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# CLASS, CLASSES, AND CLASSIC RACE-BAITING: WHAT'S IN A DEFINITION?

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## INTRODUCTION

In his article *Class in American Legal Education*, Professor Richard Sander highlights the lack of class diversity within law schools in the United States, particularly within elite law schools.<sup>1</sup> As Sander points out, law students tend to come from relatively elite class backgrounds, and Sander urges law schools to pursue class-based affirmative action, rather than race-based affirmative action, in their admissions processes.<sup>2</sup>

As a general matter, we agree with Professor Sander that class diversity within a law school and within the legal community is a laudable goal. Class-based affirmative action is neither an unnecessary nor unwarranted proposal. A number of the arguments asserted in favor of racial diversity in *Grutter v. Bollinger*<sup>3</sup> also may apply to class diversity. For example, just like racial diversity, class diversity among students can contribute to a robust exchange of ideas on legal issues.<sup>4</sup> Additionally, to the extent that law schools “represent the training ground for a large number of our Nation’s leaders” and to the extent that we want to “cultivate a set of leaders with legitimacy in the eyes of the citizenry,” class diversity, like race diversity, may signal to all citizens that the law school

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1. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 637 (2011).

2. While Professor Sander does not explicitly argue for the repeal of race-based affirmative action in his article, he suggests, through his arguments, that the flaws in many race-based affirmative action admissions policies are cause for elimination of the policy, not reform of the policy. Most tellingly, Sander states, “As we have seen, law schools could do a great deal to foster more SES diversity without using class-based preferences at all. But there is much to commend going further, and using mild SES preferences as at least partial substitute for current racial preferences.” *Id.* at 664 (emphasis added).

3. 539 U.S. 306 (2003).

4. *See id.* at 329.

path to leadership is open to people from a broad range of class backgrounds.<sup>5</sup> Indeed, Sander is not the first, nor will he be the last, law professor to address the importance of class diversity within higher education. For example, in their book *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*, Professors Lani Guinier and Gerald Torres examine the benefits of coalitions around “political race” that have enabled barriers to higher education at state universities to crumble for both disadvantaged white and minority students through the Texas Ten Percent Plan.<sup>6</sup> Additionally, Guinier, in her article *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, analyzes how measures for merit in the admissions process correlate more with factors such as parents’ education, grandparents’ socioeconomic status, racial identity, and geographic location than they do with future academic performance.<sup>7</sup> Similarly, in her article *Assessing Class-Based Affirmative Action*, Professor Deborah Malamud carefully analyzes the idea of class-based affirmative action and its potential effectiveness or ineffectiveness at addressing economic inequality.<sup>8</sup> Finally, in the article *The Admission of Legacy Blacks*, one of us, Professor Angela Onwuachi-Willig, studies the complexities of class as related to race and national origin and ethnicity for Blacks<sup>9</sup> in the admissions game, encouraging institutions to account for socioeconomic status, race, and national origin in their processes.<sup>10</sup>

In this Article, we do not take issue with Sander’s identification of class diversity as a necessary point for discussion and inclusion among law professors and deans. Rather, we take issue with the manner in which Sander sets up the discussion about law school affirmative action as an either-or proposition, with class on one end and race on the other, as though the two concerns are mutually exclusive of and incompatible with each other. More specifically, we contest Sander’s definitions of the words “class” and “socioeconomic status” and, in many ways, his use of those words as interchangeable terms in *Class in American Legal Educa-*

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5. *See id.* at 332.

6. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 67–75 (2002).

7. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 146–51 (2003).

8. Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 454–71 (1997).

9. Throughout this article, the words “Black” and “White” are capitalized when used as nouns to describe a racialized group; however, these terms are not capitalized when used as adjectives. Also, the term “Blacks” is used instead of the term “African Americans” because the term “Blacks” is more inclusive. *See* Journal of Blacks in Higher Educ. Found., *Why “Black” and Not “African American”?*, 3 J. BLACKS HIGHER EDUC. 18, 18–19 (1994). Additionally, “[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies.” Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4 (1992).

10. *See generally* Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007).

tion (although such interchangeable use is frequently employed in legal scholarship, even by the authors).<sup>11</sup> *Merriam-Webster's Dictionary* defines "class" as "a group sharing the same economic or social status"<sup>12</sup> and defines "socioeconomic" as "of, relating to, or involving a combination of social and economic factors."<sup>13</sup> Based on these definitions, it is clear that while one's class may arguably (though not convincingly) be defined solely in economic terms, one's socioeconomic status (SES) necessarily includes social factors such as race.<sup>14</sup> In fact, we find Malamud's definition of class and economic disadvantage in her article *Assessing Class-Based Affirmative Action* most convincing. Like Malamud, at least with respect to the category of "class," we "do not mean that [a person] falls below a predetermined absolute threshold of economic attainment" when we say that "that a person is economically disadvantaged"; "[i]nstead, [we mean that] one is economically disadvantaged in [our] sense of the term when one has fewer economic goods than do members of some relevant comparison group."<sup>15</sup> In this vein, we question a number of Sander's comparisons and framings of class and socioeconomic status within his article. For instance, when Sander speaks of students of "relatively elite backgrounds," he rarely notes to which groups these "elite backgrounds" are relative; he never compares, for example, the black law students from "relatively elite backgrounds" with their white, law school peers of "relatively elite backgrounds."<sup>16</sup> Along those same lines, Sander's groupings of law school students' parents by class often seems to be comparing apples to oranges, such as parents who are registered nurses to those who are doctors.

Finally, we reject what we view as Sander's misguided attempts to institute class-based affirmative action in lieu of race-based affirmative action.<sup>17</sup> In so doing, we explain why many of Sander's arguments in favor of substituting race-based affirmative action with class-based affirmative action are flawed. We also note numerous substantive reasons why law schools must continue to pay attention to race. Contrary to what

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11. Sander, *supra* note 1, at 633–34 (defining "class" and "socioeconomic status" by reference to one's income, education, and occupation, and using the two terms interchangeably "when statistics are involved").

12. *Class*, M-W.COM, <http://www.merriam-webster.com/dictionary/class> (last visited June 08, 2011) (emphasis added).

13. *Socioeconomic*, M-W.COM, <http://www.merriam-webster.com/dictionary/socioeconomic> (last visited June 08, 2011) (emphasis added).

14. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1866–94 (1996).

15. Malamud, *supra* note 8, at 453.

16. Sander, *supra* note 1, at 633 (discussing the prevalence of students from "relatively elite backgrounds" in top law schools).

17. Race-based affirmative action in legal education usually applies to black Americans, Latinos, Native Americans, and some Asian ethnicities. However, we have chosen to focus most of our emphasis on black Americans, considering that (1) Sander also puts great attention on black Americans, (2) the greatest wealth of available scholarship is on black Americans, and (3) black Americans are arguably the original, primary intended recipients of affirmative action, considering our nation's past history with slavery, Jim Crow laws, and the Civil Rights Movement.

Sander's article suggests, race and racism still matter within our society, and in a way that supports the maintenance of race-based affirmative action within law schools. In the end, we reject Sander's contention that class-based affirmative action would produce similar racial diversity within law schools.<sup>18</sup>

Overall, in this Article, we briefly lay out each of our challenges to Sander's arguments in *Class in American Legal Education*. In Part I, we first address the very problems that Sander's article highlights about the difficulties of defining class and SES, problems that may make class-based affirmative action programs less feasible and effective than Sander suggests. In so doing, we identify what we consider to be defects in Sander's class/SES groupings. We also highlight the complexities around class and race that already exist within law student populations, answering in part the important questions about to whom black law students are "relatively" advantaged or disadvantaged. In Part II, we focus on responding to Sander's substantive arguments against race-based affirmative action, demonstrating why class-based affirmative action is an inadequate substitute and why race-based affirmative action is still needed.

#### I. WHO'S GOT CLASS? THE DIFFICULTIES OF MEASURING SOCIOECONOMIC STATUS THAT AFFECT THE VALIDITY OF THE CONCLUSIONS DRAWN FROM PROFESSOR SANDER'S DATA

In making his arguments for the adoption of class-based affirmative action as opposed to race-based affirmative action, Sander relies on the following two factors to determine each student subject's class/SES: the level of education of the parent(s) of the student and the occupation of the parent(s) of the student.<sup>19</sup> In so doing, however, Professor Sander does not adequately discuss the inherent difficulties in measuring class (or what he also refers to as SES) and demarcating persons by class. Instead, Sander overlooks or minimizes the racial implications of his choices in determining class, even as he admits several flaws in his data. He also fails to address various concerns about measuring students' SES that other legal scholars such as Malamud have raised.

