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# THE VISIBILITY OF SOCIOECONOMIC STATUS AND CLASS-BASED AFFIRMATIVE ACTION: A REPLY TO PROFESSOR SANDER

ELI WALD<sup>†</sup>

## INTRODUCTION

In *Class in American Legal Education*, Richard Sander provocatively argues that law schools should replace racial preferences with socioeconomic preferences in their admission decision-making processes.<sup>1</sup> Some of Professor Sander's claims are compelling, for example, his defense of enhanced classroom diversity as an important and desirable goal,<sup>2</sup> and his assertion that diversity ought to include under-represented

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1. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 663, 668 (2011) [hereinafter Sander, *Class in American Legal Education*]. Class-based affirmative action has attracted growing attention since the mid 1990s, and Professor Sander has been a leading contributor to the discourse. See generally Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996); Kenneth Oldfield, *Social Class-Based Affirmative Action in High Places: Democratizing Dean Selection at America's Elite Law Schools*, 34 J. LEGAL PROF. 307 (2010); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370, 478–79 (2004) [hereinafter Sander, *Systemic Analysis*] (asserting that the costs of affirmative action imposed on minority students—lower grades and less learning, “higher attrition rates, lower pass rates on the bar, [and subsequently] problems in the job market”—may outweigh the benefits); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997) [hereinafter Sander, *Experimenting*]; Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1755, 1819–20 (2006) [hereinafter Sander, *Racial Paradox*] (arguing that aggressive affirmative action policies implemented by law schools and large law firms result in counterproductive outcomes: minority lawyers with relatively weak academic credentials are being hired but subsequently not promoted); Brent E. Simmons, *Should Class-Based Affirmative Action Be Substituted for Race-Based Affirmative Action?*, 56 GUILD PRAC. 95, 96, 102 (1999) (arguing that class-based affirmative action would be a poor substitute for racial-based affirmative action). The discourse has expanded outside of the academic arena to popular venues. See, e.g., *Reactions: Is It Time for Class-Based Affirmative Action?*, CHRON. HIGHER EDUC. (Dec. 16, 2009), <http://chronicle.com/article/Reactions-Is-It-Time-for/62615/>.

2. Sander, *Class in American Legal Education*, *supra* note 1, at 631. See generally David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 495 (2000) (exploring the beneficial effects of desegregating law schools and the legal profession); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541 (1996); Susan Sturm & Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515 (2003); Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88 (1995).

constituencies other than racial minorities.<sup>3</sup> Other claims are intuitively plausible, for example, the contention that historically law schools have advocated for diversity of all sorts but in practice have focused their preferential admission policies mainly on fostering racial diversity.<sup>4</sup> And yet other claims are questionable. For example, the speculation that socioeconomic preferences would effectively achieve racial diversity,<sup>5</sup> or the suggestion that socioeconomic and racial preferences are in some way inherently linked such that pursuing the former must come at the expense of the latter.<sup>6</sup> Such a tradeoff is conceptually dubious as one could, of course, advocate for both socioeconomic and racial diversity.<sup>7</sup> At the end of the day, Sander clearly succeeds in achieving his overall stated goal: stimulating the diversity discourse and exploring it in new and exciting directions.<sup>8</sup>

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3. Sander, *Class in American Legal Education*, *supra* note 1, at 631, 668–69. While Sander has been a leader in calling for greater socioeconomic diversity in law schools, others have called for increased religious, national origin, and students-with-disabilities diversity in legal education. See Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to Do with It?*, 78 MARQ. L. REV. 427, 428, 430 (1995) (discussing religious diversity in law school admissions and accreditation); Meredith George & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475, 475 (2008) (exploring disability diversity in law school instruction).

4. Sander, *Class in American Legal Education*, *supra* note 1, at 631. Law schools have also successfully addressed gender diversity and some ethnoreligious diversity, but generally speaking, did so by removing discriminatory admission policies without resorting to preferential treatment of women, Catholic, and Jewish candidates. On past gender discrimination in law schools' admission processes, see Eli Wald, *Glass-ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2250–51 (2010). Currently, women law students account for approximately fifty percent of the national law school student body. Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. LAW. & SOC. SCI. 299, 300 (2008). On the use of discriminatory ethnoreligious admission policies, see Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1837 nn.155–57 (2008). See generally JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON* (2005).

5. Sander, *Class in American Legal Education*, *supra* note 1, at 663–64. Sander himself has admitted elsewhere that “a class-based system is not a fungible substitute for a race-based system,” at least where racial diversity is the goal. Sander, *Experimenting*, *supra* note 1, at 503; see also Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504, 504 (1997) [hereinafter Malamud, *Response to Professor Sander*] (critically analyzing the UCLA experiment with class-based affirmative action and its negative impact on racial minorities); Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 454, 471 (1997) (arguing that while class, socioeconomic status, race, gender, and ethnicity are inherently intertwined, class-based affirmative action would not be an effective substitute for racial-based affirmative action and would not achieve racial diversity). But see RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* (1996) (asserting that class-based affirmative action should replace race-based affirmative action even if the former would not achieve the same results as the latter).

