor primary schooling, parenting practices, and a myriad of other social factors shrink the number of high school students with the academic preparation necessary to succeed at challenging colleges and graduate schools.

b) The effect of aspirations—the degree to which social conditions cause more privileged students to want, and therefore to pursue, more privileged occupations, while less privileged students settle for jobs that seem more “realistic” and attainable, given the hurdles in their path.

c) The effect of colleges—the degree to which undergraduate institutions effectively recruit the available talent and insure that baccalaureate programs at least do not have the effect of further narrowing the pipeline;

d) The effect of law school policy—the degree to which law school admissions and outreach practices further narrow or expand the pipeline.

e) The effect of financial assistance—in economic terms, how “elastic” is the supply of low-SES students of high promise, given greater or lesser degrees of financial assistance?

In *CALE*, I provided some evidence on points (d) and (e). Law school admission practices tend to undercut rather than promote SES diversity, and current law school financial aid policies largely ignore economic need. In this section, I will provide some evidence on (a), (b) and (c).

a) Academic preparation across class lines.

Academic preparation among high school students, as measured by various types of test scores, is strongly correlated with SES. Does the underrepresentation of low-SES students in law school simply reflect the scarcity of academically strong candidates in their ranks?

The National Educational Longitudinal Study (NELS), which I have drawn upon for data earlier in this paper and in *CALE*, is a good source for considering this question.<sup>76</sup> It started in 1988 with a large national sample of eighth-graders and tracked them over the next twelve years. Participants took a battery of tests in their high school years. Table 5 summarizes the relevant findings:

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76. NELS is discussed in *CALE*'s Appendix 2; additional documentation is available here: <http://nces.ed.gov/surveys/nels88/>.



Table 5  
High-Performing Students in Two Socioeconomic Groups

Testing threshold:	Socioeconomic group	
	Bottom half	Top tenth
Proportion of students scoring at the 94th percentile plus	1.5%	22%
Number of students scoring at the 94th percentile plus	~30,000	~88,000
Proportion of students scoring at the 80th percentile plus	8.5%	54%
Number of students scoring at the 80th percentile plus	~170,000	~216,000

Source: Author's calculations from NELS. The "number" estimates assume an annual cohort of four million students, roughly the recent annual average of 8<sup>th</sup> graders.

These numbers should be viewed as rough estimates, but they make the point well enough. Academic preparation certainly does explain part of the gap in SES representation in law school; low-SES students are far less likely to have top scores than very high-SES students. But by the same token, there are numerically a lot of high-performing, low-SES students.

There is every reason to think that the low-SES students who score in high school at the 94<sup>th</sup> percentile nationally, or above, would develop into college students fully qualified to enter the most elite law schools; certainly those schools currently admit many students who, even in their twenties, do not have credentials at the 94<sup>th</sup> percentile of a national pool. For every three very-high-SES NELS students at the 94<sup>th</sup> percentile, there is one low-SES student with comparable scores. Yet at the elite law schools, the ratio of very-high-SES students to low-SES students is 11:1. In other words, even if we assume that attending college would not narrow the academic preparation gap of high- and low-SES students, and even if we assumed that no preferences were used by law schools to admit low-SES students, the pool of raw talent among low-SES students still overshadows their presence in elite law schools.

Similarly, it is a conservative estimate to suggest that high school students who score in the 80<sup>th</sup> percentile are on the path to being academically competitive for a place in the broader spectrum of law schools. In relative terms, low-SES students are still underrepresented compared to those from the SES top tenth; but the relative gap is narrower, and the absolute gap has almost disappeared (the absolute ratio is about 6:5). Yet in the actual law school population (see Table 1 in *CALE*), the ratio of very-high-SES students to low-SES students is well over 2:1. In other words, a very conservative approach to controlling for academic prepara-

tion still suggests dramatic underrepresentation of very able but low-SES students.

b) Aspirations: Do low-SES students want to go to law school?

Dr. Lempert suggests that the pipeline of low-SES students is quite slim, in part because low-SES students do not aspire to go to law school in anything like the same numbers as high-SES students.<sup>77</sup> As evidence, he cites the same data source (the Warkov study) that I used in *CALE* to examine law school SES diversity in the 1960s. Warkov's research is very valuable in studying historical trends (as I use it), but it is hardly a reliable source for making claims about contemporary conditions. Moreover, the specific data and tables Lempert relies on are not at all designed to answer the question of interest. The Warkov data shows that among freshmen college students in the late 1950s, those who reported that they intended to pursue a graduate degree in law had more elite backgrounds than those who expressed no such goal. The data do not tell us, even for this distant era, answers to more relevant questions: among the most talented young people, how many would aspire to become lawyers (or other professionals) if they could see a realistic path to the goal? What might be the pattern of aspirations if we could set aside financial and admissions barriers, or counsel them on their chances of admission to law school given their current academic level of achievement?

Lempert suggests that 'alas, better data does not exist,' but in this he is surely mistaken. An abundance of surveys, such as the National Longitudinal Survey of Youth and the National Educational Longitudinal Survey, ask far more recent cohorts of high school students and college freshmen about their career aspirations, and have much richer background data on respondents than one can obtain from the Warkov tables. I consulted one source, a College Board dataset on SAT takers, that I happen to be using for another project, and summarize the results of my inquiry here. High school students who take the SAT complete a questionnaire in their initial application which asks them, among many other things, about their highest degree aspiration. These answers are anonymized and combined with the results of their SAT I and SAT II examinations into large databases; researchers can request extracts of these data. My research team obtained a large extract originally created for the economists David Card and Alan Krueger, which Professor Card generously (and with College Board's permission) shared with us.<sup>78</sup>

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77. Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U.L. REV. 683, 702 (2011).

78. High school students who take the SAT complete a questionnaire in their initial application to the College Board which asks them, among many other things, about their highest degree aspiration. These answers are anonymized and combined with the results of their SAT I and SAT II examinations into large databases; researchers can request extracts of these data. My research team

Table 6 presents data on the degree aspirations of different pools of high school students taking the SAT. The SES quintiles used here are constructed by methods similar to those I applied in *CALE* to the AJD data, except that in the College Board data, we have information on *family income* rather than parents' occupations (both data sets have information on the highest degree obtained by mother and father).

Table 6  
Degree aspirations of low- and high-SES high school students

Degree Aspiration	Bottom SES quintile		Top SES quintile	
	All SAT-takers	SAT-takers w/ math SAT >650	All SAT-takers	SAT-takers w/ math SAT >650
Doctoral	18%	35%	26%	42%
Master's	27%	33%	34%	32%
Bachelor's	27%	14%	21%	9%
Lower/other	7%	2%	2%	0%
Undecided	21%	16%	17%	17%

Source: College Board Sample of High School Juniors Taking the SAT, with Questionnaire and Score Data, 1994-2001.

The data show a remarkable similarity in the aspirations of high- and low-SES students, especially among those with high test scores—that is, those who would meet the “academic preparation” test laid out in the previous section. Table 6 does not support Lempert's intuition that low-SES students have dramatically lower aspirations than high-SES students.

### c) The Role of Colleges.

Every scholar who has closely examined the question has concluded that low-SES students are extremely underrepresented at elite schools, whether those schools are public or private. Young people growing up in the top SES quartile are some twenty times as likely to attend such a school as are their bottom SES quartile counterparts. The proportion of enrolled students qualifying for Pell Grants hovers around 10-12% at nearly all the elite undergraduate colleges in the nation.<sup>79</sup>

The notion that this simply reflects an inadequate supply of strong low-SES students is belied by the record of the University of California, where (as noted in *CALE*) the two most elite undergraduate schools have Pell Grant rates of 32% (at Berkeley) and 33% (at UCLA).<sup>80</sup> The obstacles to SES diversity at elite colleges are similar to the obstacles at law

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obtained a large extract originally created for the economists David Card and Alan Krueger, which Professor Card generously (and with College Board's permission) shared with us.

79. Pell Grants are federal scholarships available, roughly speaking, to students in the bottom half of the income distribution. They are discussed in more detail at *CALE*, *supra* note 1, at 641 n.29.

80. See *CALE*, *supra* note 1, at notes 28 & 30.

schools: limited outreach, a focus on racial diversity to the neglect of SES diversity, and inadequate financial aid—though on all three counts I believe the record at many elite schools is now far better than the record at nearly all law schools.

One way of getting a sense of college outreach practices is to measure the likelihood that the most able high school students in different socioeconomic and racial groups will send their SAT scores to elite institutions. The College Board data allows us to do this, and the results of one analysis are shown in Table 7. Note that this data describes the score-sending behavior of students with aggregate SAT scores (math and verbal combined) of 1200 or higher—roughly the top tenth of SAT takers, and a group that is plausibly competitive for even the top schools.

Table 7  
Probability of Students Sending SAT Scores to a Very Elite College Among 1999 SAT-takers Scoring Above 1200

SES quintile	Asians	Blacks	Hispanics	Whites
Lowest	34%	4%	8%	14%
2nd	37%	8%	16%	14%
3rd	41%	15%	22%	18%
4th	47%	25%	30%	22%
Highest	61%	48%	45%	34%

Source: Author's calculations with College Board cross-section database. Colleges include the Ivy League, Duke, and Stanford.

The patterns in Table 7 are telling. Socioeconomic status plays an enormous role in determining which students apply to elite schools. Large numbers of very able but low-SES high school students are never admitted to elite schools because they are never make it into the applicant pool. The class disparities are more intense for Hispanics and most intense for African-Americans. These numbers, at least, suggest that a greater focus on SES in outreach and “pipeline” efforts would disproportionately benefit low-income underrepresented minorities. Recall our earlier finding that, even after controlling for test scores, low-SES high school graduates are 80% less likely to attend college than high-SES graduates, while blacks are 30% more likely to attend college than similar whites. Table 7 seems to be telling much the same story, in a slightly different context: high-SES blacks are more likely to be in the applicant pool than comparable whites, while low-SES persons of all races are largely missing.

What does this review tell us about the relative importance of the five factors (identified at the beginning of this section) in narrowing the pipeline of opportunity for low-SES youths? There is not much evidence that low aspirations are the problem. The size of the “strongly academically prepared” pool is obviously a factor, but a huge gap remains after adjusting for the size of the talent pool. Inadequate outreach by higher

education appears to be a very large factor, and, as we saw in *CALE*, law school admissions and financial aid practices are large factors as well. Although this paper does not attempt a precise forecast of what would be necessary to achieve particular low-and-moderate SES enrollment goals, I think this discussion makes clear that simply overhauling aid and outreach policies to address “class” disparities would, by itself, probably make a substantial difference. Pipeline initiatives reaching high school students, and very modest preferences (equivalent to two or three LSAT points) would make an even larger difference. The bottom line: this is a problem where college and professional school policies matter, and they matter a lot.