In this Part, we—neither of whom is an empiricist—first address what we view as Sander's avoidance and minimizing of the real consequences that flow from the admitted flaws in his means for measuring SES as well as the consequences that flow from what we view as fatal flaws in Sander's methods for demarcating SES quintiles. Thereafter, we identify what is lost in the analysis because of Sander's failure to discuss the inherent difficulties of measuring class and demarcating persons by class. In particular, we highlight what we believe is lost in Sander's

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18. See Sander, *supra* note 1, at 660–64.

19. Except where specifically noted in the remaining sections of this Article, we use the terms "class" and "SES" as Sander does—interchangeably.

analysis as a result of his failure to address intergenerational wealth and account for the differences between Blacks and Whites at each defined SES level.

*A. Undercounting, Undervaluing, and Underestimating Difference*

As noted above, neither one of us is an empiricist, and as a result, we are not well-positioned to contest Sander's data from that angle. However, even as non-empiricists, we have serious questions about the validity of Sander's conclusions in light of the admitted flaws in his data and in light of some of the assumptions that Sander makes in pushing his arguments.

For example, we wonder to what extent Sander's analysis is valid when the SES status of black students is highly likely to be overrepresented for a significant portion of the black law student sample, a sample that is already, as Sander notes, quite modest.<sup>20</sup> Sander acknowledges that one flaw in his measurements is that "the SES status of students from single-parent families will tend to be overstated by the approach used here"<sup>21</sup> and that "Blacks disproportionately come from single-parent families, whose income will usually be lower—despite high educational and occupational prestige—than otherwise similar two-parent families."<sup>22</sup> Nevertheless, Sander minimizes the potential effect of this flaw, noting that "none of the data sources [he] know[s] of on the SES of the general population of law students help us take these factors into account."<sup>23</sup> Yet, a quick review of the data regarding the percentages of black and white children who live in single-parent households raises serious questions about whether Sander's analysis in his article can even be legitimately run without taking such factors in account. First, as Sander concedes himself, considering that a more accurate predictor of SES would include all persons in a household who contribute to the expenses,<sup>24</sup> Sander's averaging of SES scores between parents greatly overstates the SES of single-parent families. Second, and more importantly, Sander's risk of overstating privilege for single-parent households in his study is 2.8 times as high for black children as it is for white children.<sup>25</sup> After all, black children are significantly more likely to be raised in single-parent homes than white students—at a rate of 67% versus 24%.<sup>26</sup>

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20. Sander, *supra* note 1, at 650.

21. *Id.* at 636–37.

22. *Id.* at 652.

23. *Id.*

24. See Malamud, *supra* note 14, at 1878–79.

25. See Kids Count Data Ctr., *Data Across States: Children in Single-Parent Families by Race (Percent) – 2009*, ANNIE E. CASEY FOUND., <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=107> (last visited June 08, 2011).

26. *Id.*

Similarly, while Sander notes that his “method [may] be too conservative in characterizing the eliteness of law students . . . [because] many law students’ parents have not just bachelor degrees, but bachelor degrees from very elite schools,”<sup>27</sup> he again fails to identify and discuss the racial implications for such a flaw. Indeed, this flaw is not just likely to understate the eliteness of law students, but it is specifically more likely to overstate the eliteness of black law students and consequently understate the differences between the eliteness of black law students and white law students. Given the significant blatant discrimination in education against the parents and grandparents of today’s black law students, such law students’ parents are less likely than their white peers to have bachelor degrees from very elite schools. As one example, racial minority students today have a vastly lower likelihood of benefiting from legacy programs. At Texas A&M University in 2002—a school that no longer exercises legacy preferences—legacy preferences allowed for the enrollment of 321 white students who otherwise would not have been admitted, but only three Blacks and twenty-five Latina/os in this category.<sup>28</sup> In fact, Blacks were not permitted admission to Texas A&M University until 1963.<sup>29</sup> Similarly, at the University of Virginia, one report in 2003 indicated that 91 percent of the legacy applicants who were accepted on an early-decision basis were white, while only 1.6 percent of such admits were black, 0.5 percent were Latina/o, and 1.6 percent were Asian-American.<sup>30</sup> At one point in his article, Sander mentions legacy preferences as a factor that may have a negative impact on low SES students,<sup>31</sup> but even then, Sander fails to acknowledge the racial implications of such legacy preferences.

Finally, we contend that Sander’s methodology is flawed with regard to more than just his tools of measurement. In deciding where to insert “meaningful breaks” as Malamud would term them,<sup>32</sup> Professor Sander has created a misleading 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.<sup>33</sup> Yet, such a

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27. Sander, *supra* note 1, at 637.

28. Todd Ackerman, *Legislators Slam A&M Over Legacy Admissions*, HOUS. CHRON., Jan. 4, 2004, at A1, available at [http://www.chron.com/CDA/archives/archive.mpl?id=200\\_3722913](http://www.chron.com/CDA/archives/archive.mpl?id=200_3722913); see also *Gates Ends Legacy Role in Admissions*, BATTALION ONLINE (Jan. 16, 2004), <http://www.thebatt.com/2.8485/gates-ends-legacy-role-in-admissions-1.1207693> (containing a statement in which President Robert Gates asserted that “Texas A&M will no longer award points for legacy in the admissions review process”).

29. Michael King, *Naked City: Texas A&M’s Racial Legacy*, AUSTIN CHRON. (Jan. 16, 2004), <http://www.austinchronicle.com/gyrobase/Issue/print?oid=oid%3A193354>.

30. Daniel Golden, *Family Ties: Preference for Alumni Children in College Admissions Draws Fire—Policy, Aiding Mainly Whites, Gets Embroiled in Debate Over Affirmative Action—Critical to Schools’ Donations*, WALL ST. J., Jan. 15, 2003, at A1.

31. Sander, *supra* note 1, at 658.

32. Malamud, *supra* note 14, at 1879.

placement does not seem to accord with what the average person would consider high SES. Although there is wide variation in measuring class,<sup>34</sup> the fact that Professor Sander classifies a registered nurse as high SES<sup>35</sup> is striking because one does not even need a bachelor's degree to become a registered nurse. Indeed, a female registered nurse without a bachelor's degree would not meet the criteria for being middle-class according to prominent sociologist Thomas Shapiro, who contends that a middle-class classification according to education requires that at least one person in the household have a bachelor's degree.<sup>36</sup> By creating such a broad category of high SES persons, Sander undervalues the comparative privilege of high SES persons by race, considering that Blacks heavily populate the occupations at the bottom end of that quartile.<sup>37</sup> Indeed, Sander's misleading SES scheme has far-reaching implications all throughout his analysis because it relies on groupings that may be inaccurate and lacking in meaning, thus making any comparisons that he makes between the various racial and class groups unreliable.

Moreover, in comparing the relative representation of racial and socioeconomic groups of law students to the general population, Sander proceeds as though the groups of minority students and low-SES students are mutually exclusive of each other. We suspect others will respond much like we did when reading Sander's article, asking: "What would Table 5 look like if the SES groups (even under Sander's groupings, but preferably under one that does not classify both registered nurses and doctors under the same SES group) were divided by both race and class?" After all, as Sander highlights at a different point in his paper, "racial minorities are responsible for much of the small amount of SES diversity we can currently observe in law schools."<sup>38</sup>

### *B. Having Class and What That Means*

On top of the specific flaws in Sander's data lay more general problems with his definitions of class and SES. Throughout his article, Sander fails to address various concerns that other legal scholars such as Malamud have raised about the messiness of measuring class and SES status.

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33. Sander, *supra* note 1, at 636. Professor Sander adapts the CAMSIS scale, which ranks occupations, but adds his own percentile to it reasoning that "75% of employed women in this age cohort have lower CAMSIS codes, so registered nurses are assigned a percentile of 75." *Id.*

34. THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 87 (2004).

35. Sander, *supra* note 1, at 636.

36. SHAPIRO, *supra* note 34, at 88.

37. *Id.* at 89 ("The gap between whites and blacks grows using the occupational definition of the middle class because it does not have an income ceiling and thus includes proportionally more well-to-do families, and highly paid professionals and executives tend to be white. Conversely, employees in lower-middle-jobs—office workers, civil servants, and salespeople—are disproportionately black.")