6. Sander, *Class in American Legal Education*, *supra* note 1, at 664. But see Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729, 730 (2011) (“I strongly disagree, however, with Sander’s decision to link his class analysis to his critique of race-based affirmative action.”).

7. See, e.g., Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 302 (2004) (“In practice and in principle, affirmative action is not at odds with socioeconomic diversity. When pursued in the interest of important institutional and social purposes, racial justice and economic justice find common ground, build on common principle, and strengthen a common understanding of equal opportunity.”).

8. Sander, *Class in American Legal Education*, *supra* note 1, at 632–33.

This Response explores only one argument Professor Sander makes about class diversity: his assertion that socioeconomic status is inherently invisible. Specifically, Sander argues that, as a matter of fact, socioeconomic preferences are going to be invisible, stating that “once students have matriculated to a law school, no one can readily tell which of the others have received a preference;”<sup>9</sup> that the invisibility of socioeconomic preferences makes socioeconomic diversity superior to racial diversity and its visible racial preferences; and finally, that such invisibility is desirable, both because recipients of preferences would likely not know that they received preference and therefore would not doubt their own intellectual self-esteem, and because recipients would not be visible to others and therefore would not suffer stigmatization or become targets of bias and stereotyping.<sup>10</sup>

Sander is not alone in believing in the invisibility of socioeconomic status. In a reply to *Class in American Legal Education*, Richard Lempert similarly argues that “students from lower class backgrounds who apply to and attend elite law schools may by the time they reach law school have largely shed their lower class identities,”<sup>11</sup> adding that “[l]ower class graduates of elite schools will not stand out in the law school crowd,”<sup>12</sup> and concluding that “[l]ower SES students will, by contrast [to racial minority students], blend into the student body, and in most settings students find themselves in they will be responded to according to race, gender, and/or age rather than according to class status.”<sup>13</sup>

To be clear, Sander and Lempert invoke socioeconomic invisibility for very different, indeed, opposite reasons. Sander sees the invisibility of socioeconomic status in contrast to the visibility of racial status as a reason to prefer class-based affirmative action over racial-based affirmative action,<sup>14</sup> whereas Lempert believes that the invisibility of socioeconomic status diminishes the value of socioeconomic diversity and renders class-based affirmative action undesirable.<sup>15</sup>

Both Sander and Lempert are mistaken about the likely invisibility of socioeconomic status and preferences. Socioeconomic status and, in particular, the related concepts of social and cultural capital which inform and contribute to it, play a significant role and have a considerable impact on the experience of law students while at law school and on their

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9. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

10. *Id.* at 665–66.

11. Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U. L. REV. 683, 711 (2011).

12. *Id.* at 712.

13. *Id.*

14. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

15. Lempert, *supra* note 11, at 711 (“When it comes to contributing to diversity within law schools and to social contributions beyond law school, class-based affirmative action may add little of value.”).

legal careers after graduation.<sup>16</sup> Importantly, socioeconomic status, the possession of social and cultural capital and lack thereof are highly visible, and students of lower socioeconomic status are unlikely to be able to pass for affluent students or completely cover their status effectively even if they tried.

The visibility of socioeconomic status means that Sander is also mistaken about the relative advantage of socioeconomic preferences over racial preferences. Contrary to Sander's assertion, because socioeconomic status and preferences are going to be visible, to the extent that visible racial status and racial-based affirmative action result in significant costs incurred by its recipients, socioeconomic preferences are likely to impose similar, if not higher costs. Finally, Sander is wrong about the desirability of invisibility, that is, even if socioeconomic preferences were either inherently invisible or coverable, it is not at all clear that recipients should cover their socioeconomic status.

Sander invokes the invisibility of socioeconomic preferences to bolster his argument that class-based affirmative action should replace racial-based affirmative action.<sup>17</sup> The fact that socioeconomic status and therefore socioeconomic preferences are visible, however, is not an argument against class-based affirmative action. Quite the contrary: if socioeconomic status was invisible, Lempert's unpersuasive assertion that class diversity adds little value to diversity within law schools would be more compelling.<sup>18</sup> Instead, while the visibility of socioeconomic status does weaken Sander's argument regarding the *relative* advantage of administering socioeconomic preferences over racial preferences, it does support the case for class-based affirmative action. The visibility of socioeconomic status only means that law schools committed to diversity have to appreciate and anticipate the possible costs socioeconomic preferences might impose on recipients and respond in appropriate fashion by pursuing measures to enhance the educational experience of recipients and to mitigate the costs of affirmative action.

## I. THE VISIBILITY OF SOCIOECONOMIC STATUS, SOCIAL CAPITAL AND CULTURAL CAPITAL

### A. *The Visibility of Socioeconomic Status*

"Once students have matriculated to a law school," writes Professor Sander, "no one [would be able to] readily tell which of the others have received a [socioeconomic] preference."<sup>19</sup> Presumably, one would not be

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16. See *infra* Part I.

17. Sander, *Class in American Legal Education*, *supra* note 1, at 666. In *Class in American Legal Education*, Sander uses the terms socioeconomic and class interchangeably, *see id.* at 655–66, and this Response follows his lead.