### PART III: RESPONSES TO SPECIFIC CRITIQUES

#### A. Methodological Issues

In general, the commentators in this issue agree that *CALE* does a fair job of capturing the SES distribution of law students and young lawyers. In particular, there is a good deal of consensus that the data captures a genuine lack of SES diversity at law schools, which increases with the eliteness of the law school.

There are some dissonant notes, and in this section I will address them.

Dr. Lempert points out that my primary data source, After the JD (AJD), is based on a sample of young lawyers—that is, people who have actually graduated and passed the bar—rather than law students.<sup>81</sup> If low-SES students are more likely to drop out of law school or fail the bar, then lawyers as a group would be more elite than law students, and my measures would understate the level of SES diversity within law schools.<sup>82</sup>

It is a fair point, but one that’s easily addressed. The Bar Passage Study (BPS) from the 1990s contains an enormous sample of first-year law students,<sup>83</sup> and thus avoids the weakness Lempert identifies in the AJD. I did not rely primarily on the BPS in constructing my SES indices because the BPS is somewhat older data (it tracks a cohort six years older than the median AJD respondent) and, more importantly, because it has much less detailed data on parental occupation. But the data on parental education was collected in very similar fashion by the BPS and

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81. Lempert, *supra* note 77, at 694–95.

82. *Id.*

83. The Bar Passage Study (“BPS”) was a longitudinal study of law students conducted by the Law School Admissions Council in the 1990s. It tracked over twenty-seven thousand students from matriculation to law school in 1991 through their efforts to pass the bar in the mid-1990s. All participants completed a detailed “entering student questionnaire”, from which this socioeconomic data is drawn. The survey covered roughly eighty percent of all law students at roughly ninety percent of all law schools, providing an excellent sample for the purposes discussed here. It is certainly not subject to any of the selection bias problems identified by Dr. Lempert.

AJD, and thus can provide an ideal check on whether the AJD data gives a misleading picture. Table 8 summarizes the comparison:

Table 8  
Distribution of Parental Education AJD  
National Sample Compared to BPS Entering Law Students

<i>Top Educational Level Completed</i>	<i>AJD Mothers</i>	<i>BPS Mothers</i>	<i>AJD Fathers</i>	<i>BPS Fathers</i>
Grade school	2.5%	2.5%	3.3%	2.9%
Some high school	3.2%	3.3%	3.4%	3.5%
High school grad	22.1%	22.3%	14.9%	12.8%
Trade school	4.7%	5.6%	3.9%	3.7%
Associate degree	16.6%	19.7%	11.8%	10.1%
Bachelor's deg	24.6%	21.7%	18.8%	18.7%
Some grad school	4.3%	6.2%	4.1%	5.6%
Grad/prof degree	22.1%	19.4%	39.9%	40.0%

Source: Author's calculations based on AJD and BPS datasets

While the AJD and BPS distributions are not identical, they are extraordinarily similar. AJD mothers are slightly more likely to have finished college than their BPS counterparts,<sup>84</sup> but AJD fathers are slightly less likely to have finished college. There is no evidence here that limitations in the AJD are leading us to overstate the SES eliteness of law students.

Dr. Lempert also wonders whether missing observations in the AJD bias the data: "I am concerned that his SES index is less reliable when it is based on two measures rather than four."<sup>85</sup> This too is a reasonable concern; in particular, one might wonder whether respondents who only report two measures (and in some cases come from single-parent families) have much lower SES measures than those who report four measures. Table 9 shows the median SES index computed from respondents, depending on how many of the four SES questions they answered. (Note that the relatively small number of respondents who provided only one response were excluded from my analyses in *CALE*, from the same concern Lempert identifies.) While it is likely true that indices based on fewer measures are somewhat less reliable, there's no evidence in Table 9 that this defect biases the general SES analysis upwards or downwards.

84. And the small gap is plausibly due to the slightly older cohort.

85. Lempert, *supra* note 77, at 690-91.

Table 9  
Median “SES Index” by Number of SES Questions Answered in AJD

<i>Number of answers (out of possible 4)</i>	<i>Median SES Index</i>
1	83
2	80
3	75.7
4	79.5

Source: Author’s calculations from AJD data

Onwachi-Willig and Fricke (O-W&F) are perhaps, among the contributors, most skeptical of my SES analysis. They raise an interesting point: is it possible to really compare the socioeconomic status of different racial groups, since race is part of one’s SES?<sup>86</sup> Analytically, the answer is “yes”: the whole point of social analysis is to break down social phenomenon into different components and try to understand how they interact. (One could similarly argue that “income” and “education” are inseparable—certainly how one uses one’s income depends in part on one’s level and type of education. But that doesn’t mean one can’t usefully examine each apart from the other, and study how they interact.) In another sense, O-W&F have a point: as I have discussed a number of times, the SES measures in *CALE* tend to overstate black SES, because blacks at a given education or income level typically have less wealth and live in poorer neighborhoods than similar whites. (But these limitations can be and are overcome in well-executed class-based admissions systems.)

The most important flaw in O-W&F’s argument, however, is that the effect of race on one’s social condition clearly varies with one’s other socioeconomic characteristics. If one is in the bottom two quintiles of SES, one’s circumstances are generally far less dire if one is white than if one is black. The interaction of “race” and “low SES” amplifies many types of problems for blacks—and for Hispanics to a large degree. In contrast, as I discuss in Part I-C, the effect of race on blacks in the top quintile of SES is much more ambiguous. High-SES blacks generally have good access to mainstream opportunities and networks, and have the added advantage of race-specific networks. They absorb a very disproportionate share of all the race-related preferences extended in education, employment, and other spheres; controlling for human capital characteristics, they tend to out-earn other races, especially early in their careers. This is exactly why it *is* important to compare “race” and “class” effects.

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86. Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s in a Definition?*, 88 DENV. U. L. REV. 807, 808–09 (2011).

Onwachi-Willig and Fricke also argue that my SES analysis is deeply flawed because of improper classifications and analytic choices. They say:

In deciding where to insert ‘meaningful breaks’, as Malamud would describe them, Professor Sander has created a misleadingly heavily weighted high SES scheme. For example, a female registered nurse is accorded an occupational score of 75 out of 100, which places her in the high SES quartile. Such a placement does not seem to accord with what the average person would consider high SES . . . by creating such a broad category of high SES persons, Professor Sander conflates the privilege of high SES persons by race, considering that Blacks heavily populate the occupations at the bottom end of that quartile. Indeed, Sander’s misleading SES scheme has far-reaching implications all throughout this analysis because we cannot be certain if any of his groupings are accurate and meaningful and thus cannot truly rely on any comparisons that he makes between the various racial and class groups.<sup>87</sup>

There are three claims here. First, is the “75” SES score assigned to registered nurses too high, and thus a sign that the SES coding scheme is unreliable? No, it is not. Registered nurses<sup>88</sup> complete, on average, several years of college-level training; many consider an “R.N.” degree to be roughly comparable to a bachelor’s, and many R.N.s independently hold bachelor degrees. More concretely, registered nurses have high earnings: in 2009, the median female registered nurse had earnings of \$60,000, putting her at the 80<sup>th</sup> percentile of all women earners.<sup>89</sup> There is no evidence that the “75” score is inappropriate. Second, are these SES scores a “Sander scheme”? No, they are not. As I explain in detail in the *CALE* appendices, my SES methodologies are based on the most authoritative indices developed by social science scholars—primarily sociologists in England and the United States.<sup>90</sup> These indices are basic tools of the trade for scholars studying social stratification. Third, are the results in *CALE* deceptively influenced by a strategic choice of “break points”? No, they are not. O-W&F’s argument implies that, for example, a particularly high number of black law students are swept into the “75<sup>th</sup> to 90<sup>th</sup> percentile” range because they have SES values at the bottom end of this range. In fact, the median law student in all the cells of Tables 1 and 8 of *CALE* has an SES score that is higher than the midpoint of the cell. Consider, for example, the third data cell in the fourth data column of *CALE*’s Table 8 which reports that among black law students at the top

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87. *Id.* at 812–13.

88. Note that there are several occupational tiers of nurses; vocational nurses are assigned lower scores for occupational prestige than registered nurses, while nurse practitioners are assigned somewhat higher scores.

89. Author’s analysis of data contained in: U.S. BUREAU OF THE CENSUS, AMERICAN COMMUNITY SURVEY (2009).

90. See *CALE*, *supra* note 1, at 670 app.1.



two tiers of law schools, 23% have SES scores in the 75<sup>th</sup> to 90<sup>th</sup> percentile range, and 43% have SES scores in the 90<sup>th</sup> to 99<sup>th</sup> range.<sup>91</sup> The median score of the blacks in the first group is at the 84<sup>th</sup> percentile, and the median score of the blacks in the second group is at the 96<sup>th</sup> percentile.<sup>92</sup> In other words, my groupings are *understating* the “average” actual eliteness of these students. Indeed, because of the top-skewness of the law student SES distribution, *any* broad grouping will understate the actual eliteness of these students.

### B. On the Visibility of Class

In CALE’s comparison of race and class preferences, I wrote:

Moreover, [class-based preferences] are “invisible”: once students have matriculated to a law school, no one can readily tell which of the others have received a preference. Both the *small size* and the invisibility of these preferences are advantages. Students receiving such preferences are much less likely to be stigmatized and, indeed, may not even be aware that they have received a preference. They are also likely to perform scholastically at levels close to the middle of the class, a good thing both for them and for the academic atmosphere of the school. There is much less likely to be group self-segregation or the nourishment of group resentment, which sometimes happens with strictly race-based preferences.<sup>93</sup>

Professor Wald builds his comment largely around this passage. He argues that class identity is not only palpable, but that “socioeconomic preferences are going to be as visible as race preferences”; that “socioeconomic preferences will impose similar, if not higher costs” on their recipients; and that the “social and cultural capital” of students (which Wald thinks are closely associated with their SES) “have a considerable impact” on the careers of these students.

Some of Wald’s language makes me bristle a bit. I thought it was clear from my essay (see the quoted passage) that I meant “invisibility” in a relative, not an absolute sense. Certainly, if I thought class was a completely invisible trait, I should not place so much importance on SES diversity in the first place. And much of the lessened visibility I associate with the use of SES preferences comes from their smaller size; Wald seems to assume that I propose simply replacing existing racial preferences with similar SES preferences. I do not.<sup>94</sup> Still, Wald was not the

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91. *Id.* at 651 tbl.8.