38. Sander, *supra* note 1, at 651.



### 1. The Difficulties of Defining Class/SES

In several articles, Malamud has undertaken a comprehensive look at the inherent difficulties in devising a technically, morally, and culturally accurate class-based affirmative action program.<sup>39</sup> In so doing, she has urged a structural, intergenerational approach to understanding economic disadvantage, one that is cognizant of the limitations of most traditional indicia used to estimate economic disadvantage and that considers the intertwinement of race, gender, and class oppressions.<sup>40</sup> For example, Malamud asserts the following about defining and understanding class in the United States:

Class is social in the dual sense that the class system is inherent in and perpetuated by the structure of economic relations in the society and that shared class position has the potential for being mobilized as the basis for both group identity and political action. Class is diachronic in the triple sense that class position is (1) intergenerationally transmitted, (2) mediated through the strategic behavior of social actors over time, and (3) incapable of being understood without reference to patterns of change in the economic organization of the society.

Finally, there is an alternative version of a belief in class, which builds on the meaning of class just described, but goes beyond it. In this view, class is said to interact with race, gender, and ethnicity (and perhaps other elements of social identity, such as place of residence) in interlocking and mutually defining structures, and it is their interaction that is seen to shape both consciousness and life chances. One of the many consequences of this view, if it is correct, is that class analysis can never be race- or gender-blind and therefore cannot strictly be viewed as an alternative to the traditional foci of antidiscrimination law and policy.<sup>41</sup>

Overall, Malamud suggests that, although the various elements of economic advantage are structurally intertwined, and all are needed to present a full picture, institutions can consider wealth, occupation, income, education, consumption, and class consciousness (as well as race, gender, and ethnicity) in determining whether applicants should be the recipients of class-based affirmative action.<sup>42</sup> At the same time, however, Malamud acknowledges and explains the individual limitations and advantages of each of these elements. For example, in describing wealth, she argues that, despite its ability to represent true inequality that is directly related to the availability of opportunities and its revelation of stark racial inequality, wealth is rarely revealed or utilized in studies.<sup>43</sup>

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39. See, e.g., Malamud, *supra* note 14.

40. *Id.* at 1855–56.

41. *Id.*

42. *Id.* at 1870–85.

43. *Id.* at 1870–72.

She further notes that occupational status demonstrates the intergenerational nature of class and its lack of mobility, but points out that there is not an agreed upon set of characteristics to classify occupations and that job titles may not represent true duties or prestige.<sup>44</sup>

Thereafter, Malamud explains that, in contrast to wealth, while income data is easily attainable and measurable, it makes economic mobility seem more accessible than it actually is.<sup>45</sup> Furthermore, she points out that income is not accurately conveyed when given individually, but is more truly representative of SES when presented in the aggregate form for a family or household.

Related to that, Malamud explicates that measuring class by educational status is a catch-22 because, although it is a significant indicator of opportunities available to a child, the complexity (such as the reputation of the school, the type of degree, whether the program is a night or day program) of education level cannot easily be taken into consideration, resulting in persons with less socially valued forms of education seeming more privileged than they actually are.<sup>46</sup> Likewise, she notes that consumption is a defining characteristic of class in American society, but that context dictates the importance of it, making, for example, a rural family's consumption patterns difficult to compare to persons in urban areas.<sup>47</sup>

Finally, Malamud warns of expecting students to have a shared class consciousness and to be willing and able to discuss a disadvantaged perspective based on class because many students—particularly by the graduate level—may lack a strong connection to their lower class roots.<sup>48</sup> In considering such elements of economic disadvantage, she also states that decisions must be made regarding how to classify a person's disadvantage: gradationally, categorically, or relationally.<sup>49</sup> Furthermore, she contends, a decision must be made on (1) whose class should be measured: that of an individual, a family, a household; (2) how to define a household; (3) how many generations should be included; and (4) how to treat children with parents in different households.<sup>50</sup> Malamud argues that the most accurate way to gain an understanding of economic advantage is by looking at the household as a whole, but also importantly notes that the economic advantages of grandparents may be outcome determinative of a child's life opportunities.<sup>51</sup>

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44. *Id.* at 1872–77.

45. *Id.* at 1877–80.

46. *Id.* at 1880–83.

47. *Id.* at 1883–85.

48. *Id.* at 1885–88.

49. *Id.* at 1863–65.

50. *Id.* at 1866–68.

51. *Id.* at 1866–69.

## 2. Acknowledging What's Missing in Sander's Measures of Socio-economic Status

In his article, Sander never grapples with any of the complexities of class that Malamud astutely lays out, choosing instead to rely on a more simplified definition. As a result, Sander fails to tell a complete story of SES.

Overall, Sander claims to be measuring SES, but he never takes into consideration that racial status is highly important in American society, conferring both social and economic benefits and detriments. In fact, he seems to suggest that race itself comes with no disadvantages.<sup>52</sup> His failure to adjust for the disparate racial impact of certain tools for measuring SES renders racial inequality invisible. Of particular significance is Sander's unnecessary averaging of family household SES data (as noted in Part I.A),<sup>53</sup> his exclusion of income data in relation to occupations,<sup>54</sup> and most starkly, his lack of data on wealth, which would more fully complete the stories about intergenerational wealth.<sup>55</sup> The true SES of many black families is much lower than Sander emphasizes,<sup>56</sup> thus greatly destabilizing his argument that high-SES blacks are being unfairly advantaged over low-SES whites.

First, Sander's determinants of SES lack income, which, in relation to occupation, renders pay differentials within occupations invisible. A person may hold a job within an occupation in the public sector or the private sector, the former which, on average, pays less.<sup>57</sup> Considering Blacks are more heavily represented in the public sector as civil servants,<sup>58</sup> their SES is likely overstated by not including the income commensurate to the occupation, rendering any income disparity invisible.<sup>59</sup>

But even more significant than Sander's exclusion of income determinants<sup>60</sup> is his failure to account for and analyze wealth.<sup>61</sup> While the average income gap between black families and white families has nar-

52. See generally Sander, *supra* note 1 (centering his analysis around socioeconomic rather than racial diversity).

53. *Id.* at 636.

54. *Id.* at 633–36.

55. *Id.* at 652 (recognizing that wealth is important and that there is likely a racial disparity).

56. Although Professor Sander recognizes that the measures are likely to overstate the wealth of Blacks, he denies that such flaws significantly or fatally affect his classifications. See *id.* (recognizing that the SES of Blacks is likely to be overstated).

57. SHAPIRO, *supra* note 34, at 89 (stating that Blacks are more likely to be civil servants who earn less, situating themselves as lower middle-class).

58. Malamud, *supra* note 14, at 1893.

59. SHAPIRO, *supra* note 34, at 89 (discussing the problem with occupation classifications when there is no income cap, which places clerical workers and executives in the same category despite great variance in economic advantage).

60. *Id.* at 36 (“Income is an indicator of the current status of racial inequality . . . wealth discloses the consequences of the racial patterning of opportunities.”).

61. Sander, *supra* note 1, at 650–53 (recognizing that wealth is important and that there is likely a racial disparity).

rowed to 64 cents to every dollar,<sup>62</sup> the racial wealth gap is much greater.<sup>63</sup> The impact of the legacy of racial oppression is evident by looking at the difference in wealth: “[B]lack families possess only 10 cents for every dollar of wealth held by white families.”<sup>64</sup> Although the exact spread of the racial wealth gap varies, “[w]hite households in every income quintile have significantly higher median wealth than similar-earning black households.”<sup>65</sup>

The source of the wealth gap is not fully explained by factors such as income,<sup>66</sup> education, or job status—any of the traditional measures of class status.<sup>67</sup> The racial wealth gap’s lack of correlation to traditional measures of class is illustrated by the finding that, if wealth is used as the measure “black families headed by professionals like doctors and lawyers would be in the same class as white families headed by blue-collar workers, such as coal miners.”<sup>68</sup> Considering that more merit-based differences such as “education, jobs, and earnings” do not explain the racial wealth gap, it must be explained by non-merit-based sources such as “inheritance, institutional discrimination, and discriminatory public policy.”<sup>69</sup>

This story of wealth is not one that can be or should be ignored when we are talking about class and SES distinctions in the affirmative action context. With regard to inheritance, white parents give funds to children earlier and in greater amounts.<sup>70</sup> In his rather revealing book, *The Hidden Cost of Being African American*, sociologist Thomas Shapiro discusses the power of intergenerational wealth on racial inequality by discussing the prevalence of “transformative assets,” which serve as “inherited wealth lifting a family beyond their own achievements.”<sup>71</sup> Transformative assets include “down payments and closing costs for first-time homebuyers, college tuition payments, large cash gifts, and loans, as well as old-fashioned bequests at death.”<sup>72</sup>

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62. SHAPIRO, *supra* note 34, at 7 (noting that the gap had narrowed following 1989 figures which found that a black family made only 55 cents for every dollar a white family made).

63. *Id.* at 32–33.

64. *Id.* at 47 (“The net worth of typical white families is \$81,000 compared to \$8,000 for black families.”).