18. Lempert, *supra* note 11, at 711.

19. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

able to tell because socioeconomic background, unlike, for example, gender or racial identity, is invisible.<sup>20</sup> Whereas women law students cannot pass for men law students, and black law students can often not pass for white law students; students from lower socioeconomic backgrounds, suggests Sander, can easily pass for more affluent law students because one's socioeconomic status is supposedly invisible. Professor Lempert makes the same point more forcefully, arguing that "students from lower class backgrounds who apply to and attend elite law schools may by the time they reach law school have largely shed their lower class identities."<sup>21</sup> According to Lempert, socioeconomic status is invisible because all law students, by virtue of attending law school, have arguably attained the same class status such that telling them apart would be hard, even impossible to do. Furthermore, asserts Lempert, if law students of lower socioeconomic backgrounds have not already "shed" their class identity, surely they will as lawyers.<sup>22</sup>

Is socioeconomic status inherently invisible? "Passing," explains Kenji Yoshino, is the concealment of aspects of one's identity by passive means, for example, by remaining silent about certain otherwise salient characteristics.<sup>23</sup> "Covering" is a more active form of "ton[ing] down a disfavored identity" by acting pursuant to expectations consistent with identity traits one does not possess.<sup>24</sup> Students of lower socioeconomic status could attempt to pass for hailing from a more affluent status by remaining silent about their background. For example, they might not mention in conversations with other law students that they attended public schools, public colleges or private colleges on financial aid; they might refrain from talking about being the first person in their family to

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20. Two American Bar Association reports study the experience of perhaps the most visible minority group within the profession, women of color. See ABA COMM'N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY, WOMEN OF COLOR IN LAW FIRMS* (2006); ARIN N. REEVES, 2008 ABA COMM'N ON WOMEN IN THE PROFESSION, *FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS* (2008).

21. Lempert, *supra* note 11, at 711.

22. *Id.* at 714 ("[L]ow SES students who attend elite law schools are seeking and will obtain a credential that will allow them to transform their class identity from low to high.").

23. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 18 (2006).

24. *Id.* at ix. Yoshino's work on passing and covering is somewhat paralleled by Carbado and Gulati's study of "identity work." See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260-62 (2000) (exploring a form of covering at the workplace as outsiders respond to stereotyping by altering their work, and sometimes aspects of their personal identities). Both works have generated a significant discourse. See, e.g., Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809, *passim* (2007) (discussing both Yoshino's and Carbado & Gulati's work). Moreover, the works have been built upon by scholars exploring the interplay of discrimination, stereotyping and professional identity. See, e.g., Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1212-13 (2008) (criticizing colorblindness as it relates to admissions); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 812 (2011) (arguing that comparators are no longer useful tools in workplace discrimination cases); Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 662-64 (2010) (discussing challenges faced by plaintiffs in intra-group discrimination suits); Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 551 (2010) (arguing that courts should recognize claims of multiracial discrimination).

attend college or law school; and they might not talk about having to work part- or full-time while at law school to support themselves.

Yet in the most basic of ways, successful socioeconomic passing is still doubtful. One might be asked where one attended school, whether there are any lawyers in one's family, or why one chooses to forgo competing for law review in lieu of working in the library. Or one might be asked about driving a lemon, having three roommates in an apartment in a remote part of town, not joining everybody for expensive drinks at the end of the school day, or about travel plans during spring break. For the very same reasons, covering one's socioeconomic status, even if one was willing to try more actively to "fit in," might be quite hard if not impossible to do.<sup>25</sup>

Consider the following examples of passing and covering. Recalling her experience as a first year law student from a low socioeconomic background, Lisa Pruitt writes, "I recall needing to keep secret those familial details," adding "[i]f I was asked about my family of origin, I probably referred to my father as the owner of a 'small business.' Which he was, of course; it's just that his office had eighteen wheels and he spent his days (and very often his nights) traversing the country in it."<sup>26</sup> Pruitt concludes, "I now know that my behavior is called 'passing'—class passing to be precise."<sup>27</sup> If passing, for example, by keeping secrets, was enough, socioeconomic status would be inherently invisible. But once one has to hide or embellish the truth, one is engaged in the more proactive act of covering, which suggests that class identity and socioeconomic status are not inherently invisible.

Moreover, covering is sometimes hard to accomplish even if one is willing to attempt it. Revisiting his law school experience, Ezra Rosser recalls the following exchange during a job interview: "'You didn't go to the Corcoran while you lived in D.C.?' I was asked by a member of a hiring committee incredulously before she reacted by turning away from me with seeming disinterest in my candidacy,"<sup>28</sup> exposing, if you will, his attempt to cover his class identity. Class privilege, asserts Rosser, "is infused in every conversation and is an understood shared reference, yet it is never acknowledged."<sup>29</sup>

In particular, the possible need of some students of lower socioeconomic status to work either part-time or full-time while enrolled in law school deserves special attention because it impacts not only one's visi-

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25. Malamud, *supra* note 6, at 735 ("Unlike Sander, I believe that class is often made visible through social interaction.").