92. Calculations by the author from the CALE data; original data available from the author.

93. CALE, *supra* note 1, at 665–66 (emphasis added).

94. As I have written many times, and repeat again in CALE (see page 666), the mismatch effect is not caused by *racial* preferences but by *large* preferences. If law schools instituted SES preferences on the scale currently used for blacks and American Indians, this would have the same counterproductive effects on low-SES students that are currently experienced by those racial minorities. But I think it quite unlikely that any school would ever extend widespread SES preferences on the scale of many current racial preferences. This is, in large part, because one can achieve substan-

only commentator to interpret my observation about “invisibility” as a strong claim, so I am grateful to him for highlighting the issue and giving me an opportunity to clarify my views. More importantly, Wald is raising intrinsically interesting issues.

On most of these matters, I completely agree with Wald. We agree that any preference system needs to vigilantly monitor the academic outcomes of beneficiaries, and that admissions systems should be modified, or effective academic support instituted (and itself monitored for results) if preferenced students are performing poorly. We also agree that financial support is vital, and perhaps special orientation programs are important to contribute to the success of students who will have few role models from their own past to help them decipher the culture of law school and the legal profession.

I do not believe, as Wald fears I do, that students and faculty will be unaware of the greater class diversity in the student body, or that all or even most low-SES students will seamlessly “pass” as elite and privileged. Like Wald, I think those would be both unlikely and undesirable outcomes. As I point out in Part I, low-SES students are much more likely to bring different attitudes and viewpoints to law school than their affluent peers. These different views will come out in class and hallway discussions, as will the greater range of life experiences and hardships in the more diverse student body. This is all very much to the good.

Thus, in our assessment of the failings of the current affirmative action system, and in our values and goals, Wald and I seem to be as one. Our disagreements mainly lie in two matters that are not values but rather empirical judgments: first, just how “visible” SES status is at law school, and second, how much low-SES students are handicapped *simply by virtue of their background* in their legal careers. Wald provides little empirical evidence on these points, and I think the available evidence supports contrary views.

Careful surveys that ask individuals to place themselves in the SES hierarchy find a relatively low correlation between objectively-measured SES and self-identified SES.<sup>95</sup> That is, even though SES has very powerful effects on many life outcomes in the United States, Americans are not terribly class-conscious. This carries over into law school. Low-SES

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tial SES diversity with small preferences (see the analysis in Part I, as well as the UCLA law school experiment, where the school achieved very high SES diversity with preferences that were, on average, one-fifth the size of its earlier racial preferences for blacks and American Indians. The smaller preferences, as I tried to make clear in *CALE*, are an important contributor to the lower visibility of SES preference recipients.

95. For example, the General Social Survey asks respondents questions (e.g., about education, occupation and income) that allow us to assign them an SES score. It also asks them a couple of questions about how they would describe their own “class” (e.g., “working,” “middle,” “upper-middle”). If we rank-order these self-assigned classes, they correlate poorly with the objective measure of SES (correlations are generally under .25). For the source data, see *supra* note 59.

students do not perceive higher levels of student tension than other students. I doubt that any law professor or student can pick out low-SES students with anything approaching the accuracy with which they can make racial classifications. When UCLA was at the zenith of its SES diversity efforts, there were no visible signs of class hostility, and study groups appeared to be far more integrated across class lines than they had ever been across racial lines (though these last observations are based on very casual empiricism). Moreover, UCLA's historically highest bar passage rate was achieved by its most socioeconomically diverse class—the class of 2000 that I wrote about in 1998.<sup>96</sup> All of these things imply that “stigma” and segregation is not likely to be as severe with a system of modest class preferences as it is with current, large racial preferences.

The question of how SES affects the careers of lawyers is fascinating and important. As it happens, my colleague Jane Yakowitz and I recently completed a major study of how well law school eliteness, law school grades, and social class predict success as a lawyer.<sup>97</sup> We found that law school performance (as measured by grades) has the largest impact on outcomes, and that its impact has grown over time. Law school eliteness has a somewhat less important, and diminishing effect. Social class was undeniably quite important at one point—certainly as late as the 1950s<sup>98</sup>—but its significance has declined over time and is undetectable in contemporary datasets.<sup>99</sup> This is completely consistent with the anecdotal evidence from practicing lawyers. Social stratification within the legal profession was once endemic, but attitudes and practices with respect to race, religion, and class have all progressed remarkably over the past forty years. Because of these changed attitudes, low-SES lawyers are no longer handicapped, to any measureable degree, in pursuing their careers, including careers at elite law firms. Ironically, the barriers to class mobility for would-be lawyers are not in the marketplace, but in higher education.

### *C. Knocking Down a Few Over-the-Top Claims*

In most of this reply article, I have responded to the more critical essays indirectly, by elaborating on the available research, suggesting new ways of looking at old debates, and emphasizing areas of common ground. In some cases, however, fundamental views of particular critics are based on mistaken evidence, and it would be counterproductive to let those claims pass without rebuttal. This section dissects some of those claims.

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96. The UCLA class of 2000 had a bar passage rate of 90% on the July 2000 California bar exam. Its bar passage rate on the prior three July exams—the last three years of conventional race-based affirmative action—had averaged under 82%.

97. Sander & Yakowitz, *supra* note 45.

98. *Id.* at 7.

99. *Id.* at tbl.11 and accompanying text.

For example, in explaining his skepticism about class-based admissions preferences, Richard Lempert gives a dismissive account of the UCLA Law School experiment in using SES preferences after Proposition 209 went into effect in 1997:

[T]he students enrolled 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....only five black students enrolled ...and Hispanic enrollment was also way down. Because of these outcomes the faculty decided to discontinue the experiment.<sup>100</sup>

Lempert says he got these facts from an oral presentation he heard some years ago. Probably his anonymous, oral source was misinformed; possibly Lempert's memory is faulty; what we know for sure is that his facts are wrong. Out of 269 applicants admitted to UCLA Law School in 1997 with SES preferences, only fifty, or 19%, were Asian.<sup>101</sup> Over the prior seven admissions cycles at UCLA—before the SES program began—Asians had made up an average of 15.5% of admitted students.<sup>102</sup> Asians thus did only *slightly* better under the SES system than under conventional admissions; it is wildly inaccurate to suggest that Asian-Americans were the “overwhelming” beneficiaries of the program. Hispanics made up 17% of those admitted with SES preferences; they accounted for 9.8% of overall admissions in the prior seven cycles.<sup>103</sup> Blacks made up 5.2% of those admitted with SES preferences. UCLA's black and Hispanic enrollment numbers were hurt some because the SES preferences we used were smaller than our traditional racial preferences; thus our black admittees, in particular, had competing offers from more elite schools.<sup>104</sup> Nonetheless, UCLA's black enrollment was ten students—not five, as Lempert claims. Furthermore, black and Hispanic enrollment combined made up 12.8% of the first-year class<sup>105</sup>—a remarkable achievement in the first year of a regime that used *no* racial preferences. The faculty did not “abandon” the SES experiment after one year; it shifted instead to a system of using subjective rather than objec-

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100. Lempert, *supra* note 77, at 19–20.

101. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 496–97 (1997).

102. *Id.*

103. *Id.* Average enrollments of minorities during the six years before Prop 209 went into effect were 9.7% black, 14.1% Hispanic, and 16.7% Asian.

104. This point is elaborated in Sander, *supra* note 101, at 492.

105. *Id.* The enrollment figures can be independently verified in a number of sources, such as the admissions statistics compiled by the University of California Office of the President (copy on file with the author).

tive evaluations of socioeconomic disadvantage,<sup>106</sup> which (as some of us warned) did lead to significant declines in minority enrollment.

Deirdra Bowen makes some inaccurate claims about law school racial preferences and black enrollment. She claims, without any direct evidence, that “it is really only in [the] top ten law schools that one finds the most aggressive use of affirmative action.”<sup>107</sup> This is not true; as I showed in *Systemic Analysis*, very large racial preferences are used in every tier of American law schools except among the “historically minority” schools.<sup>108</sup> Indeed, the very top law schools tend to have more black and Hispanic students with small preferences because these schools, unlike all others, do not have their top minority candidates suctioned up by more elite schools.<sup>109</sup>

Bowen also claims that black and Mexican-American enrollments in law schools have been eroding away over the past fifteen years.<sup>110</sup> She does have a source for this claim: Conrad Johnson, a law professor at Columbia who conducted a study in collaboration with the Society of American Law Teachers (SALT).<sup>111</sup> Unfortunately, Professor Johnson’s study was bogus: he made a variety of research errors that invalidated nearly all of his results. The Law School Admissions Council issued a statement disclaiming Johnson’s results,<sup>112</sup> and even SALT backed away from the study. In point of fact, black law school enrollment rose some from 1992-94 to 2006-08, and Hispanic enrollments (of which Mexican-Americans make up the largest share) jumped a dramatic 38%. It is equally untrue that black law students are rejected from law schools at “double” the white rate; because of racial preferences, blacks are many

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106. Under the objective system, UCLA measured four “household” and three “neighborhood” characteristics of each applicant, and used an algorithm to assess overall socioeconomic disadvantage. Under the subjective system (which, in my judgment, was less effective), admissions officers read essays and looked at each individual’s reported statistics, and developed an intuitive judgment about socioeconomic disadvantage.

107. Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751, 768 (2011).

108. *Systemic Analysis*, *supra* note 40, at 416. Using the Bar Passage Study data, I calculated the black-white gap as measured by a standard academic index; the gap was 170 points among the most elite schools; in the next four tiers, the gap was, respectively, 174 points, 202 points, 165 points, and 172 points. Only in the sixth tier, of historically minority schools, was the gap significantly smaller.

109. *See id.* at 417.

110. Bowen, *supra* note 107, at 769–70.

111. *See id.*

112. *See* Statement from Stephen T. Schreiber, Exec, Vice President, Law School Admissions Council (Jan. 14, 2010) (on file with author) *available at* <http://www.saltlaw.org/userfiles>. Unfortunately, Johnson’s inaccurate findings got wide play in a January issue of the *New York Times*. *See* Tamar Levin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 6, 2010, *available at* <http://www.nytimes.com/2010/01/07/education/07law.html>. When I wrote to Tamar Lewin, the author of the *Times* article, pointing out the inaccuracies, she expressed “hope” that the *Times* “will do a better job” next time. No published correction was forthcoming. Email from Tamar Lewin, *New York Times* Correspondent, to the author (February 2, 2010) (on file with author).

times more likely to be admitted at nearly every American law school than are whites with comparable credentials.<sup>113</sup>

Near the conclusion of *CALE*, I write “In the age of Obama, there is abundant evidence that upper-middle-class minorities have made dramatic gains over the past fifty years, and experience genuine access to mainstream American institutions. There are still significant problems for these groups . . . but in most ways the landscape has been transformed since 1960.”<sup>114</sup> In a confusing passage, Arin Reeves misquotes me and implies that I believe that Barack Obama’s election, by itself, demonstrates that full racial equality has been achieved in America. In fact, I advance neither the premise nor the conclusion Reeves suggests. Like Eugene Robinson and Ellis Cose, I see President Obama’s election as a symbol and metaphor of black progress, but not, by itself, a fact upon which any particular racial policy should be built. The story of how racial disparities have evolved, and what this evolution implies for law school admissions policies, is complex, and much of *CALE* and this essay aim to provide a coherent version of this story.