65. *Id.* at 49.

66. *Id.* at 88–89 (stating that his study corroborated prior findings that income does not predict wealth levels).

67. *Id.* at 87.

68. *Id.* at 92.

69. *Id.* at 42.

70. *Id.* at 67–69. With respect to gifts from living family members, blacks and whites are just as likely to receive at all levels of wealth but “[t]he gift for the average white recipient was \$2,824, compared to \$805 for black families,” and “[b]lack families are just as willing to help their adult children, but their circumstances limit their ability to do so.” *Id.* at 68. Additionally, “among those fortunate enough to receive bequests, blacks received 8 cents of inheritance for every dollar inherited by whites.” *Id.* at 69.

71. *Id.* at 10.

72. *Id.*

Similarly, institutional discrimination and policy have played an enormous role in racial wealth differences that affect educational opportunities. For example, as a result of post-World War II governmental policies and societal trends, the modern middle-class was built. In fact, many middle-class white families were able to establish wealth through greater education and homeownership as a result of these policies and now are routinely able to leave their children inheritances as a result of these benefits.<sup>73</sup> Following World War II, the Federal Housing Administration created policies that facilitated homeownership for the masses, and the GI Bill and Veterans Administration's home loans provided veterans financial assistance for gaining an education and buying a home.<sup>74</sup> However, these policies precede the 1968 Fair Housing Act.<sup>75</sup> Thus, when Whites were seizing government-provided opportunities, Blacks were blocked from capitalizing on them due to homeowners' refusals to sell, banks' refusals to give mortgages to Blacks or in black neighborhoods, and the simple exclusion of Blacks from such housing and educational programs.<sup>76</sup>

The modern wave of increased homeownership was not the first major governmental housing policy that overwhelmingly benefited white families. In 1862, the federal government passed the Homestead Act, which gave out 160 acres of "free"<sup>77</sup> land for people to raise a family, build wealth, and create opportunities for their children.<sup>78</sup> Some estimates calculate that a quarter of the white adult American population is a descendant of a Homestead Act recipient and thus a beneficiary of a racially exclusive federal housing policy.<sup>79</sup> All the while, black Americans never received their forty acres and a mule or a comparable tool to build wealth following the end of slavery.

Even current housing policy benefits the families of wealth-rich persons and yields to racial discrimination and racist consumer preferences. For example, current housing policy requires new homebuyers to make a down payment of 20% of the home price.<sup>80</sup> By paying such a great portion of the home price, a person avoids paying private mortgage insurance (which is equivalent to approximately 0.75 percent of the loan)

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73. *Id.* ("In fact, as a result of the tremendous postwar economic prosperity and public policies promoting middle-class homeownership, today inheritances are commonplace for middle-class families.")

74. *Id.* at 190.

75. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619).

76. SHAPIRO, *supra* note 34, at 108-09; *see also Census Report: Broad Racial Disparities Persist*, MSNBC.COM (Nov. 14, 2006, 12:01 AM), [http://www.msnbc.msn.com/id/15704759/ns/us\\_news-life/](http://www.msnbc.msn.com/id/15704759/ns/us_news-life/).

77. By "free," we mean that the land was given without to the exchange of money from the recipients.

78. SHAPIRO, *supra* note 34, at 190.

79. *Id.*

80. *Id.* at 111-12.

and secures a lower interest rate.<sup>81</sup> Steep initial prices provide great barriers to homeownership for those with college debts and parents who do not offer to pay all or a significant portion of the down payment—in other words, those without access to transformative assets.<sup>82</sup> Upon acquiring adequate funds to buy a home, racial discrimination in securing a mortgage often results in a barrier, if not complete, at least a higher cost barrier.<sup>83</sup> Consistently, black families with similar credentials to white families are rejected; one study showed that lending institutions deny Blacks home loans eighty percent more often than similarly situated Whites.<sup>84</sup> And, overall, Blacks' interest rates are 0.3% higher than Whites.<sup>85</sup>

Finally, upon securing a home, black families (living in areas that are more than ten percent black) find that their home equity does not appreciate at near the same level as if they lived in a nearly all white neighborhood.<sup>86</sup> Their home value appreciates at an 18% lower rate than homes in white neighborhoods, because by and large, Whites will not buy a home in a black neighborhood.<sup>87</sup> Therefore, the demand for a home in a black neighborhood is limited to black families (and possibly other minorities) who have the requisite funding, rather than the entire population, including Whites, who have a greater ability to buy homes.<sup>88</sup> Thus, the primary source of wealth—homeownership<sup>89</sup> and home equity—accrue to black homeowners at a significantly lower rate, which in turn limits the quality of the schools in those areas as well as the assets that families can further provide to their children.<sup>90</sup>

The impact of intergenerational wealth, which has accrued and continues to grow as a result of discriminatory practices and policies, demonstrates that, although strides in education and income are improving

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81. *Id.* at 112.

82. *Id.* at 111–19 (describing the vast difference in help securing the down payment for first homes between black and white families).

83. *Id.* at 111.

84. *Id.* at 109–10.

85. *Id.* at 111.

86. *Id.* at 120–21.

87. *Id.* at 122 (“The pool of potential buyers is no longer 100 percent of the affordable market, because for all practical purposes potential white buyers shun such neighborhoods. The potential buyers are now mainly other black Americans who can afford the home and possibly other minorities.” (footnote omitted)).

88. *Id.*

89. *Id.* at 43 (“[F]or families in the middle three-fifths of America’s net worth distribution, ranging from \$1,650 to \$153,000, equity in their principal residence represents 60 percent of their wealth.”).

90. *Id.* at 53 (“Everything else being equal, blacks accrue only \$1.98 in wealth for each additional dollar earned, in comparison to \$3.25 for whites, so that, net of all other factors, the average black family earning \$60,000 possesses \$76,000 less wealth than the average white family with the same earnings. The most dramatic difference is the wealth effect of homeownership, which is worth about \$60,000 more for whites than blacks. The evidence bolsters my core argument that the way homes are bought and sold, where they are located, and how the market values them provides a contemporary foundation for racial inequality.”).

the current reality for some black Americans, many Blacks are left in the dust compared to their white counterparts who are able to maintain and raise their social status<sup>91</sup> precisely because of racial advantage in a variety of forms.<sup>92</sup> Plain and simple, white students are statistically more likely to have already received greater opportunities from their families and are more likely to receive greater future opportunities by utilizing wealth that is unparalleled among Blacks.<sup>93</sup>

In fact, research on students at twenty-eight elite undergraduate institutions—the very kinds of institutions that serve as feeder schools for law schools—reveals that these institutions' multiracial students, black immigrant students, and especially black American students with long term roots in the United States (otherwise known as legacy Blacks<sup>94</sup>) are significantly disadvantaged in terms of various SES indicators when compared to their white *peers* at the same elite institutions. For example:

Recent findings from a study of students at twenty-eight colleges and universities reveal that, while only seventy percent of fathers of [immigrant] Blacks and 55.2 percent of fathers of legacy Blacks were college graduates, 85.7 percent of white first-year students were college graduates; similarly, while only 43.6 percent of the fathers of [immigrant] Blacks and 25.3 percent of the fathers of legacy Blacks had advanced degrees, 56.7 percent of the white fathers in the group had advanced degrees.<sup>95</sup>

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91. *Id.* at 10 (“Many of the families I spoke to relied on transformative assets to acquire their class standing, social status, homeownership, the kind of community they live in, and their children’s schooling.”).

92. *Id.* at 13 (“Many whites continue to reap advantages from the historical, institutional, structural, and personal dynamics of racial inequality, and they are either unaware of these advantages or deny they exist. Black Americans in particular pay a very steep tax for this uneven playing field and outcome, as well as for the denial of white advantage.”); *see also id.* at 114 (“In effect, young white families possess an advantage in housing markets and homeownership because their parents’ economic livelihoods and ability to accumulate wealth were untrammelled by race in previous generations.”).

93. *Id.* at 40 (“A further analysis of this already disturbing data discloses imposing and powerful racial and ethnic cleavages. In 1999, 26 percent of all white children grew up in asset-poor households, compared to 52 percent of black American children and 54 percent of Hispanic children.”).

94. The term “legacy Blacks” applies to African-Americans who come from families in which all four grandparents descend from black American slaves. *See Onwuachi-Willig, supra* note 10, at 1149 n.27.