26. Lisa R. Pruitt, *How You Gonna' Keep Her Down on the Farm . . .*, 78 UMKC L. REV. 1085, 1092 (2010).

27. *Id.*

28. Ezra Rosser, *On Becoming "Professor": A Semi-Serious Look in the Mirror*, 36 FLA. ST. U. L. REV. 215, 221 (2009).

29. *Id.* at 222.

bility, but may also constitute a significant hurdle to one's academic success in more direct ways.<sup>30</sup> Law school, especially in the first year, is generally considered an intense, time-consuming endeavor.<sup>31</sup> Part of "learning to think like a lawyer" involves reading significant volumes of case law. Sixty-, seventy-, and even eighty-hour weeks are not unheard of, and a part-time or full-time job may put one at a significant disadvantage. Considering that performance at the first year of law school is disproportionately important to one's success in law school,<sup>32</sup> and that law school grades are curved such that one is measured and graded explicitly relative to other law students, a socioeconomic-based time constraint can turn into a real disadvantage.

Sander proposes that socioeconomic preferences may require a significant increase in financial aid to level the playing field.<sup>33</sup> Indeed, in competing for top law students, law schools have recently begun to grant not only tuition waivers but also "cost of living" stipends.<sup>34</sup> It should be noted, however, that offering such significant financial support to students of lower socioeconomic status, even if financially feasible,<sup>35</sup> would not necessarily allow for effective passing or complete covering. Financial aid may address some aspects of disadvantage at law school: it may alleviate the need of some students to work part- or full-time and allow them to concentrate on their studies; and it may allow them to pay for

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30. See, e.g., JEAN JOHNSON ET AL., PUB. AGENDA, WITH THEIR WHOLE LIVES AHEAD OF THEM 4 (2009), available at <http://www.publicagenda.org/files/pdf/theirwholelifesaheadofthem.pdf> (finding that a primary reason students drop out of college is that they have to work to support themselves and their families). Interestingly, while both Sander and Lempert are mindful of the impact of work commitments on the academic achievements of college students, see Sander, *Class in American Legal Education*, *supra* note 1, at 647 ("Much of the reason for underrepresentation of some groups in law school has to do with low rates of college entrance and completion. This is particularly true for young Hispanics, who often drop out of high school to help support their families."); Lempert, *supra* note 11, at 706 ("[A] student who has to work almost a full time job while in school to pay her college tuition may have grades below those of fellow students whose parents paid their way."), both appear to overlook the consequences for law students.

31. Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77-79 (2002) (summarizing the research showing that the law school experience is stressful, intensely competitive, time-consuming, and anxiety producing). *But see* Paul D. Carrington, *The Pedagogy of the Old Case Method: A Tribute to "Bull" Warren*, 59 J. LEGAL EDUC. 457, 460-61 (2010) (documenting educational reforms meant to reduce student stress, if not time-commitment); Clinton W. Shinn, *Lessening Stress of the 1L Year: Implementing an Alternative to Traditional Grading*, 41 U. TOL. L. REV. 355, 368 (2010) (same).

32. Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982) ("First-year grades control the distribution of goodies: honors, law review, job placement, and, because of the importance placed on these matters by the law-school culture, even the student's sense of personal worth."); see Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 773-75 (2004) (summarizing the literature on the importance of first-year grades).

33. Sander, *Class in American Legal Education*, *supra* note 1, at 660.

34. For examples of such policies, see GA. STATE UNIV. COLL. OF LAW, BULLETIN 2010-2011, at 66-68 (2011), available at [http://law.gsu.edu/resources/registrar/College\\_of\\_Law\\_Bulletin\\_2010-2011.pdf](http://law.gsu.edu/resources/registrar/College_of_Law_Bulletin_2010-2011.pdf); *Tuition and Financial Aid*, COLUM. L. SCH. (2011), [http://www.law.columbia.edu/jd\\_applicants/admissions/tuition](http://www.law.columbia.edu/jd_applicants/admissions/tuition) (last visited May 14, 2011).

35. A cost, by the way, that may make socioeconomic preferences quite expensive, perhaps even more expensive than administering racial preference. This is contrary to Sander's position that socioeconomic preferences are going to be easier to administer and entail lower costs than racial-based affirmative action. Sander, *Class in American Legal Education*, *supra* note 1, at 664-68.

and enroll in bar exam prep courses putting them on equal footing with their more affluent counterparts.<sup>36</sup> But it cannot address some inherent aspects of socioeconomic status. It will not change where one went to school, one's family background, what one's parents do for a living, or where one vacations.<sup>37</sup>

Three important conceptual clarifications are in order. First, the visibility of status and identity is not a binary characteristic; rather, it is a question of degree. Furthermore, some statuses and identities are more inherently visible than others, for example, racial, ethnic, and gender identity are more intrinsically visible than class, religious, and national origin status (assuming one does not have a pronounced accent). Furthermore, some identities and statuses such as race and gender are, if you will, *prima facie* visible whereas other, such as socioeconomic status, may be less obviously so.