Reeves makes a related point that requires comment. She suggests that Franklin Roosevelt’s election to the presidency in 1932 said as much about public attitudes towards disability as Barack Obama’s election in

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113. See *Systemic Analysis*, *supra* note 40, at 409; Jane Yakowitz & Richard H. Sander, *Lifting the Veil on Law School Admissions*, (unpublished manuscript) (on file with author). Much of Bowen’s article seems to either miss the point of my arguments in *CALE*, or insinuates, without providing evidence, that I’m misleading readers. For example, she writes that my discussion of admissions at the University of Missouri at Columbia (“UMC”) “indicts students of color. . . . Sander goes into great detail offering the gradation of scores and the odds that a white student was admitted within a certain range, but does not offer the same data regarding students of color.” There are two misrepresentations here. The point of my discussion of UMC’s admissions is not to “indict” black students, but to give the reader insight into both the mechanical use of race by law schools admissions officers and the focus of these officers on admitting those blacks with the highest scores, not the blacks who would most enhance “diversity” at the school. I use fewer categories in discussing black admissions at UMC than white admissions, because there were only two relevant categories for blacks in the admissions cycle I discuss: 93% of blacks with an academic index above 44 (UMC’s scale) were admitted, and 100% of blacks with an academic index below 44 were rejected (as noted in *CALE*, whites were rarely admitted with index scores below 58). Bowen goes on, “The reader is left to wonder, how many black students applied? What were their scores? Were they all lower than the white students? Without providing this information, Sander gives an impression that all black students were mismatched or robbed more qualified white students of seats at UMC.” Bowen, *supra* note 108, at 781–82. I hope most readers recognize that none of my work on affirmative action is concerned with whether white students are “robbed” admissions places, but rather with how well a school’s diversity objectives, and the preferenced students themselves, are served by highly mechanical processes that focus on a single factor (race) and ignore the academic disparities that result. Bowen (like any reader) is welcome to examine the data from UMC (or dozens of other datasets our research group has collected). The data about UMC offered in *CALE* is sufficient to make the point developed there. As to Bowen’s other concerns, here is some additional data: in the admissions cycle I examined, UMC had forty-one black applicants for UMC’s class of about one hundred fifty. Fourteen were admitted, and seven enrolled. The median black applicant had an index of 42. Many white applicants had even lower scores, but these were all rejected; the median white applicant had an index of 60. The blacks who ended up enrolling from this group had a median index of 54, about eight points lower than the class median and enough, I believe, to put them at serious risk of mismatch and bar failure.

114. *CALE*, *supra* note 1, at 668.

2008 said about public attitudes towards race<sup>115</sup> (the implication is that prejudices simmered undiminished towards, respectively, the handicapped and blacks, despite the elections). This analogy is utterly fallacious. FDR went to great lengths to hide from the public the extent of his disability, and he lived in an era when the press was willing to respect his privacy (or collaborate with his deception, if you prefer). The public knew he had suffered from polio, but it was not generally realized until after his death that he was essentially paralyzed from the waist down. FDR's advisers agreed, and he apparently did as well, that the public would not accept a seriously handicapped President.<sup>116</sup> The Obama case is radically different; Obama's race was a central fact of his biography, and for legions of his supporters it was a central virtue of his candidacy.<sup>117</sup>

#### PART IV. REVISITING THE "MISMATCH" DEBATE

One of my central goals in this symposium was to show that the need for reform in law school diversity policies goes far beyond the problem of "mismatch" that I wrote about in 2004, 2005, and 2006. Nonetheless, the question of whether and how *any* admissions preference harms its intended beneficiaries looms over this discussion, and my reply would be incomplete without a discussion of the mismatch issue.

Moreover, this is a particularly good time to examine the state of debate on the mismatch question. 2011 has seen the publication, in the *American Economic Review*, of results from what could be described as the first large-scale, randomized experiment on the mismatch effect.<sup>118</sup> The K-12 version of the mismatch debate is the controversy over "tracking"—that is, whether students should be grouped by "ability" or taught with completely heterogeneous peers. The AER study reported on a World Bank-funded experiment in Kenya, in which thousands of students were randomly assigned to "tracked" classrooms or more heterogeneous classrooms. The authors found dramatic improvements in learn-

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115. Arin N. Reeves, *Race as a Red Herring? The Logical Irrelevance of the Race vs. Class Debate*, 88 DENV. U. L. REV. 835, 842 (2011).

116. This issue is thoroughly discussed and documented in JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* (2007).

117. Helene Cooper, *Black Voters' Support for Obama Is Steady and Strong*, N.Y. TIMES, Oct. 26, 2011, available at <http://www.nytimes.com/2011/10/27/us/politics/obamas-support-among-blacks-remains-strong.html?pagewanted=all> ("Beyond issues, many African-Americans feel an emotional connection to Mr. Obama that seems unshakable, saying that nothing can compare with seeing someone who looks like them in the White House."). Tim Groseclose discusses in detail research that suggests that to the extent race factored into the 2008 presidential election, it was a net benefit for Obama. TIM GROSECLOSE, *LEFT TURN: HOW LIBERAL MEDIA BIAS DISTORTS THE AMERICAN MIND* 85–86 (2011).

118. Esther Dufló, Pascaline Dupas & Michael Kremer, *Peer Effects, Teacher Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 AM. ECON. REV. 1739 (2011). Dufló won the 2010 John Bates Clark medal, now given annually to the American economist under the age of forty judged to have made the most significant contribution to economic thought and knowledge.

ing among the tracked students—improvements that occurred across the spectrum of students. Though there are, of course, vast differences between Kenyan schoolchildren and American law students, it is noteworthy that all of the empirical implications of mismatch theory, including findings about teachers “pitching” the level of instruction to the preparation level of students, held robustly in the context of a rigorous experiment.

Closer to home, Duke economists recently released the second in a series of studies<sup>119</sup> that examine in detail the effects of preferences on undergraduates at Duke; the research has tested and found strong support for a host of ‘mismatch’ phenomena. So far as I know, this innovative and thorough research has gone completely unanswered by mismatch critics.

This year has also seen the formal retraction of earlier anti-mismatch findings published by Katherine Barnes, a law professor at the University of Arizona who has been one of the half-dozen leading empirical critics of mismatch.<sup>120</sup> Barnes has conceded that her earlier analyses were mistaken;<sup>121</sup> her revised analysis of data from the Bar Passage Study (the main data source for all the major analyses, to date, of law school mismatch) leads her to conclude that eliminating affirmative action would have no measureable impact on the number of black lawyers. In Barnes’s model, she assumes that eliminating racial preferences would reduce the number of blacks entering law school by 21%, so her finding that the number of black lawyers produced by this system would not change implies that individual blacks are doing much better in the system. My colleagues and I calculate that her revised model implies that, without preferences, the rate at which black law students become lawyers goes up by 28%, and the number of black law students who fail to become lawyers drops by *fifty-five percent*.<sup>122</sup> This would seem to be a striking confirmation of the mismatch hypothesis, and it is certainly a striking change of position by someone who had been a very harsh critic of mismatch.

Of far more significance is the recently completed research of Doug Williams, the Wilson Professor of Economics (and department chair) at Sewanee: The University of the South. In two related papers, Williams

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119. Peter Arcidiacono, Esteban M. Aucejoz, Hanming Fang, Kenneth I. Spenner, *Does Affirmative Action Lead to Mismatch? A New Test and Evidence*, QUANTITATIVE ECON. (forthcoming 2011); Arcidiacono et al., *supra* note 47.

120. Barnes’s originally advanced her critique in Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007).

121. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, A Lesson, and an Update*, 105 NW. U. L. REV. 791 (2011).

122. Doug Williams, Richard Sander, Marc Luppino & Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes*, 105 NW. U. L. REV. 813 (2011).



has painstakingly analyzed the methods of every significant empirical critique of law school mismatch.<sup>123</sup> (It was through this work that the mistakes committed by Barnes first came to light.) In every instance, Williams's research disclosed one or multiple research flaws that accounted for the original author's conclusions against mismatch. Using each researcher's methods, Williams found that more defensible analyses of the underlying data showed evidence that leaned towards a mismatch interpretation, sometimes overwhelmingly so. Williams's findings are straightforward and easy to understand and replicate. They leave very little ground left for any critic of the mismatch effect to stand upon.

Yet the current state of knowledge about law school mismatch is not reflected in institutional behavior. Professor Malamud writes that "Sander has made it impossible (and rightfully so) to ignore [the possibility of mismatch effects]."<sup>124</sup> I wish she were right. It is true that almost all legal academics are aware of the fireworks occasioned by my earlier research, but it is emphatically not true that the legal academy is engaged in any even-handed deliberation about the mismatch issue. Indeed, it would be more accurate to say that, at the major institutions of the legal academy—such as the Law School Admissions Council, the American Bar Foundation, and the American Association of Law Schools—it is considered extremely bad form to take the mismatch hypothesis seriously. If the topic of mismatch is brought up at all, it must quickly be cast aside in a tone both conclusory and dismissive. The determination to ignore the mismatch issue, and to ostracize those who think the problem is real, is manifest. How else can one explain why, in the six years since *Systemic Analysis* appeared, none of these institutions have released new data relevant to assessing the mismatch issue or the problem of minority bar passage? Why have none of them empanelled neutral social scientists to evaluate and report on the mismatch debate? On this issue, many otherwise distinguished academics have fostered an environment in which data is inaccessible and honest debate is profoundly chilled. Thus, I can think of at least one highly-regarded researcher in legal academia who lost a job, at least in part, for not regarding the mismatch issue with sufficient wariness. Other academics regularly tell me of their concerns about being punished professionally for engaging in mismatch research or even for investigating minority bar

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123. Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools?*, (Working Paper 2009), available at <http://econ.duke.edu/~hf14/ERID/Williams.pdf>. This paper was presented at the American Law and Economics annual meeting in 2010, and revised version in 2011).

124. Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729, 730 n.2 (2011). Her full language on this point follows: "In my own work, I have acknowledged that the diversity rationale pushes institutions towards a focus on their own institutional goals, rather than on the consequences of affirmative action for the lives of its intended beneficiaries [citation omitted]. I believe Sander has made it impossible (and rightfully so) to ignore those consequences—although I am more persuaded by his critics on the merits of the question of what those consequences are in fact."

passage outcomes at their schools. One distinguished (and apolitical) academic offered to help me with mismatch research so long as his name was never attached to the work. I have many times been invited to give lectures or publish articles, only to have the invitations withdrawn when colleagues of the person making the invitation learn of it and protest. Indeed, the *Stanford Law Review* staff who published *Systemic Analysis* were pressured into publishing only critical response pieces, even though distinguished academics who (in article outlines submitted to the law review) offered more balanced assessments sought to participate.<sup>125</sup> A 2008 academic conference largely devoted to the issue of raising minority bar passage rates was undoubtedly precipitated in large part by my mismatch research, but made no attempt to address mismatch in a serious way.<sup>126</sup> The United States Civil Rights Commission conducted hearings on the mismatch effect in 2006, issued a report containing a careful dissection of *Systemic Analysis* and the major critiques, and concluded that the problem was a potentially serious one, requiring corrective measures similar to the transparency recommendation I advanced in Part II.<sup>127</sup> But the legal education establishment has completely ignored the report. Officials asked about the mismatch hypothesis almost automatically react the way several contributors to this symposium did: they say something to the effect that “it’s been dealt with” and cite critiques that have, in truth, been all but discredited. It is hard to imagine legal education officialdom ignoring any other civil rights issue in this way.

Coherent debate about law school mismatch has proven difficult in the legal academy for reasons that are, in some degree, understandable. Obviously, many of those who have been deeply invested in affirmative action throughout their professional lives find it almost impossible to contemplate the idea that preference programs at law schools systematically injure the vulnerable people they purport to help. Moreover, serious discussion of mismatch usually involves discussion of the size of racial preferences, the poor performance of preferenced students in law school, and the abysmal disparities in bar passage rates across racial lines. These facts are upsetting to many academics; some of their colleagues want to avoid discussion simply because they know that others will be upset. Still others conclude that the topic is so emotional that rational discussion is impossible and that raising the subject is therefore pointless. All of this helps to explain why the principal scholarly reaction to the mismatch

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125. An editor at *Stanford Law Review* told me of this decision; proposed essays by James Lindgren and William Henderson were among the more balanced responses that the journal bypassed to focus only on very critical pieces.

126. Bar Exam Passage Conference, held in Chicago in October 2008, and sponsored by the ABA and the Law School Admissions Council. It is described here: <http://apps.americanbar.org/legaled/calendar/conferences/Bar%20Passage/barpassageagenda.html>.

127. U.S. COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS: A BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS 143 (2006), available at <http://www.usccr.gov/pubs/AALSreport.pdf>.

hypothesis has been dominated by diatribes—some clothed in empiricism, some not—rather than dispassionate analysis. Robust debate, release of new relevant data, deliberative assessments by non-partisan scholars—none of these have been in evidence.<sup>128</sup>

Nonetheless, the evidence that the mismatch effect is real, and is particularly acute in law schools, continues to grow. It touches upon and affects all of the issues raised in this symposium. It is thus appropriate to summarize in an accessible way why every legal academic needs to ponder the problem. In the next few pages I lay out why the three different ways of approaching the mismatch issue all lead to a common conclusion that now goes unrefuted.

#### A. *The Conceptual Demonstration*

First is the empirical paradox laid out in *Systemic Analysis*.<sup>129</sup> Black law students perform as well in law school, or very nearly as well, as do whites with similar entering credentials (LSAT, UGPA, and undergraduate college). They also perform as well on the bar exam as do whites with similar credentials and law school grades. Yet if we predict bar performance based on pre-law credentials (LSAT and UGPA), a huge gap opens up between blacks and whites. How can this be? According to mismatch theory, the explanation lies in the fact that law school racial preferences cause blacks to be clustered at the bottom of the credential distribution at the great majority of law schools. Although blacks receiving preferences get the grades predicted by their credentials at these schools, these grades are so low that they signify (based on later bar performance) that little learning is going on. Most whites with comparable credentials go to much less elite schools, get better grades, learn more, and thus do far better on the bar. Confirming this pattern, we know that at virtually all law schools, getting grades that put one's class rank in the bottom ten percent of one's law school class (where most blacks receiving preferences end up) translates into terrible bar passage outcomes. The mismatch hypothesis—that students with credentials far below the class mainstream learn less, because the instruction is not “aimed” at them, than they would learn at another school where their credentials better match the mainstream—can explain all of these observed facts. No one

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128. It is striking, for example, that law students (often minority students) at Harvard, Stanford, New York University, Michigan, Northwestern, and Duke have organized forums or debates on law school mismatch issues. So have nearly all of the major organizations of black lawyers. But no law faculty at these schools (or any other “top 10” law school) has organized any kind of debate or forum exploring the evidence for and against the mismatch effect.

129. This paragraph summarizes an argument laid out in *Systemic Analysis*, *supra* note 40, at 425–54, and which is revisited and elaborated upon in Sander, *supra* note 48, 57 STAN. L. REV. 1963, 1966–78 (2005).

in the entire mismatch debate has put forth any coherent alternative account.<sup>130</sup>

Indeed, few of the critics have even *attempted* to explain these facts. Ayres and Brooks, near the end of their critique, half-heartedly suggest that “stereotype threat” might account for the patterns.<sup>131</sup> But stereotype threat implies underperformance on tests where rumors of inferiority distract students and undermine performance; it is thought to be most serious on standardized exams. How then, can one explain that the black-white grade gap is as large in legal writing classes (a finding demonstrated from multiple data sources) as it is in timed law school exams or the LSAT?<sup>132</sup> Katherine Barnes offers a closely-related argument: she believes that discrimination against blacks causes lower performance. But this account fails, for the same reason—discrimination would show up in lower-than-expected grades in law school for blacks, or lower-than-expected bar passage rates. Neither phenomenon appears in the data.

Moreover, research on older white students, who receive significant preferences at many law schools, suggest that they, too, end up with low grades and worse bar passage outcomes at schools where they face a credential deficit.<sup>133</sup> The fact that in six years of discussion, no one has articulated an alternative explanation to account for even most of these facts is, by itself, compelling evidence supportive of the mismatch hypothesis.

### *B. The Simple Empiricism of Comparing Law Schools*

The idea that mismatch might be occurring at law schools first occurred to me when, at UCLA in the early 1990s, I learned that black graduates from the school often had a fifty percent failure rate on the California Bar. California’s exam is a hard one, but even with preferences, UCLA’s black students during this period had very respectable

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130. The only part of this logic disputed by the critics, to my knowledge, is the first statement—that black grades in law school show little evidence of underperformance. But my claim is backed not only by my own analyses, but by a series of authoritative LSAC studies (which again, to my knowledge, no one has disputed), showing very small levels of black underperformance in law school. My own research suggests that when such studies control for undergraduate college attended by students, even this slight underperformance goes away.

131. Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN. L. REV. 1807, 1838–40 (2005). Ayres and Brooks cite no actual evidence of stereotype threat in law schools and concede that “we do not have a compelling theory as to what is causing” lower rates of black achievement on the bar. In their piece, they simply sidestep the logic of the argument summarized here. With no sense of self-irony, Ayres and Brooks suggest that the historically black law schools are good places to see where things are going right for black students. Of course, it is at these schools that mismatch is minimized, and it is these schools that Ayres and Brooks inexplicably *omit* from one of their central mismatch analyses!

132. Ayres and Brooks suggest that perhaps stereotype threat affects every intellectual task undertaken by law students; but this proves too much, since it implies that black law students will go on to become black lawyers whose performance is hindered throughout their careers by stereotype threat. Moreover, this entire explanation seems to hinge on substantial black underperformance in law school grades, for which there is no evidence.

133. Christian DuBois, “Too Old for Law School?” (2005 working paper on file with author).

credentials. Based on their credentials, they should have been passing the bar at a rate above the state average; instead they were often fifteen points below it. The disparity was worse if one simply focused on students (of any race) admitted with particularly large preferences. For example, students admitted to UCLA's Class of 2005 with large preferences (that is, they had LSAT scores more than ten points below the school average) had a first-time California bar passage rate in July 2005 of 44%; graduates of lower-ranked Southwestern Law School, who had an overall median LSAT about the same as the "large preference" UCLA students, had a first-time bar passage rate in 2005 of 66%. This suggests that "mismatch" was lowering the bar passage rate among "large preference" UCLA students by twenty-two points, or a full third. Almost certainly, the effect was even larger, because the Southwestern bar passage rate would itself be misleadingly depressed by the school's own "mismatched" students. At UCLA, students admitted with LSAT scores at the school median had bar passage rates of 96% (far above the school average of 89%), so a student with the median LSAT at Southwestern may well have had a bar passage rate of 75% or 80%. In any case, it seems clear that students who would have had very good prospects of passing the bar at Southwestern had much worse prospects at UCLA.<sup>134</sup>

This disparity is what we would expect if the mismatch hypothesis is true. Are there alternate explanations? One idea often advanced is that lower-ranked schools are more focused on "teaching to the bar," so their pass rates are artificially inflated at the expense of a well-rounded legal education. Thus, the low black bar passage rate at UCLA might simply reflect a broader and better legal education. But this explanation flounders on the data; analyses of bar takers always show a positive effect of law school eliteness upon bar passage rates.<sup>135</sup> Probably some, or even all, of this eliteness advantage can be accounted for by the higher unobserved credentials of elite school students,<sup>136</sup> but the fact remains that no evidence exists for the idea that lower-ranked schools do a systematically better job of preparing their students for the bar.

The other possible hypothesis is that nonwhite students (who make up a disproportionate share of the "large preference" students at UCLA) simply do worse on the bar when we hold credentials constant. But as we have seen, that is clearly not true; race itself explains none of the bar passage disparities. Once again, it is hard to think of a plausible alternative to the mismatch account.

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134. The UCLA data for this class comes from a spreadsheet prepared by the UCLA Records Office, and available from the author; data from Southwestern comes from the ABA-LSAC Official Guide to ABA-Approved Law Schools, 2004 edition (2003) at 663 (for Southwestern student credentials), and State Bar of California, General Statistics Report, July 2005 California Bar Examination (2006).

135. See, e.g., *Systemic Analysis*, *supra* note 40, at 444.

136. See, e.g., Sander, *supra* note 48, at 1972 (discussing the unobserved credentials problem, which will make bar passage performance at elite schools appear stronger).

The UCLA example was provocative, but it was a single case and therefore could be dismissed as a fluke. For this reason, I did not include it, even as an example, in *Systemic Analysis*. But since that time, detailed data has become available for two other, quite different law schools: the University of Michigan and George Mason University. Do similar patterns hold at these schools?