95. Onwuachi-Willig, *supra* note 10, at 1190 (citing Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 257 tbl.3 (2007)); *see also* DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* 30–31 tbl.2.5 (2003). Among the schools included in the study were the following (in alphabetical order): Barnard College, Bryn Mawr College, Columbia University, Denison University, Emory University, Georgetown University, Howard University, Kenyon College, Miami University-Oxford, Northwestern University, Oberlin College, Pennsylvania State University, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Tufts University, Tulane University, University of California-Berkeley, University of Michigan, University of North Carolina, University of Notre Dame, University of Pennsylvania, Washington University in St. Louis, Wesleyan University, Williams College, and Yale University.

Admittedly, these statistics reveal a generally more privileged group in the United States as a whole, but such racial differences in educational attainment among this more privileged group stand separate and apart from the eliteness of the schools attended by the students' fathers, a factor, which for the reasons described in Part I.A., are far more likely to slant in favor of white students.<sup>96</sup>

Additionally, the same study of twenty-eight elite institutions revealed that black students at these schools were more likely than their white peers to come from families that were earning less as middle-income families and that black students also were more likely than their white peers to be experiencing many of the factors related to coming from poverty. Specifically, the study showed "that only 23.8 percent of black immigrant families and 25.5 percent of African-American families" with students at the elite institutions "had an income over \$100,000 as compared to 52.9 percent of white families, for whom fewer mothers were working outside of the home."<sup>97</sup> Furthermore, "whereas 15.7 percent of the black immigrant families and 19.5 percent of the African-American families in the twenty-eight college study had ever been on welfare, only 5.3 percent of the white families had ever been on welfare."<sup>98</sup>

Lastly, studies show that black and white students experience significantly different advantages with regard to homeownership, a fact that should come as no surprise given Shapiro's accounting of institutional and attitudinal discrimination against Blacks in housing. For example, the same "study of the black and white students at select elite colleges revealed that, while only 71.4 percent of black immigrant families and 73.7 percent" of legacy Black families in the study "owned a house as opposed to renting (a relatively elite group compared to average American families), 93.8 percent of white families owned one."<sup>99</sup> Second, and more importantly, the study showed that, even among this elite group, Blacks were at a significant disadvantage in terms of wealth through assets, as the average value of the homes for the black immigrant families was \$220,600 and the average value of the homes for the legacy Black families was \$193,200 compared to the average value of the homes for the white families at \$327,400, a difference of more than \$100,000–\$130,000 for both groups.<sup>100</sup>

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96. See *supra* Part I.A.

97. Onwuachi-Willig, *supra* note 10, at 1190–91 (citation omitted); see also Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1501 (1997) (highlighting that black married couples are more likely to be equal wage earners).

98. Onwuachi-Willig, *supra* note 10, at 1191–92 (citation omitted).

99. *Id.* at 1192 (citation omitted).

100. *Id.*



Such stark differentials in wealth indicated by these studies as well as the research by Shapiro and others on intergenerational wealth demonstrate that Sander's attempts to compare occupation- and education-indicated, high-SES Black persons to high-SES White persons without any consideration of real wealth distorts the reality of societal advantage and privilege and thus distorts the results of such studies.

## II. WHAT'S RACE GOT TO DO WITH IT? A RESPONSE TO PROFESSOR SANDER'S SUBSTANTIVE ARGUMENTS AGAINST RACE-BASED AFFIRMATIVE ACTION

In addition to our concerns about Sander's measures of class and SES, we also have several substantive responses to Sander's push to replace race-based affirmative action with class-based affirmative action. Apart from the practical reasons presented above, there are numerous policy reasons why Sander's proposal to do away with race-based affirmative action lacks merit. Specifically, we respond to Sander's misunderstanding of the benefits of diversity, his failure to recognize the raced implications of "neutral" admissions criteria, and his underestimation of the effects of contemporary racism.

### A. *Understanding Race, Grutter, and the Benefits of Diversity*

As an initial matter, we believe that Sander misunderstands the benefits of diversity in articulating his arguments for class-based affirmative action and against race-based affirmative action. To begin, by alleging that law schools pay little attention to the actual diversity contributions of students of color,<sup>101</sup> Sander misses the objective of race-based affirmative action. The purpose is not to expose white students to *the* minority opinion.<sup>102</sup> The purpose is to break down racial barriers between students, reduce stereotypes, and create enhanced learning as a result of cross-racial interactions.<sup>103</sup> Such results help white students, who have likely lived highly racially segregated lives,<sup>104</sup> to learn that there is not *one* minority opinion (and vice versa).<sup>105</sup> Furthermore, a critical mass of racial minorities improves minority students' educational experience because it allows individual students to hold less of the burden (that white students do not have) to educate inquisitive and unknowing white

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101. Sander, *supra* note 1, at 665–56.

102. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

103. *Id.* at 330.

104. SHAPIRO, *supra* note 34, at 143 (referencing GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 34 (2001)) ("A recent study on school segregation reports that 'white students are by far the most segregated in schools dominated by their own group.' Whites on average go to schools where 80 percent of the students are white. In comparison, blacks and Latinos attend schools where a little over half of the students are black or Latino.")

105. See *Grutter*, 539 U.S. at 330.

classmates about race<sup>106</sup> and allows minority students to focus on their own education.

The interest in breaking down stereotypes through a critical mass of racial diversity continues to provide public benefits long after students graduate. Multinational firms support race-based affirmative action because they desire a well-educated workforce that includes employees of all races who, through prior exposure to diversity, have an ease and familiarity with working in diverse groups.<sup>107</sup> Moreover, major corporations and the military have expressed a great need for a well-educated, racially diverse workforce.<sup>108</sup> This is due in part to the finding that heterogeneous workgroups produce better outputs.<sup>109</sup>

This interest in breaking down stereotypes and creating a robust exchange of ideas is not furthered by the presence of low-SES students, that is, if we accept Professor Sander's emphasis on characteristics that distinguish low-income students from students of color. Indeed, we take issue with several of Sander's problematic arguments for why class-based affirmative action is better than race-based affirmative action: his arguments that students who receive class-based preferences can remain invisible, are less likely to be stigmatized, "may not even be aware that they have received a preference," and are less likely to engage in "group self-segregation."<sup>110</sup>

First, Sander's argument that the ability to remain invisible is a benefit of class-based affirmative action<sup>111</sup> is tantamount to arguing that black racial passing as white is a healthy act with no psychological or material consequences. The very point and benefit of diversity, including class or SES diversity, is that students see, hear, acknowledge, accept, and embrace differences and learn from each other by listening to and respecting the views of others whose opinions and analyses may differ from their own because of differing backgrounds and life experiences. Because economic background can be invisible, and students are not readily identifying themselves as low-SES as Sander claims and Malamud warns,<sup>112</sup> there is not as great of a broadening of perspective introduced by low-SES students. It follows that having a critical mass of invisible low-income students in the class would not, based on Sander's arguments, help to challenge stereotypes or facilitate better interpersonal skills. Furthermore, even now with race-based affirmative action, "no

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106. *Id.* at 319 (discussing the impact of having a critical mass of racial minority students in that it allows students to not feel obligated to serve as racial spokespersons).

107. *See id.* at 330–31.

108. *See id.* (citing the amici from the business and military community in support of race-based affirmative action).

109. *See id.* at 330.

110. Sander, *supra* note 1, at 665–66.

111. *Id.*

112. *Id.*; *see also* Malamud, *supra* note 14, at 1886–88.

one can readily tell which [students] have received a preference.”<sup>113</sup> That some students think they can or, worse, assume that all black students must have benefited from a preference is not an issue that we should shy away from, but rather challenge. As educators, it is fair to say we have a responsibility to teach students not to paint all members of a group with a broad brush of stereotypes simply based on their racial background.

Second, as one study conducted by Professors Angela Onwuachi-Willig, Emily Houh, and Mary Campbell has shown, racial minorities do not feel stigmatized by affirmative action, either internally or externally.<sup>114</sup> The findings of another study by Professor Deirdre Bowen fall in line with the Onwuachi-Willig, Houh, and Campbell study about the stigma argument.<sup>115</sup> Thus, contrary to what Sander asserts, the stigma argument does not necessarily hold water. Even if the stigma argument does carry weight, it is not admissions preferences *per se* that stigmatize students, but rather the negative stereotypes and associations that attach to students’ identity groups that stigmatize. As Erving Goffman’s theory of stigma explicates, stigma is both a precondition to and consequence of being a “non-normal”—where “normal” status is defined and perpetuated by the very privileges, social and otherwise, that attached to such status.<sup>116</sup> The stigmatized individual is one who “possesses . . . an undesired differentness from what we had anticipated.”<sup>117</sup> For example, Onwuachi-Willig, Houh, and Campbell found in their study that groups that were not negatively stereotyped within the educational context, such as Asian Pacific Americans, were not presumed by student subjects to benefit from affirmative action, even in cases where they were actually included in affirmative action programs.<sup>118</sup> Or as Professor Christopher Bracey has explained, students are only “stigmatized” by affirmative action if their racial group is already generally stigmatized in that manner in society; the actual facts do not matter.<sup>119</sup>

More so, we, as an academic legal community that relies so heavily on factors such as the LSAT, stigmatize students with our words and

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113. Sander, *supra* note 1, at 666.