To be fair, both Sander and Lempert appear to argue that socioeconomic status is relatively rather than absolutely invisible. Sander points out correctly that socioeconomic status is not as inherently visible as racial status.<sup>38</sup> Yet contrary to Sander's position, socioeconomic and racial identities may nonetheless end up imposing similar costs on recipients of admission preferences. Socioeconomic status may be less inherently visible than racial and gender identity and more easily coverable, but still be visible enough to impose costs on and compromise the experience of law students of lower class standing.

Lempert explicitly acknowledges that visibility is a relative concept, noting, "I do not mean to suggest that all differences between lower class and more privileged law students will be wiped out by a shared elite education,"<sup>39</sup> but believes that class identity can be "shed" and "blended" to such a degree as to render it invisible. Lower class graduates, maintains Lempert, "may not only have already have shifted their attitudes to be more like those of their more privileged peers but will also have shared with them many of their most important recent life experiences."<sup>40</sup> Not so, argue Pruitt and Rosser. "My failure to learn more about the law school scene in advance of becoming part of it is not, mind you, because

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36. Studying means of legitimizing power and authority, Bourdieu has identified three forms of symbolic capital: economic capital (money and property), social capital (social networks) and cultural capital (cultural competence). Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241–58 (John G. Richardson ed., 1986). Following Bourdieu, significant financial aid would contribute to the economic capital of students of lower socioeconomic status, but its impact on social and cultural capital would be more tenuous. See Fiona M. Kay, *The Social Significance of The World's First Women Lawyers*, 45 OSGOODE HALL L.J. 397, 419–20 (2007), for a discussion of the expanding use of the Bourdieusian approach in studies of contemporary law practice.

37. In other words, generous financial aid would likely have little direct impact on one's social and cultural capital.

38. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

39. Lempert, *supra* note 11, at 712 n.85.

40. *Id.* at 712.

I wasn't ambitious," points out Pruitt; rather, "I didn't know enough to know what I didn't know."<sup>41</sup> And Rosser, as if directly responding to Lempert notes "[b]y the time I entered Yale, I had grown more used to the wealth of my peer group, but had not yet acquired the set of experiences that is the backdrop for conversations among the elite. I needed to go to Europe, or so everybody said."<sup>42</sup>

Since the visibility of socioeconomic status is a matter of degree and its impact on law students no doubt varies across students, law schools, and contexts, one may be tempted to conclude that ultimately the question of visibility is an empirical one. To an extent, of course, it is, although it should be noted that while only limited evidence exists, it tends to support the claim that socioeconomic status is visible and has a significant impact on law students and lawyers alike.<sup>43</sup> Moreover, if nothing else, one should question Sander's and Lempert's empirically unsupported sweeping claims regarding the relative invisibility of socioeconomic status. "No heads will turn," argues Lempert, "if an upper class white student is out with a student from the bottom of the SES pecking order . . . . If this example seems trivial, consider that no one has ever posited a crime of 'driving while lower class.'"<sup>44</sup> The examples are anything but trivial. The point is not only that some heads may very well turn in both expensive restaurants and snobbish elite circles if an upper class student dated a student from a lower class but also that such inter-class dating may or may not be very common and should not be assumed to be commonplace. And while no one may have ever been accused of "driving while lower class," many law students and lawyers have experienced the feeling of "trying to get an elite job while lower class."<sup>45</sup>

Second, because aspects of one's identity and certain statuses can change over time, visibility is a dynamic rather than a static characteristic. Lempert, in particular, is of the belief that the class identity of students of lower socioeconomic backgrounds has so changed by the time they arrive in law school as to render it invisible and meaningless.<sup>46</sup> Without a doubt, socioeconomic status can and does change. Rosser, for example, colorfully explains how he has come to like brie and therefore has acquired the "the most essential character trait for any aspiring law

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41. Pruitt, *supra* note 26, at 1088.

42. Rosser, *supra* note 28, at 221.

43. See *infra* Part I.B.

44. Lempert, *supra* note 11, at 713.

45. Rosser, *supra* note 28, at 221. See also Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 4, at 1821–25, 1836–42 (discussing the experience of lower socioeconomic status Jewish lawyers seeking to get hired and promoted by elite Wall Street law firms); THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* 144–55 (1991) (exploring the experience of blue-collar Italian-American lawyers seeking elite positions). See generally ALFRED LUBRANO, *LIMBO—BLUE-COLLAR ROOTS, WHITE-COLLAR DREAMS* (2004) (documenting the frustrations of "straddlers," professionals of blue-collar backgrounds who struggle to fit in the white-collar world).

46. Lempert, *supra* note 11, at 711–15.

professor [and lawyer]: I had become comfortable with wealth and privilege."<sup>47</sup> Yet the fact that socioeconomic status is dynamic does not mean that the hurdles and challenges faced by students (and lawyers) of lower classes should be overlooked or belittled, and that class passing and covering should be taken for granted. Moreover, becoming comfortable with wealth and privilege is very different from attaining, let alone benefiting from, wealth and privilege.