Through a series of public records requests, my research associates and I were able to assemble data on the graduation and first-time bar passage outcomes (for Virginia) of ten cohorts of students at George Mason (GMU)—those matriculating from 1998 through 2007.<sup>137</sup> The sample is modest, partly because GMU's black enrollment was generally small and partly because some GMU graduates do not take the Virginia bar exam, but we nonetheless have complete data on forty-one black entering students. Among this entire group, only 29% graduated from GMU and passed the Virginia bar on their first attempt. These GMU blacks had a median LSAT score of 151 and a median UGPA of 3.17.

Compare these students with those at predominantly black Howard University School of Law, just a few miles from the GMU campus. Howard students in 2001-04 had a median LSAT score of about 151 and a median UGPA of about 3.12, nearly identical to the GMU blacks. The proportion of entering students graduating and passing the New York bar on the first attempt was an average of 60% during the 2001-04 period, about double the GMU rate.<sup>138</sup> Once again, a cohort of students with similar credentials apparently had much better outcomes when they attended a school where their credentials were close to the school median.

It is true that this comparison is far from exact; we do not know who within the Howard class is taking the New York bar, and the New York bar during the period of comparison had a slightly higher first-time bar passage rate than did the Virginia bar. But I do not think that any combination of plausible assumptions can explain away even a large fraction of the vast difference in black outcomes between the "mismatched" students at GMU and the generally well-matched students at Howard.

A third example, the University of Michigan Law School (UMLS), is particularly interesting, not only because UMLS policies were the subject of *Grutter v. Bollinger*,<sup>139</sup> but because studies of UMLS graduates

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137. Why George Mason? Because administrators there were uniquely willing to provide detailed individual-level data on outcomes, so long as our request came from a resident of Virginia (as required under the state's public record laws). This analysis is based on the George Mason Disclosed Database for 1995-2007 and is available from the author.

138. See AMER. BAR ASS'N, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2002-2005 editions). I averaged Howard data on attrition and New York bar passage over four years. For the reasons discussed *supra*, text accompanying note 138, this is almost surely an underestimate of the success rate of Howard students with credentials at the class "median".

139. 539 U.S. 306 (2003).

have played an outsized role in the debate over the effects of law school affirmative action. Richard Lempert and his two coauthors (David Chambers and Terry Adams) published, to much acclaim, a 2000 study that painted a generally rosy picture of the post-graduate careers of UMLS's minority students.<sup>140</sup> In particular, the study purported to demonstrate that virtually all of UMLS's black students passed the bar exam. Lempert even took the stand in *Grutter* and testified that the bar passage rate of UMLS blacks was very close to one hundred percent.<sup>141</sup> This assertion, which Lempert frequently invoked in one form or another,<sup>142</sup> was very salient in the debate over *Systemic Analysis*. How could the mismatch effect be a real problem if, at the one school where minority outcomes had been most carefully studied, bar passage was a non-existent problem for minority students?

I was always highly skeptical of Lempert's claim because it did not line up with any of the other available data. As discussed above, the most comprehensive data source on the bar outcomes of individual (anonymous) students was the Bar Passage Study (BPS), the LSAC's longitudinal survey that had tracked some twenty-seven thousand first-year students in the 1990s from their entry into law school through the beginning of their professional careers.<sup>143</sup> Law schools are not identified in the BPS, but the UMLS was certainly grouped either in 'Cluster 4' or 'Cluster 5', the two clusters that contain the most selective law schools. At those schools, according to the BPS, nearly 30% of black students fail the bar on their first attempt, and over 15% never pass. A substantial number of blacks graduating from these schools never attempt the bar, and thus also do not become lawyers. Thus, for Lempert to be right—for UMLS black graduates to essentially never fail the bar—something extraordinarily would have to be happening in Michigan.

In the fall of 2005, I was able to obtain aggregated bar records from the State of Michigan, which reported the overall bar passage rates of bar-takers from each of Michigan's law schools for each year from 1975 to 1995, a period roughly contemporaneous with the period covered by the Lempert et al study.<sup>144</sup> The data was not broken down by race, but it did show that over the twenty-year period, all UMLS graduates who took

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140. Lempert, Chambers & Adams, *supra* note 50, at 395 (suggesting minority bar passage rate varies from 95% to 98%).

141. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 862–63 (E.D. Mich. 2001) (“almost all” minority graduates pass a bar exam).

142. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 127, at 9, 52 (“virtually every minority Michigan graduate passed the bar”).

143. The BPS has, on the one hand, wonderfully detailed data on individual students, including detailed surveys completed at various points during the student's progression through law school. On the other hand, as discussed further below, the BPS obscures vital data for comparative analyses: schools are grouped into six broad 'clusters'—it is not even possible to know for sure which schools are put in which cluster—and state bars are grouped into broad geographic areas.

144. The UMLS Bar data was supplied by Tim Raubinger, Assistant Secretary, Michigan Board of Law Examiners, in the fall of 2005 (on file with the author).

the Michigan bar had a 90.7% first-time bar passage rate. The first-time rate for all students in the comparable BPS clusters was 91.2%. This suggested that there was nothing unusual about UMLS's overall bar performance. Moreover, since the Michigan state data showed a fairly low rate of success among UMLS students who re-took the bar, Lempert's claim that essentially all UMLS students passed the bar was implausible.

A few months later, in analyzing data from Michigan alumni surveys, I learned another startling fact: about 60% of UMLS blacks ended up in the bottom tenth of their class. This was somewhat *worse* than the rate at comparable BPS schools (about 50%), and thus pretty much dashed the idea that UMLS had some special form of academic support that allowed its black graduates to have unique success on the bar. Rather, it implied that, if anything, UMLS black graduates would have a lower first-time bar passage rate than comparable BPS blacks (recall the BPS black rate at elite schools was 70%).

In September 2006 I wrote about these findings on the Empirical Legal Studies blog,<sup>145</sup> arguing that the bar success rates Lempert claimed for UMLS blacks could not possibly be true. Lempert wrote three comments on my blog entry, totaling some seven thousand words! He made some thoughtful points but mainly avoided the central issue: what did the University of Michigan's internal records on its graduates say about black bar passage rates? And why hadn't Lempert and his coauthors examined and reported on this data in the course of a major research project on the success of UMLS's affirmative action program? Lempert wrote that it had never occurred to him to inquire about first-time bar passage rates, and that in any case it would be impossibly difficult to track down the actual bar outcomes of Michigan graduates. Both claims seemed unbelievable, since every law school I've encountered not only tracks the bar outcomes of graduates, but regularly generates internal reports on year-to-year changes. Of course, ordinarily only faculty (like Lempert) and administrators have access to such data. So how to nail down what was actually happening?

Happily, fate intervened at this point, assisted by the discovery process. In November 2006, Michigan voters passed Proposition 2, a measure (similar to Prop 209 in California) which prohibited the use of racial preferences by state entities, including the University of Michigan. A suit to enjoin enforcement of Prop 2 followed,<sup>146</sup> and the lawyers representing one of the parties in the litigation sought my advice in shaping discovery requests. Among many other things, we learned that UMLS

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145. Richard Sander, *Do Elite Schools Avoid the Mismatch Effect?*, EMPIRICAL LEGAL STUDIES (Sept. 22, 2006), [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/09/do\\_elite\\_school.html](http://www.elsblog.org/the_empirical_legal_studi/2006/09/do_elite_school.html).

146. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011).



did indeed maintain records of how its graduates did on the bar exams of many states, and we obtained lists, for several cohorts of UMLS graduates, of bar outcomes. By comparing names in these lists to UMLS student facebook, we could reasonably categorize students by race, and thus, at last, measure the actual bar performance of UMLS students by race.<sup>147</sup>

The results suggested that UMLS blacks taking a bar exam for the first time had a 62% pass rate; those taking multiple bar exams had an eventual success rate of 76%. In other words, UMLS black performance on the bar was, as we guessed, a little worse than the rate found in the BPS for similar schools. This finding is, in my view, devastating to Lempert's study and to his testimony in *Grutter*.<sup>148</sup> It also suggests that UMLS fits the pattern I have discussed with UCLA and George Mason. Students at a less-elite neighbor of UMLS—Wayne State University School of Law—have average credentials similar to or a little lower than those of UMLS blacks, but entering students have an aggregate graduation and first-time bar passage rate (in Michigan) of about 73% (again, the rate for students at Wayne State with “average” credentials is almost certainly much higher). Taking attrition at the University of Michigan into account, conservatively, the comparable figure for black Michigan students during the same period is 60%.<sup>149</sup> This simple comparison thus suggests that the mismatch effect sharply lowers the success rates of the purported beneficiaries of affirmative action at UMLS. Rather than being an exception that confounds mismatch theory, the University of Michigan fits the pattern.

These three case studies of law schools provide easy to understand, prima facie evidence of the mismatch effect. I submit that any law professor or dean can confirm similar patterns by examining the records of their own school. Those who disbelieve the mismatch effect have an obligation to explain these patterns in non-mismatch terms. To date, no one has.

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147. One might criticize this method for relying on facebook to classify students by race. We had two different graduate students classify the students, and they produced essentially identical results. Moreover, to the extent our classification of blacks might contain errors (say 10% of those we classified as black are of another race), that would tend to raise, rather than lower, our estimate of the group's bar passage rate. Of course, I would also welcome the school to release its own reports on bar outcomes by race.

148. These results imply that Lempert, Chambers & Adams' study, *supra* note 50, overlooked or omitted virtually all the black students—and a very large number of them—who never became lawyers. Since the whole point of the study was to evaluate the post-graduate outcomes of UMLS's minority graduates, it is hard to see how this problem does not invalidate all of their results. Note, however, that Richard Lempert, after reading a draft of this article, vigorously disputed my estimate. Readers may find additional debate and discussion of this issue at <http://www.seaphe.org/>.

149. See, e.g., AMER. BAR ASS'N, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2002-05 editions). As with the analysis of Howard, *supra*, I analyzed four years of attrition and bar passage statistics for Wayne State. Because of the small sample size in the disclosed data, the Michigan estimate applies to blacks taking the bar in all the states disclosed by UMLS.

C. *The Demonstration through Statistical Analysis of BPS Data*

Most of the empirical debate about the mismatch effect has focused on quantitative modeling, rather than the simple intuitive or school-by-school comparisons I have discussed in the last two sections. In this work, a scholar will typically draw a conceptual inference from the mismatch theory: if mismatch is true, then we should observe such-and-such empirical regularity in large-scale databases. Over half-a-dozen such studies in this vein have been completed: by Ayres & Brooks, Yoon & Rothstein (who published one study and wrote a second), Daniel Ho, Katherine Barnes (original and revised), Lempert and another group of coauthors (one published and two unpublished), Doug Williams (two working papers), and (indirectly) Timothy Clydesdale.<sup>150</sup> Many of these studies conclude that the evidence for the mismatch effect is weak or nonexistent, and although few legal academics have the quantitative chops to follow the debate, this collective body of research provides comfort to those who wish to believe that the mismatch idea can be safely ignored.