114. See generally Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1299 (2008) (finding that “1) minimal, if any, internal stigma felt by minority law students, regardless of whether their schools practiced race-based affirmative action; 2) no statistically significant difference in internal stigma between minority students at affirmative action law schools and non-affirmative action law schools; and 3) no significant impact from external stigma”).

115. See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198–99, 1223–25 (2010) (“Underrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.”).

116. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2–5 (1963).

117. *Id.* at 5.

118. Onwuachi-Willig, Houh & Campbell, *supra* note 112, at 1344–45.

119. Christopher A. Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANO-LATINO L. REV. 15, 39 (2006).

rhetoric about deservingness based on LSAT scores (which Sander never acknowledges as a factor in favor of high-SES students).<sup>120</sup> Consider this one true story, a story which we are confident other minority law professors, low-SES law professors, or minority and low-SES professors could recount.

Law students at an institution are engaged in intense debates about rankings and admissions. During this debate, a white, low-SES student approaches a minority law professor to discuss the discussions within the law school. He feels conflicted. The white, male student knows that he had among the lowest, or perhaps the lowest, LSAT score of any student in the law school. He has performed well in law school and wants to contest the validity of the LSAT to his classmates. He knows that he belongs in the law school. He also wants to respond to attacks on minority students as the persons responsible for lower rankings. He knows that people are attributing low scores to minority law students that he himself and another white friend had. He wonders whether he should out himself. In fact, he never does. He never speaks out. He remains silent.

Contrary to what Sander thinks, it was not any preference that this low-SES, white student received that made him feel stigmatized. Internally, he knew that he had earned his spot. He also did not feel any external stigma, as he felt no burden from students' doubts about him or mistreatment of him; in fact, no students doubted him precisely because he is white. What made him feel stigmatized, if anything, was the rhetoric about who belonged based on LSAT scores. More than its revelation about stigma, this student's story highlights the problems with Sander's identification of invisibility as a positive. Because this low-SES, white student could remain invisible, his classmates never had the opportunity to learn from him in a way that could have challenged their blind acceptance of the factors currently used during law school admissions processes.

Additionally, Sander's point about group self-segregation is just plain disturbing.<sup>121</sup> Ask any random, racially mixed group of law school graduates from a predominantly white institution who their closest friends from law school are, and you will likely find that the racial minority students have the more diverse group of law school friends; white law students are more likely to have a group of close friends who also are white. The fact is that racial minority students at predominantly white institutions cannot self-segregate. It is impossible to function within a predominantly white law school as a minority student and not interact with students of different races. That students of color may eat lunch together or have a party together is not group self-segregation, that is,

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120. See *infra* Part II.B.

121. See Sander, *supra* note 1, at 666–67.

unless one also wants to identify the all-white lunch tables and all-white parties, too, as group self-segregation. Unfortunately, the only time that racial groups seem to bother people in school settings is when it is minority students who are together. Very few people ever question the all-white tables or all-whites groups that are surrounding the minority tables or group or having their own parties.<sup>122</sup> That Sander would identify group self-segregation as an argument against race-based affirmative action only highlights the importance of racial diversity among both the students and the faculty, as minority students and faculty are more likely to impart these important lessons about double standards in looking around at “segregated” groups to their white peers.

Finally, we respond to Sander’s argument that low-SES students are worthier beneficiaries of affirmative action because their level of disadvantage is more accurately determinable than that of black students because class status more fully conveys privilege than skin color.<sup>123</sup> As one example of his point, Sander points to the overrepresentation of first and second generation black students from Africa and the Caribbean at colleges and universities, asserting that multiracial students and black African and Caribbean immigrants should be considered demographically distinct from black descendants of American slaves<sup>124</sup> (referred to as legacy Blacks<sup>125</sup> or ascendants).<sup>126</sup>

First, we reject Sander’s contention that low-SES students are worthier beneficiaries of affirmative action than minority students because their disadvantage is more determinable. It is a misnomer to state that SES preferences are based on individual circumstances, whereas race is based on group membership; thus, the former are more just.<sup>127</sup> SES preferences are based on group membership in that one does not have to show that she ever actually suffered from being in that class. In that way, race is also based on group membership. In order to be based on individual circumstances, people would need to show that they individually have been harmed by low-SES.

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122. See BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 52 (1997) (discussing how questions regarding seating at lunch tables are generally framed).

123. Sander, *supra* note 1, at 664–66.

124. *Id.* at 665.

125. Onwuachi-Willig, *supra* note 10, at 1148–49.

126. Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1236 (2008) (defining such persons as “ascendants” in order to emphasize “blacks’ ascendancy out of chattel slavery and segregation” as well as limit persons in the category to those that “personally experienced America’s racially discriminatory history their entire lives or were born from parents who were generally considered black at the time that affirmative action policies were first adopted . . . a product . . . of analyzing affirmative action from its inception from the perspective of the historical struggle undertaken by the black community to overcome its racial oppression in the United States”).

127. Sander, *supra* note 1, at 664.

But, while we do not agree with Sander's larger point about who is a "worthier" affirmative action beneficiary, we do agree that groups of black students should be distinctly considered based on national origin and interraciality due in part to the fact that multiracial students and black immigrants generally tend to have greater privilege than legacy Blacks.<sup>128</sup> We also agree that the presence of multiracial students and black immigrants in elite law schools when classified as simply "black" overestimates the presence of legacy Blacks.<sup>129</sup> Finally, we contend that it is important, especially for remedial purposes, to ensure that racial diversity includes greater numbers of legacy Blacks.<sup>130</sup>

However, we do not think that law schools should exclude multiracial and black immigrant students from their race-based affirmative action plans. Because racial stereotypes of black people do not entirely exclude multiracial and black immigrant people,<sup>131</sup> many of the interests served by including legacy Blacks in race-based affirmative action plans also are furthered by the presence of multiracial and black immigrant students.<sup>132</sup> Indeed, race-based affirmative action for legacy Blacks is supported in part because it counteracts the external and internal factors that hinder the success of affirmative action beneficiaries (such as race discrimination and stereotype threat, respectively). Because multiracial students (if they identify as black or part-black) and black immigrant students are often subject to the same stereotypes as legacy Blacks, they also are at risk of suffering the effects of race discrimination and stereotype threat.<sup>133</sup> Furthermore, while some black immigrants, particularly first generation, voluntary immigrants, do not tend to suffer from stereotype threat, voluntary black immigrants and their descendants are not forever exempt from bearing the weight of the effects of societal anti-black discrimination; while black immigrants are often able to proceed successfully with their goals unencumbered by cultural stereotypes that often hinder legacy Blacks, the advantage of the immigrant perspective, which allows them to distance themselves from black American stereotypes as well as compare their situation not to white Americans but to their life back home, starts to give way after the very first generation.<sup>134</sup> Thus, the advantages gained by higher education for black immigrants

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128. See Onwuachi-Willig, *supra* note 10, at 1165–79.

129. See *id.* at 1144–45 (discussing the diverse backgrounds of "Black" students admitted to law schools); see also Brown & Bell, *supra* note 124, at 1245 (arguing that the percentage of "Ascendants . . . may be considerably less than many administrators and members of the faculty and admissions committee realize").

130. See Onwuachi-Willig, *supra* note 10, at 1162–63.

131. Brown & Bell, *supra* note 124, at 1241.

132. See Onwuachi-Willig, *supra* note 10, at 1180–1207 (arguing that legacy Blacks, as well as black immigrants and multiracial students, serve the purposes of race-based affirmative action by advancing diversity and social justice).

133. *Id.* at 1187–88.

134. See *id.* at 1195, 1198 (discussing the impacts of cultural assimilation and stereotypes on immigrants).

may not curtail the future detrimental effects of racial stereotypes and stigma on their descendants.

Moreover, race-based affirmative action, which includes multiracial and black immigrant students, also benefits Whites. The presence of multiracial and black immigrant students and their interaction with white students in the classroom may help to counter Whites' stereotypes of not only that particular subgroup of Blacks, but Blacks in general. Such an environment allows Whites to develop greater cultural competence and become better prepared to work with co-workers from different backgrounds.