Finally, Sander points out that the visibility of affirmative action and admission preferences may be a function not only of the status of recipients but also of the size of preferences given to them.<sup>48</sup> This observation is related to his controversial "mismatch" hypothesis, pursuant to which the significant credential gap between recipients and non-recipients of preferences ends up hurting recipients academically and subsequently as lawyers.<sup>49</sup> Here, Sander merely argues that irrespective of any possible mismatch effects, the visibility of preferences is likely going to increase with the size of preferences given. But, of course, the visibility of preferences is going to increase with their size if and only if the mismatch hypothesis is correct. Exploring the validity of the mismatch hypothesis is outside the scope of this Response. Importantly, however, and regardless of the mismatch hypothesis, socioeconomic status is not inherently invisible, and therefore, the visibility of socioeconomic status ought to be meaningfully considered in assessing the desirability of class-based affirmative action.

### B. *The Visibility of Social and Cultural Capital*

The visibility of socioeconomic status is further evidenced by the fact that two salient elements of socioeconomic status in play at law school and upon graduation, "social capital," including the ability to benefit from existing networks and capacity to effectively build relationships; and "cultural capital," including the possession of confidence and intellectual self-esteem, are highly visible.<sup>50</sup> Social capital is a resource that "exists in the *relations* among persons."<sup>51</sup> It is the sum of the resources that allow a person to accomplish economic and non-economic

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47. Rosser, *supra* note 28, at 220.

48. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

49. *Id.*; Sander, *Systemic Analysis*, *supra* note 1. *But see* Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 (2008) (finding only weak empirical support for the mismatch hypothesis).

50. Of course, questions of class, privilege, social capital and cultural capital impact all educational institutions, not only law schools. *See, e.g.*, Caroline Hodges Persell & Peter W. Cookson, Jr., *Chartering and Bartering: Elite Education and Social Reproduction*, 33 SOC. PROBS. 114, 126 (1985); Liz Thomas, *Student Retention in Higher Education: The Role of Institutional Habitus*, 17 J. EDUC. POL'Y 423, 427 (2002).

51. James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 100-01 (1988) (exploring the use of social capital through demonstrating its effect in the family and in the community in aiding the formation of human capital).

goals, achieved through a person's network of relationships.<sup>52</sup> This network provides its members with an advantageous credential that arises from its members' obligations, norms, status, friendships, and esteem with other members in the network.<sup>53</sup> In addition, a person's network, extended by "friends of friends," connects him with opportunities that would otherwise not have revealed themselves.<sup>54</sup> This network of relationships can exist "inter-generationally," within the family, or outside of it. Outside of the family, social capital "consist[s] of the social relationships that exist among parents, in the closure exhibited by this structure of relations, and in the parents' relations with the institutions of the community."<sup>55</sup>

Cultural capital consists of embedded and acquired cultural competence. It is accumulated through educational accomplishments, travel, and exposure to a wide of range of experiences, and recognized and reflected by one's credentials, personality and conduct.<sup>56</sup> Cultural capital includes both knowledge, such as mastery of particular subject matters, language proficiencies, well-roundedness in current affairs, music, the arts and literature, and the enjoyment of various hobbies; and skills, such as the development of intellectual self-esteem and confidence, strong writing capacities, and speaking abilities.<sup>57</sup>

A significant body of work documents the role of social and cultural capital in lawyers' careers. Networking social capital, the extent of one's personal and institutional contacts, is "crucial to advancement within the

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52. See Bourdieu, *supra* note 36, at 249. See generally RONALD S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION 8–13 (1992) (discussing how the different types of capital are invested to create a "profit").

53. See Bourdieu, *supra* note 36, at 249.

54. See generally JEREMY BOISSEVAIN, FRIENDS OF FRIENDS: NETWORKS, MANIPULATORS AND COALITIONS 83–96 (1974) (discussing different factors that add to a person's network); Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1378 (1973) (demonstrating that weak connections among groups of people are "indispensable to individuals' opportunities and to their integration into communities").

55. Coleman, *supra* note 51, at 113.

56. See Craig Calhoun, *Habitus, Field, and Capital: The Question of Historical Specificity*, in BOURDIEU: CRITICAL PERSPECTIVES 61, 70 (Craig Calhoun et al. eds., 1993); see also NAN LIN, SOCIAL CAPITAL: A THEORY OF SOCIAL STRUCTURE AND ACTION 14–17 (Mark Granovetter ed., 2001).

57. Some legal scholars have discussed social and cultural capital, as well as other forms of capital, in terms of "professional capital." See, e.g., Carole Silver, *The Variable Value of U.S. Legal Education in the Global Legal Services Market*, 24 GEO. J. LEGAL ETHICS 1, 3–4 (2011); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 942 n.59 (2002) ("Professional assets accrue from a combination of human capital, social capital, and cultural capital and are the 'stuff' from which advancement occurs. Human capital is operationalized as the specific lawyering skills acquired through both legal education and practice experience. Social capital consists of individuals' ability to draw on relationship networks for establishing support. Although this network may initially consist of other lawyers in the firm, it may then expand to lawyers in the community and, in turn, expand to the acquisition of clients. Theorists such as Bourdieu suggest that success in careers results from the accumulation of these forms of capital.").