I suggest, however, that anyone who spends some time carefully reading this body of work, together with the commentaries written by Williams,<sup>151</sup> by me,<sup>152</sup> and by Williams et al<sup>153</sup> will find this research quite compelling in supporting the mismatch hypothesis. The key to understanding this literature is to keep in mind five methodological issues that affect all the work to some degree or other:

- *The conservative effect of noise.* All of these studies have relied entirely on the Bar Passage Study (“BPS”), which remains the only large-scale dataset that includes student credentials, law school performance, and bar outcomes for a national sample of students. Unfortunately, the BPS data is extremely noisy – that is, inexact -- for these analytic purposes. The “pass” data is more complete than the “fail” data; the only data on school attended is in the “cluster” variables, which are broad and overlapping in their measures of school eliteness; there is no data on actual bar scores, but only whether a graduate passed or failed in a group-

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150. Ayres & Brooks, *supra* note 131; 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 (2005); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 (2008); Jesse Rothstein & Albert H. Yoon, *Mismatch in Law School* (May 2009) (unpublished manuscript), available at [http://gsppi.berkeley.edu/faculty/jrothstein/workingpapers/rothstein\\_yoon\\_may2009.pdf](http://gsppi.berkeley.edu/faculty/jrothstein/workingpapers/rothstein_yoon_may2009.pdf); Daniel Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005); Barnes, *supra* note 121; Barnes, *supra* note 122; Williams, *supra* note 124; Timothy Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Age, Gender, Race, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711 (2004).

151. Williams, *supra* note 123.

152. Sander, *supra* note 47; Richard H. Sander, *Mismeasuring the Mismatch: A Reply to Ho*, 114 YALE L.J. 2005 (2005).

153. Williams, Sander, Luppino & Bolus, *supra* note 122.

ing of states (and bar pass thresholds usually vary significantly within these groups); we cannot even measure mismatch exactly, since we can't isolate students within a single school and measure their relative credentials. All of these weaknesses in the data make it more likely that actual patterns will not stand out; in the context of testing for mismatch, it means that any mismatch (or anti-mismatch) findings that are statistically significant are likely to be strong indeed, while findings that are merely consistent with mismatch (e.g., a coefficient that points in the predicted direction but is not statistically significant) should not be dismissed.<sup>154</sup>

- *Selection bias from unobserved variables.* A fundamental challenge in measuring mismatch is the problem of “unobserved characteristics.” Law school admissions officers base decisions largely on LSAT, UGPA, and race, but other factors—undergraduate college, writing ability, references, etc.—are important at the margin, and are likely to be especially important in anomalous admissions decisions (e.g., when someone with low credentials is admitted to an elite school). Thus, when we compare Student A at an elite school with Student B at a non-elite school, even if the two students have the same LSAT and UGPA, it is very likely that Student A has other, hidden characteristics that make her a stronger candidate (e.g., Student A got a 3.6 at Harvard, while Student B got a 3.6 at Ball State). Different techniques for modeling mismatch do a better or worse job of dealing with this problem, but nearly all models will incorporate some bias against finding mismatch, because in any comparison of students from higher-ranked and lower-ranked schools, the unobserved credentials of those at the lower-ranked schools will tend to be lower and they are thus handicapped in direct comparisons of outcomes.<sup>155</sup>

- *Choice of outcome.* Different outcome measures are more or less relevant for assessing “mismatch” per se. Nearly all of the critics of *Systemic Analysis* focused on whether a student ultimately passed a bar exam and became a lawyer.<sup>156</sup> In these models, someone who takes five attempts to pass a bar is considered just as successful as someone who passes on their first attempt. This is a relevant test if one is only interested in whether affirmative action actually reduces the number of minority attorneys (since then one only cares about who ultimately obtains a license). But it is a very poor measure of whether affirmative action causes its beneficiaries to learn less in law school. The reason is obvious: if someone fails the bar on their first attempt, they will spend an enormous amount of time trying to re-educate themselves about the law.

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154. This problem is often referred to as “attenuation” or “regression dilution.”

155. Rothstein & Yoon, *supra* note 150, at, provides a good discussion of this problem. Ayres and Brooks acknowledge this problem in motivating their second-choice method, but then discount the results that flow from their second-choice model.

156. This is the primary outcome focused upon by Ayres & Brooks, Barnes, Rothstein & Yoon, and, apparently, Ho.

They may hire special tutors, buy new study aids, and immerse themselves in their bar preparation course. These are all post-law-school treatments, so they will tend to counter whatever harms mismatch may have inflicted during law school. If we are interested in mismatch itself (which of course we *should* be interested in), then first-time bar passage is a more relevant measure.

On the other hand, if we simply measure first-time bar passage for law graduates, we may create a bias *in favor* of the mismatch hypothesis. Suppose, for example, that more-elite school C almost never flunks out students; it has a 98% graduation rate for matriculants. Less-elite school D, in contrast, weeds out its weaker students (partly to protect its overall bar passage rate); it has a 75% graduation rate for matriculants. If we measure how graduates of these two schools do on the bar, we may create a bias in favor of less-elite school D because that school has weeded out its weakest matriculants. An appropriate measure of mismatch is therefore one that considers all law school matriculants, and considers graduation *and* first-time bar passage as the successful outcome.<sup>157</sup>

• *Paying attention to coefficients.* My claim in *Systemic Analysis* was that the mismatch effect might explain as much as half of the black-white gap in first-time bar passage rates—that is, about fifteen points (the rest is explained by the broad differences in credentials between blacks and whites). Suppose that in actually testing mismatch with the BPS, an analyst considers “eventual” bar passage rather than first-time bar passage. The predicted mismatch effect (in the BPS) is now less than half as large—perhaps six or seven points. Suppose the technique of the analyst does not compare someone with “no” mismatch with someone who is “maximally” mismatched, but compares two people with moderately different levels of mismatch. The predicted effect might now be only two or three points. Suppose, finally, that the test being used has a modest sample size—say two groups of two hundred students.<sup>158</sup> What analytic result would we expect?

Even if no other forms of bias contaminate the results, this test is not likely to produce a statistically significant result, regardless of whether mismatch is operating or not. The test, we can say, has been engineered to fail. It is therefore relevant in discussing mismatch tests and their results, to think about what coefficients we could reasonably

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157. Williams refers to this as the “smooth passage” outcome variable; I believe he is the only scholar in this literature to use this very logical measure.

158. A notorious example of this problem is in Ayres & Brooks, *supra* 131. When the authors used their “second-choice” model to evaluate mismatch, they found that second-choice students were significantly more likely to pass the bar on their first attempt, and more likely to take fewer attempts to eventually pass the bar. But because they found merely a positive (and not “statistically significant”) effect of “second choice” on the probability of ever passing a bar exam, they essentially dismissed the importance of all three results. In fact, as Williams shows in some detail in his 2011 article, and as I suggested in *Reply to Critics*, all three outcomes are part of a consistent and logical pattern showing mismatch.

expect, and whether these would be significant or not. Similarly, if variations on a given test produce coefficients that are in the predicted direction and roughly of the predicted magnitude, that is evidence in favor of the theory, not against it.

- *Robustness checks.* As with any social science analysis, mismatch analyses should be carefully vetted to insure that results are robust to variations in formulation, so that reported results are not driven by idiosyncratic assumptions. Ayres and Brooks, for example, based their negative assessment of the mismatch effect almost entirely on an analysis that excluded historically black law schools.<sup>159</sup> The results change sharply without this restriction, yet the authors neither noted this dependency on an idiosyncratic assumption, nor provided a valid justification for excluding most “non-mismatched” blacks from their analysis.

I think the vast majority of empirical scholars would agree that solid research should adhere to all five of these principles. But the empirical critics of law school mismatch have neglected or ignored these principles, sometimes to a stunning degree. Daniel Ho, for example, violated a number of these principles in his “matching” test of the mismatch hypothesis.<sup>160</sup> The concept behind his test was sound: find pairs of black students with similar characteristics who attended law schools of differing eliteness, and compare their outcomes. But in executing his test, he compared students in adjacent (and eliteness-wise, overlapping) tiers, rather than comparing students from elite schools with students from very non-elite schools. His choice greatly increased the noisiness of his analysis. He failed to acknowledge that his test was biased against finding a mismatch outcome, since he could not match on many academic unobservable characteristics (e.g., undergraduate college) (thus ignoring the selection bias issue). Indeed, he was unable to show whether the pairs of students he was comparing actually experienced any difference in how their credentials compared to their peers! He not only failed to present results for alternative outcomes; he did not clearly explain what outcome he was testing. Most seriously, though, he never presented results for *the most logical* “matching” analysis: comparing pairs of black students from the *top* BPS tiers with the *bottom* BPS tiers—that is, comparing similar students who did, and did not, receive large admissions preferences. That test, as performed by Williams, shows large and *highly significant* mismatch effects.<sup>161</sup> Those who know matching methodology

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159. Ayres & Brooks, *supra* note 131, at 1824. Ayres & Brooks did two principal tests of the mismatch effect in their paper, a “relative tier” test and a “second choice” test. The relative tier test omitted historically black schools, and the “second choice” test generally produced results confirming or consistent with mismatch (tests for mismatch outcomes either showed statistically significant mismatch effects, or showed results consistent with mismatch but not statistically significant). In summing up, the authors discounted the second-choice results and emphasized the deeply flawed “relative tier” results. *Id.* at 1838.

160. See Ho, *supra* note 150, at 2002–04.

161. See, e.g., Williams, *supra* note 123.

cannot understand why Ho would have left out entirely what seems to be the most appropriate use of his test.<sup>162</sup> It is indeed hard to comprehend—unless Ho's mismatch test was simply engineered to fail.

A similar disregard of some or all of these basic principles affects the critiques of Ayres & Brooks, Barnes, Clydesdale, Lempert et al, and Rothstein & Yoon. Some are much worse than others. Clydesdale made a gross methodological error that invalidated most of his analysis.<sup>163</sup> Barnes, as I have noted, made pervasive errors, perhaps in her programming, that invalidated hers. Rothstein & Yoon, in contrast, were concerned about some of these problems (e.g., "selection bias") and deployed strategies to counteract them.<sup>164</sup> All of the critics, however, violated at least two of the relevant principles, and thus missed (or concealed) the decisive evidence of mismatch that flows from their models.