Regardless, the current lack of precision in beneficiaries of race-based affirmative action in law school admissions is not a fatal flaw; a more appropriate approach is to reform race-based affirmative action. For example, one of us has urged the required inclusion of racial/ancestral heritage background essays in admissions processes for all applicants. In such an essay, an applicant who is a legacy Black could describe discrimination that she has faced in American society, and a black immigrant applicant could describe the challenges in light of her circumstances.<sup>135</sup> Such a procedure would allow an admissions committee to gain a greater understanding of who an applicant is, including her privileges and disadvantages; the challenges she has personally faced; how far she has come; and whether her admission will advance the school's mission.<sup>136</sup>

*B. Failing to Understand the Racial Implications of "Neutral" Admissions Criteria*

In addition to articulating arguments that display a fundamental misunderstanding of the benefits of diversity, Sander fails to discuss and critique many important admissions criteria that work to the advantage of high-SES students and disadvantage of low-SES students. Although Sander highlights current admissions criteria that slant in favor of high-SES students, such as legacy preferences, the lack of accounting for grade inflation at private colleges, and preferences for "interesting" records,<sup>137</sup> he does not acknowledge all of the criteria that can work to disadvantage low-SES students during the law school admissions process, including rather prominent criteria. One of the most startling omissions in Sander's list of factors that negatively impact low-SES students is the LSAT. That Sander excludes the LSAT itself from a list of items that may privilege higher-SES students is shocking. Numerous studies reveal that the results of exams like the LSAT correlate very highly with paren-

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135. *Id.* at 1220–24.

136. *Id.* at 1221–24.

137. Sander, *supra* note 1, at 658–59.

tal income.<sup>138</sup> Also, basic common sense would require including the LSAT on any list of high-SES advantages in the admissions game, given that the preparation courses that help many students raise their LSAT scores by an average of 7 points costs over \$1,000–\$2,000 and that some students have the privilege of having the resources to hire private tutors for the LSAT.<sup>139</sup> Yet, Sander never discusses the LSAT, which plays a huge role in the admission process, as one of the disadvantages to low-SES students.

Additionally, Sander attacks the “interesting factor” in admissions decisions as being anti-low SES, but in so doing, he does not consider how such a factor may be used to recognize the contributions from groups that have been historically discriminated against in society.<sup>140</sup> The interesting factor not only may assist racial minorities, but also would allow white low-SES students to be viewed more holistically and favorably than if the admissions committee considered only LSAT and UGPA. A broad conceptualization of the interesting factor should not be seen as an impenetrable barrier for low-SES students, as it may include student involvement in popular, mainstream activities, such as student government, and non-popular or specialized school and community organizations. In addition to not harming low-SES students, the interesting factor may allow greater diversity of groups that have been historically discriminated against. Particularly, “interesting factors” may include leadership positions in intercultural organizations such as black student organizations, feminist organizations, and GLBTQ organizations. Activity and leadership in such groups enriches the campus experience for many and provides an outlet for minorities and allies of all types to improve a campus they perceive as hostile to their group. Consequently, although the interesting factor may work to benefit high-SES students whose privileges and connections make Capitol Hill internships or knowing several languages more likely, such non-standardized criteria also allow other types of diversity to be taken into consideration that are vital for a well-rounded class and that provide recognition for student involvement that is local and non-cost prohibitive.

Finally, Sander’s critique of admissions criteria does not acknowledge the role of race in American society. A difference in average LSAT scores between black and white students does not delegitimize the pres-

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138. See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1630 (2003); see also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 987–88 (1996) (discussing the relationship between SAT scores and parental income).

139. Julie A. Helling, *Law and Diversity Program: A Model for Attracting, Retaining, and Preparing Diverse Students for Law School*, 4 SEATTLE J. SOC. JUST. 561, 565 (2006) (“[M]any students take an LSAT preparation course and the typical cost is over \$1,000.”); Jerry R. Parkinson, *Admissions After Grutter*, 35 U. TOL. L. REV. 159, 163 (2003) (“[T]aking an LSAT preparation course improves an applicant’s score by approximately seven points.”).

140. Sander, *supra* note 1, at 659–60.



ence of the group with lower scores, harm the student, or serve as an accurate indicator of longtime future success. Stating that racial preferences are equivalent to an increase in LSAT score by seven to fifteen points for Hispanic and Black students, respectively,<sup>141</sup> should be considered valid only if the LSAT predicts law school grades, bar passage, and the ability to practice law and be a citizen lawyer.<sup>142</sup> However, the LSAT does not do that work—the LSAT is intended only to predict first year grades and is able to do so only at a correlation of 0.40 with a 0.00 being no correlation, and 1.00 being a perfect correlation.<sup>143</sup> Considering that the LSAT is not a strong predictor of success as a lawyer or even as a second or third year law student,<sup>144</sup> non-GPA and LSAT factors, including race, should not be considered a delegitimizing factor in admissions. Additionally, it would be telling to see what other factors result in a boost to traditional measures of credentials. For example, how much of a LSAT score boost do admitted students whose parents attended that law school “earn”? While such students would have already received the social boost of privilege that leads to a higher likelihood of gaining a higher UGPA and LSAT score, how much would admissions officers overlook the lower UGPA or LSAT scores of such students?

Not only does a differential in LSAT score not deny a black student’s legitimacy as having earned her spot in the law school class, but it also does not harm the student due to a “mismatch effect,” which claims that recipients of race-based affirmative action are given such a great preference in admissions that it overcompensates for their weak LSAT scores and UGPAs such that they are incapable of competing with their white counterparts whose scores are much higher.<sup>145</sup> The rates of black students dropping out of law school, having lower law school GPAs, and having higher bar failure rates should not be readily attributable to lower intelligence or preparedness, but rather should be considered a possible result of racial discrimination and microaggressions encountered by black students in predominantly white schools.<sup>146</sup> Furthermore, black students may be underperforming on ability tests such as the LSAT, law

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141. *Id.* at 654.

142. *See* Guinier, *supra* note 7, at 149 (citing the University of Michigan Law School’s study which found that “individuals with lower LSAT scores and college grades tended to spend more time in public or unremunerated legal service” and that “following graduation, the school’s black and Latino students succeeded in ways that eluded many of their white counterparts whose entry-level credentials were higher” (footnote omitted)).

143. Stephen P. Klein, *Law School Admission, LSATs, and the Bar*, ACAD. QUESTIONS, Winter 2001–02, at 33, 34.

144. *Id.* at 33 (conceding that “[t]he LSAT is not designed to predict who will be a good (or otherwise ‘successful’) lawyer”).

145. Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools”*, 7 AFR.-AM. L. & POL’Y REP. 1, 15 (2005) (stating that the mismatch effect theory is flawed, as “[e]ven when the LSAT scores and UGPAs of African-American law school students are similar to those of their white peers, black students do not receive law school grades that are comparable to those of their white counterparts”).

146. *Id.* at 16–20.

school exams, and the bar exam, due to pressure that a failure may result in a perceived stereotype confirmation—a phenomenon known in psychology as “stereotype threat.”<sup>147</sup>

Even more egregious than Sander’s unquestioned acceptance of the LSAT as an accurate, unbiased predictor of ability to practice law is his disregard of the racialized nature of legacy preferences in a country where de jure access to predominantly white law schools is barely two generations old. Sander’s reference to legacy preferences as unduly benefiting high-SES students<sup>148</sup> should not be seen as race-neutral.<sup>149</sup> Legacy preferences disproportionately benefit white students who are socially and economically privileged.<sup>150</sup> This non-merit based criterion serves as affirmative action for children of alumni.<sup>151</sup> It also has a much greater likelihood of benefiting white high-SES students due to prior barriers to education for people of color and a continued lower graduation rate at all levels of education.<sup>152</sup> Legacy preferences are not used to remedy past discrimination, but rather to maintain the status quo and ensure that their beneficiaries maintain their family privilege, which was gained in part through direct and indirect oppression.<sup>153</sup> While Sander discounts this impact as an insignificant factor in law school admissions,<sup>154</sup> the recent scandal at one university, which was reported to include trading admis-

147. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995) (demonstrating through a series of experiments that when told that a test was measuring a person’s ability, black students performed worse than if they thought that it did not measure ability and concluding that “the present experiments show that making African American participants vulnerable to judgment by negative stereotypes about their group’s intellectual ability depressed their standardized test performance relative to White participants”); see also Johnson & Onwuachi-Willig, *supra* note 142, at 20–21 (applying stereotype threat theory to black law students).

148. Sander, *supra* note 1, at 658.

149. Richard D. Kahlenberg, *10 Myths About Legacy Preferences in College Admissions*, CHRON. OF HIGHER EDUC. (Sept. 22, 2010), <http://chronicle.com/article/10-Myths-About-Legacy/124561/> (discussing legacy preferences at the undergraduate level and stating “legacy preferences continue to disproportionately hurt students of color”); see also *supra* Part I.A (discussing Professor Sander’s failure to acknowledge the racial implications of legacy preferences).