firm,”<sup>58</sup> increases the likelihood of partnership,<sup>59</sup> and relates to the likelihood of working in more prestigious fields of law,<sup>60</sup> leading to higher earnings.<sup>61</sup> On the other hand, limited social capital is identified as a cause of inequality.<sup>62</sup> Similarly, cultural capital has been shown to be an important and necessary asset for those who seek promotion to partnership, and its concentration in the partnership ranks to produce a structural transformation and a new stratification of the legal profession, meaning that those who possess limited cultural capital end up facing an additional hurdle on their quest for promotion and equality.<sup>63</sup>

Importantly, social and cultural capital also play a significant and visible role in one’s legal education. Lucille Jewel has shown that “students who come to legal education with amassed cultural and social capital are more likely to attend better law schools and achieve higher grades in law school than students who lack the same amount of cultural and social capital,” concluding that “the level of status and prestige that one can attain in the practice of law is related to law school status and law school performance, which are, in turn, related to cultural capital advantages.”<sup>64</sup> Similarly, Timothy Clydesdale has demonstrated that while black students have the highest levels of self-confidence upon entering law school, “they report the lowest level of social capital (i.e., fewest lawyers in the family) and describe nearly twice as many experiences of race discrimination during law school as any other minority group.”<sup>65</sup> In contrast, “[w]hite American law students have the highest social capital.”<sup>66</sup> Clydesdale points out that “[a]ll minority law students . . . have consistently lower [first-year] GPAs . . . than their white classmates,”<sup>67</sup>

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58. Fiona M. Kay & John Hagan, *Cultivating Clients in the Competition for Partnership: Gender and the Organizational Restructuring of Law Firms in the 1990s*, 33 *LAW & SOC’Y REV.* 517, 542 (1999);

59. See Fiona M. Kay & John Hagan, *Raising the Bar: The Gender Stratification of Law-Firm Capital*, 63 *AM. SOC. REV.* 728, 737 (1998); see also Ronit Dinovitzer, *Social Capital and Constraints on Legal Careers*, 40 *LAW & SOC’Y REV.* 445, 445–47, 451–52 (2006); Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 *GEO. J. LEGAL ETHICS* 1361, 1368 (2009).

60. See JOHN P. HEINZ ET AL. *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 69 (2005).

61. See John Hagan, *The Gender Stratification of Income Inequality Among Lawyers*, 68 *SOC. FORCES* 835, 837 (1990); Jo Dixon & Carroll Seron, *Stratification in the Legal Profession: Sex, Sector and Salary*, 29 *LAW & SOC’Y REV.* 381, 382 (1995).

62. David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 *HOUS. L. REV.* 1, 27 (2004) (arguing that for black lawyers, a lack of social capital in the form of elite networks maintains or reinforces their disadvantage in the profession).

63. See John Hagan et al., *Cultural Capital, Gender and the Structural Transformation of Legal Practice*, 25 *LAW & SOC’Y REV.* 239, 239–44 (1991).

64. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1174 (2008).

65. Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 *LAW & SOC. INQUIRY* 711, 727–32 (2004).

66. *Id.* at 732.

67. *Id.* at 736–37.

speculating that “[s]omething intrinsic to the structure or process of legal education affects the grades of all minorities; [law school first-year] GPA differences are not explained by differences in academic ability . . . differences in entrance factors . . . or first-year experiences . . . .”<sup>68</sup>

Of course, to an extent, success at law school is a function of merit. Performance on law school examinations has to do with the ability to comprehend and analyze a large body of case law, statutes, and secondary materials, and demonstrate critical thinking and effective writing skills.<sup>69</sup> It also, however, has a lot to do with possessing social capital including the ability to network, and cultural capital, including conducting oneself with confidence and self-esteem. Doing well in law school requires not only listening to but also understanding professors, their lingo, and cultural frames of reference. It requires the confidence to speak up, the ability to take criticisms, even in modified Socratic ways, constructively, and a thick skin. It requires familiarity and the ability to deal effectively with a stressful, highly competitive environment, which puts an emphasis on strong individualism. It requires some sophistication: in knowing how to interact with law professors to secure mentors, in knowing to apply for law review, and in seeking and securing extracurricular opportunities and activities.<sup>70</sup> In short, it requires a healthy dose of social capital, including proficient networking, and cultural capital, including self-esteem.<sup>71</sup>

To be sure, social capital, for example, the ability to network, and cultural capital, for example, acting confidently showcasing self-esteem, are not uniquely possessed by the affluent, nor are they binary qualities one either possesses or not. Rather, social and cultural capital are complex multifaceted phenomena, which some possess more than others. But it would be imprudent to underestimate the impact of high socioeconomic status on law school performance, and ignore the fact that affluent students are more likely to possess greater social and cultural capital than

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68. *Id.* at 737; *cf.* Garth & Sterling, *supra* note 59, at 1365–66, 1393 (suggesting that over time law school prestige will tend to matter less for large law firm hiring decisions); David Wilkins et al., *Urban Law Schools Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 442 (2007) (showing that outsider graduates, even of elite law schools, found employment in large law firms only when they had the appropriate social capital).