The great contribution Williams makes to this literature is his scrupulous concern with all five of the methodological problems I've outlined. Williams conducts several conceptually distinct tests of mismatch effects, analyzes the strengths and weaknesses of each, and presents results of over one hundred variations on mismatch tests.<sup>165</sup> He finds strong and consistent evidence that mismatch substantially hurts the "smooth passage" of students receiving large preferences from matriculation to first-time bar passage; indeed, his coefficients suggest that mismatch can entirely explain the underperformance of blacks on the bar exam, and he shows that mismatch affects other students receiving preferences (e.g., Hispanics).

Table 11 provides an overview of the major empirical pieces testing mismatch models with the BPS data. The central message of this table is that all of the extant tests, when done appropriately, provide strong evidence of mismatch. Indeed, the question of whether mismatch is hurting minority law students is not even a close one.

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162. Personal communication from James Lindgren, Northwestern University.

163. Clydesdale, *supra* note 150. Clydesdale's error is that he predicts student law school performance without standardizing his two most important predictors (LSAT scores and undergraduate grades) for the school attended. This is like using today's temperature to predict what month it is without controlling for one's latitude (or even whether one is in the southern or northern hemisphere). Had the editors of *Law and Social Inquiry* been familiar with the data Clydesdale used, and understood this problem in his method, it is inconceivable that the article would have been published in anything like its current form.

164. Rothstein & Yoon, *supra* note 150 (unpublished manuscript).

165. Doug Williams, *Do Racial Preferences Reduce Minority Learning in Law Schools?* (Working Paper 2011), available at <http://www.seaphe.org/pdf/williamsseptember.pdf>.

Table 10  
An Overview of “Mismatch” Analyses Using BPS Data

<i>Authors</i>	<i>Test</i>	<i>Design issues</i>	<i>Result when most serious design problems are removed</i>
Ayres & Brooks (2005)	“Relative tier” – examined how “mismatched” students did when compared to outcomes in tier they would have attended without preference	(1) A&B ignored strong evidence of Hispanic mismatch effects in their model;  (2) A&B omitted historically black law schools from analysis, which account for a majority of non-mismatched black students.	Strong evidence of mismatch for both blacks and Hispanics, especially when one considers outcomes most relevant to the mismatch issue.
Ayres & Brooks (2005)	“Second choice” – examined black students who passed up the most elite school that admitted them to attend a less elite school	(1) A&B used the outcome variable most likely not to show mismatch: whether graduates ever passed the bar, and then  (2) failed to explain that the coefficient they obtained fell within the expected range.	Overpowering evidence that black “second-choice” students do better in graduating and passing the bar on their first attempt; all other “second-choice” results closely follow mismatch theory predictions.
Ho (2005)	“Matching” – uses matching techniques to compare outcomes of very similar pairs of students attending different law school tiers.	Ho matched students across adjacent tiers of law schools, even though, in the BPS, the tiers overlap in eliteness. Most of his matched students therefore attended schools virtually identical in eliteness, and it is not surprising that he found non-significant effects. A proper matching test would compare students at least two tiers apart.	Matching black students in the top two tiers with similar students in the bottom two tiers shows that students attending the less-elite law schools have dramatically lower rates of failing the bar.
Yoon & Rothstein (2009)	“Eliteness” test: predicts ultimate bar passage of blacks from individual characteristics and credentials, including an “eliteness” variable to capture whether students are mismatched.	Yoon & Rothstein compare the two most elite tiers with the “bottom four” tiers; there is significant overlap in the actual eliteness of schools in these groups, blurring the effects of mismatch. They also fail to test the most logical “mismatch” outcome – whether students graduate and pass the bar on their first attempt.	When the two middle tiers are removed from Yoon & Rothstein’s model, or when more appropriate mismatch outcomes are utilized, the model shows strong mismatch effects.

<i>Authors</i>	<i>Test</i>	<i>Design issues</i>	<i>Result when most serious design problems are removed</i>
Yoon & Rothstein (2009)	"Race" test: uses "black" as a proxy for preferences, thus putting in functional form the concept I used to illustrate mismatch in Systemic Analysis.	Yoon & Rothstein find significant evidence for mismatch from this test, though they argue it may pick up underperformance of blacks unrelated to mismatch. They also argue the effects only show up in the bottom quintile of the credential distribution.	Since 75% of blacks in the BPS are in the bottom quintile of credentials, this test actually shows pervasive mismatch effects, and the effects become larger when more appropriate mismatch outcomes are utilized.
Barnes (2007)	"Open functional form," simulating outcomes for students at specific credential levels at different tiers.	Barnes's published results were wildly incorrect, and she reports her original code was lost. Her "corrected" results use different outcome measures, but in any case now finds that if preferences were abolished, and the bottom 22% of black applicants were not admitted to law school, there would be no significant change in the number of black lawyers.	When properly corrected, Barnes's original model shows significant mismatch effects for students, especially blacks, with low credentials.
Williams (2011)	"Effect of selectivity"	Williams' paper is the only one to date to carefully think through the various empirical issues I discuss in the text; he considers each of these tests to be somewhat biased against a finding of mismatch, but he devises innovative alternative measures to provide insight into how modeling choices affect the measurement of mismatch. Williams is also the only analyst to include analyses of non-black minority groups.	Each of Williams' tests finds strong and consistent support of mismatch, for both blacks and minorities generally; for the first two tests, his estimates very closely match the "unexplained" gap in black/white outcomes.
Williams (2011)	"Second choice"		
Williams (2011)	"Instrumental variable on choice"		

Many of the results presented in this part are new, or are just entering into the circulatory system of legal scholarship. Together, perhaps along with other important work still in the pipeline, these findings may persuade many law professors not only that the mismatch problem is real, but that it is sufficiently serious to overshadow the sensitivities of



those upset by the very idea of mismatch. A unified expression of concern from a substantial number of legal scholars might well be all that is necessary to set in motion formal inquiries, better information disclosure, and (perhaps?) even transparency in admissions.

Yet the ideological dynamic within the legal academy may continue to make it irresistible to ignore the mismatch problem. It is so easy for a law school dean to behave, say, in a way similar to a school board member in a rural district where strong lobbying groups oppose the teaching of evolution, or like a congressman in a district where grassroots constituents oppose measures to curtail global warming. “All the evidence is not in”; “it’s a theory, not a fact”; and other such platitudes provide a comforting way of evading responsibility. The problem with these analogies, of course, is that the law school dean presides over a house of *scholars*, in a place where pursuit of the truth is supposed to be paramount. And the law school dean often has direct access to evidence bearing on the mismatch problem. So analogizing the law school dean to the rural school board member or congressman is really too kind.

The battle unfolding in California over the disclosure of the State Bar’s database highlights the sad state of debate.<sup>166</sup> The State Bar has assembled information on California bar-takers over the past thirty years that constitutes an almost ideal database for studying the mismatch effect. It has many of the key variables that exist in the BPS, but in much more precise form: actual schools attended by students (rather than an imprecise “tier”), and actual scores obtained on bar exams, along with information on pre-law school credentials and law school grades. Analyses with the State Bar data would thus not be subject to many of the analytic problems that inhere in the BPS (discussed earlier in this section), making the demonstration of mismatch more obvious and making it possible to measure how “mismatch” varies with the size of a law school’s preference (something that is largely beyond the capacities of the BPS).

In 2006, the State Bar’s psychometricians and I developed a research plan for a study using the State Bar data that would involve no release of the Bar’s internal data, but would generate invaluable insight into the mismatch issue. The plan generated wide support among Bar officials, until California law schools and various academic partisans in the mismatch debate (including Dean Larry Kramer of Stanford Law School, Professor Lempert, and the Society of American Law Teachers) argued that such a study would be improper and might even be illegal! The arguments were absurd—but the political power they intimated was real, and the Bar backed down.

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166. Extensive materials on the California Bar lawsuit are available at <http://www.seaphe.org/topic-pages/california-bar-lawsuit.php>.

Joined by advocates of greater government transparency, I then filed a public records request with the Bar and, when again rebuffed, filed suit in 2008, seeking a redacted version of the Bar data that would rigorously protect the anonymity of bar-takers while preserving the analytic value of the database. In June 2011, a panel of the California Appellate Court ruled unanimously in our favor, holding that the State Bar was subject to a common law right of access.<sup>167</sup> The case has now been accepted for review by the California Supreme Court,<sup>168</sup> and already a stream of amicus briefs is arriving at the Court, often from associations of minority lawyers who claim any data disclosure will jeopardize their privacy.

Even if there were genuine doubt about the existence of law school mismatch effects—even, let us suppose, that there was only a 50/50 chance that the Bar data would confirm the mismatch problem—it is hard to see how the actions of those seeking to bury data and kill academic inquiry are defensible. What one can see are the actions of a small, essentially reactionary cohort, fearful of what data will show and even more fearful of reforms to existing preference systems, invoking the specter of an ideological attack on affirmative action to rally troops unaware, and uninterested, in the true pattern of underlying motives.

#### PART V. CONCLUSION

The *Denver University Law Review* has performed a signal service with this symposium. The time is ripe to assess what we have learned from past diversity efforts, and to think afresh upon how to better connect our fundamental values to the initiatives we put forth. The symposium has brought together a true diversity of perspective and many contributors with creative and thoughtful suggestions.

American higher education in general, and legal education in particular, plays a unique role in the development of national leadership. It does not write upon a blank slate—necessarily, much of what it does is simply recognize and certify successive cohorts of pre-packaged elites. But higher education undoubtedly influences the shape of American elites, and since the 1960s educational leaders have perhaps become more self-conscious about the way they use that influence.<sup>169</sup> Law schools are thus bastions of privilege that try, in theory at least, to redefine and re-channel the sources of privilege. This is a delicate task, and it is easy for yesterday's innovative reform to become entrenched and unaccountable.. All of the contributors to this symposium, I think, believe that law schools should engage in a process of continual revolution from

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167. *Sander v. State Bar of California*, 126 Cal. Rptr. 3d 330, 340 (Cal. Ct. App. 2011).

168. *Sander v. State Bar of California*, 2011 Cal. LEXIS 9272 (Cal. Aug. 25, 2011).

169. This was one of the central messages of the classic study by Christopher Jencks and David Reisman, *The Academic Revolution* (2d edition, 1969).

within. We all recognize the need to challenge complacency and to remake a system that continually seeks to perpetuate and encrust itself.

For this process of ongoing rebellion to work, we must welcome new ideas and challenges to sacred assumptions. We must question whether what we do really works, and openly consider how new means can better foster cherished ends. Above all we must welcome empiricism, and must be committed to the transparency that empiricism thrives upon. Otherwise we unwittingly enshrine a dogmatic privilege under another name.