150. Kahlenberg, *supra* note 147 (discussing how underrepresented minorities make up “only 6.7 percent of the legacy-applicant pool” at selective colleges and universities as compared to 12.5% of the total applicant pool).

151. *Id.* (discussing the fact that “being a legacy increased one’s chance of admission to a selective institution by 19.7 percentage points”).

152. *Id.* (“Moreover, this disparate impact is likely to extend far into the future. In 2008, African-Americans and Latinos made up more than 30 percent of the traditional college-aged population but little more than 10 percent of the enrollees at the *U.S. News*’s top 50 national universities.”); see also SARAH R. CRISSEY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2007 U.S. CENSUS CURRENT POPULATION REPORTS 4–5 (2009), available at <http://www.census.gov/prod/2009pubs/p20-560.pdf> (providing high school diploma attainment rates for native, non-immigrants, as follows: 89.6% of non-Hispanic whites, 80% of Blacks, 76.5% of Hispanics of any race; and providing Bachelor degree attainment rates as follows: 30.1% of non-Hispanic Whites, 16.2% of Blacks, and 15.9% of Hispanic of any race).

153. Kahlenberg, *supra* note 147 (“Because they disproportionately benefit whites, legacy preferences reduce, rather than enhance, racial and ethnic diversity in higher education. And rather than being a remedy for discrimination, they were born of discrimination. . . . They explicitly classify individuals by bloodline and do so in a way that compounds existing hierarchy.”).

154. Sander, *supra* note 1, at 654–55.

sions for the children of politically powerful people in exchange for jobs for current students<sup>155</sup> coupled with the statistics that show that the rate of white legacy admits at elite undergraduate institutions is often at least ten times that of non-white legacy admits, should raise questions.<sup>156</sup> The role of parental connections, whether it be as an alumni or a politically well-connected person, should not be overlooked as a possible racial barrier to law school admissions.<sup>157</sup>

Finally, as the work of Professors Devon Carbado and Cheryl Harris demonstrates, the required exclusion of race from the law school admissions process is not race-neutral and, in fact, negatively impacts racial minorities, creating a new racial preference for Whites.<sup>158</sup> As Carbado and Harris ask, what does it mean to ask a racial minority student, for whom race has been central to her life experience, to write a personal statement without any reference to race? As Carbado and Harris explain:

This incentive structure is likely to be particularly costly to applicants for whom race is a central part of their social experience and sense of identity. The problem is compounded by the fact that the life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race. Consequently, should these applicants attempt to transcribe their experiences in race-neutral terms, they risk that they will be disadvantaged because their lives will be unintelligible to admissions officials and unrecognizable to themselves.<sup>159</sup>

*C. Recognizing That Contemporary Racism Supports the Need to Maintain Race-Based Affirmative Action In Order to Achieve Racial Diversity*

Contrary to Sander's assertion that the elimination of race-based affirmative action would not affect racial diversity if replaced by class-based affirmative action,<sup>160</sup> several studies show that class-based affirmative action results in lower racial diversity, particularly lower black student enrollment. This was evident with regard to Sander's university,

155. See Jodi S. Cohen et al., *U. of I. Jobs-for-Entry Scheme*, CHI. TRIB. (June 26, 2009), <http://www.chicagotribune.com/news/local/chi-ui-trustees-26-jun26,0,3541380.story>; Lee A. Daniels, 'Clout U.': *The Admissions Scandal at the University of Illinois*, DEFENDERS ONLINE (Sept. 29, 2009), <http://www.thedefendersonline.com/2009/09/29/%E2%80%98clout-u-%E2%80%99-the-admissions-scandal-at-the-university-of-illinois>.

156. Kahlenberg, *supra* note 147 ("At Texas A&M, 321 of the legacy admits in 2002 were white, while only three were black and 25 Hispanic. At Harvard, only 7.6 percent of legacy admits in 2002 were underrepresented minorities, compared with 17.8 percent of all students. At the University of Virginia, 91 percent of early-decision legacy admits in 2002 were white, 1.6 percent black, and 0.5 percent Hispanic.")

157. The impact of the scandal on racial minorities is unclear, but considering that Whites hold most positions of political power, it is likely to disproportionately help them.

158. See generally Devon Y. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

159. *Id.* at 1148 (footnote omitted).

160. Sander, *supra* note 1, at 664.

UCLA School of Law, following Proposition 209.<sup>161</sup> Sander's reference to maintained racial diversity at UCLA School of Law after Proposition 209<sup>162</sup> was not a clear win for all racial minorities, considering that almost all of the diversity consisted of two-thirds white and one-third Asian American students, with a great decrease in enrollment of Latino<sup>163</sup> and black students.<sup>164</sup> Interestingly, the greatest direct losers in removing race-based affirmative action were black Americans, who are the primary intended beneficiaries of race-based affirmative action.

While low-SES white students may suffer from economic disadvantage, they gain great benefits from white privilege. Proposing to replace race-based affirmative action with class-based affirmative action will shift the beneficiaries of affirmative action to white low-SES applicants due to the sheer greater number of poor white students than poor students of color. By failing to note the privileges and disadvantages that low-SES white students and high-SES black students have, Sander paints an incomplete picture. As discussed before, high-SES Blacks may have a greater amount of income than low-SES whites, but they may not be anywhere close to equals when it comes to wealth. Additionally, Blacks are still disadvantaged by their race, which serves generally to advantage Whites.

In sum, race and class are not equal forms of status. Being a racial minority is not the same disadvantage as being low-SES. Unlike race, which often carries physical, immutable characteristics,<sup>165</sup> white students from low-SES backgrounds are able to makeover themselves in order to render their background near invisible to outsiders, especially by graduate school.<sup>166</sup> While attempts at passing (which we do not advocate) as economically privileged may be discovered,<sup>167</sup> passing in and of itself is far more attainable for the majority of economically disadvantaged Whites than it is for Blacks. By passing as not economically disadvantaged, students from low-SES backgrounds will not suffer external stigma for being poor; even if they are "discovered," they may be admired for exemplifying the power of meritocracy. Furthermore, white persons from economic disadvantage have not suffered the same pervasive racial discrimination that Blacks have encountered, and continue to encounter, regardless of class. Blacks of all classes suffer racial oppres-

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161. *Id.* at 663–64.

162. *Id.* at 661–64.

163. The authors recognize that the classification "Latino" represents a very large, encompassing ethnic group that is multiracial. However, for the purposes of classifications, many sources use it as one monolithic group in comparison to multi-ethnic, and in some regards multi-colored racial groups. As a result, we will not disturb the comparative groups.

164. Sander, *supra* note 1, at 663–64.

165. Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1103 (2010) (discussing that although race is a social construct, physical markers include not only skin color, but hair texture).

166. Malamud, *supra* note 14, at 1887.

167. *Id.*

sion,<sup>168</sup> which can be particularly more harmful for dark-skinned Blacks than light-skinned Blacks.<sup>169</sup>

#### CONCLUSION

In conclusion, we perceive numerous defects in Sander's methodology that raise serious questions about the results in his article *Class in American Legal Education*. Even if one accepts all of Sander's measurements and arguments, the necessary conclusion is not that race-based affirmative action should be replaced with class-based affirmative action, but rather that class-based means for ensuring diversity also must be employed in law school admissions processes. More importantly, Sander's arguments, if anything, reveal that our means for measuring merit in the admissions processes in higher education, and in law schools specifically, are not class-neutral at all, but instead class-biased in favor of students from high-SES backgrounds. To our minds, such revelations support an overhaul of the way in which we consider students for admission into law schools, not an overhaul of any existing affirmative action programs.

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168. BART LANDRY, THE ECONOMIC STAGNATION OF THE BLACK MIDDLE CLASS: A BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS 24–25 (2005), available at [http://www.usccr.gov/pubs/122805\\_BlackAmericaStagnation.pdf](http://www.usccr.gov/pubs/122805_BlackAmericaStagnation.pdf) (statement of Professor Landry, Department of Sociology, University of Maryland, College Park) (describing upper class occupations as an area of highly “intense” discrimination, and stating that “in 1983, with 43.4 percent and 35.7 percent of whites and blacks concentrated in the upper middle class, there was a gap of 7.7 percentage points. The gap worsened by 1990 before declining again by 2002, but is still standing at about 8.1 percent”).

169. Onwuachi-Willig, *supra* note 10, at 1166 (“For example, studies have shown that ‘[f]or every 72 cents a dark-skinned Black [makes], a light-skinned Black earn[s] a dollar.’” (alterations in original)).