69. Critical scholars have compellingly deconstructed the notion of objective merit and exposed its inherent reliance on social and cultural factors. *See, e.g.*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 956–58 (1996).

70. *Cf.* Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM 389, 391–92 (2006) (exploring the experience of female law students at Yale Law School, and specifically investigating why female students, with similar credentials to their male counterparts, participate less in class discussion and are less likely to form professionally beneficial relationships with faculty members).

71. Some argue that merit and social capital are so inherently intertwined that it is impossible to understand one without the other, that is, that defining and assessing “merit” by some set of so-called objective criteria without exploring it in context is misleading and undesirable. *See, e.g.*, Margaret Y. K. Woo, *Reaffirming Merit in Affirmative Action*, 47 J. LEGAL EDUC. 514, 515 (1997) (arguing that merit analysis must include considerations such as motivation, maturity and perseverance).

their lower socioeconomic counterparts, and take advantage of their socioeconomic status both while in law school and following graduation. Those who have been groomed since birth—via prep schools, private schools, and elite private education—to acquire cultural capital, to be confident, and to possess social capital, to network effectively, are simply more likely to do better in law school. Indeed, it is precisely because social and cultural capital are so visible that students of higher socioeconomic class are well positioned to do better than their less affluent counterparts. Law school and law practice, or at least elite law schools and elite law practice, implicitly but inherently build on social capital and networking, as well as on cultural capital and self-esteem, in many fundamental and complex ways.<sup>72</sup>

That is not to say, of course, that law students of lower socioeconomic status who are less likely to be endowed with cultural and social capital cannot and do not do very well getting into and succeeding in law school. Deborah Malamud demonstrates the risk of exaggerating the impact of cultural capital on soft entrance variables employed by admission officers at law schools.<sup>73</sup> On the one hand, the possession of cultural capital, for example, access to “interesting” life experiences, and of social capital, such as having family contacts who can provide “interesting” job leads, is likely to render an affluent candidate more appealing than a lower class candidate in terms of soft entrance variables.<sup>74</sup> On the other hand, suggests Malamud, admission officers may be impressed by “up from adversity” stories which candidates of lower socioeconomic status are more likely to be able to tell.<sup>75</sup> Once in law school, students from lower class backgrounds who do not have as much cultural and social capital may be at a disadvantage compared to their affluent counterparts, but may be able to somewhat compensate for that by featuring strong

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72. Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 *LAW & SOC'Y REV.* 1, 10 (2007) (“[S]chools are a key site through which students acquire their professional expectations—schools thereby play a critical role in the reproduction of social stratification, with students not merely acquiring the skills they require for professional life, but perhaps more trenchant, adapting to the dispositions necessary for the professional roles they are destined to take. This can be achieved because schools are themselves embedded in the reproduction of students’ social origins: the prestige of the school that individuals attend is itself a function of their social class, so that in bestowing degrees and credentials, schools confirm and reaffirm students’ anticipated status within the profession. Research on law schools . . . indeed establishes that these are key sites in the development of students’ expectations and aspirations.” (citation omitted)); Rebecca L. Sandefur, *Staying Power: The Persistence of Social Inequality in Shaping Lawyer Stratification and Lawyers’ Persistence in the Profession*, 36 *SW. U. L. REV.* 539, 545 (2007) (“Professional degrees play an important role in social mobility and in the social reproduction of the American upper-middle class.”); see also DEBRA J. SCHLEEF, *MANAGING ELITES: PROFESSIONAL SOCIALIZATION IN LAW AND BUSINESS SCHOOLS* 44 (2006). See generally David B. Bills, *Credentials, Signals, and Screens: Explaining the Relationship between Schooling and Job Assignment*, 73 *REV. OF EDUC. RES.* 441 (2003).

73. Malamud, *supra* note 6, at 742–22.

74. *Id.* at 743.

75. *Id.*

work ethic and personal drive.<sup>76</sup> Moreover, while students of lower socioeconomic status may be less likely to have access to interesting jobs and have limited life experiences of the sort that matter in law school, they are certainly not clueless.<sup>77</sup>

The experience of Jewish male law students, the first minority group to enter the legal profession in relatively large numbers, is revealing regarding the inherent importance of socioeconomic status on legal education and law practice. Once discriminatory quotas fell, Jewish male law students began to attend elite law schools in large numbers.<sup>78</sup> As I have discussed elsewhere in detail, some Jewish law students, mostly of German descent, were able to pass or cover as WASPs, demonstrating the “requisite” cultural capital, and rose to the top of their classes.<sup>79</sup> As importantly, what many poor Jewish students of Eastern European descent lacked in visible cultural capital, they made up in personal drive, self-esteem, and networking. While these students could not pass or cover for WASP students, they built on a long tradition of learning and excellence to rise to the top of their classes, and they relied on a significant number of Jewish lawyers in the lower spheres of the profession for necessary networking.<sup>80</sup>

Still, upon graduation, many Jewish students in the top of their classes were not hired by elite WASP Wall Street law firms. And while one might be tempted to think of such discrimination as simply based on ethnoreligious grounds, the discrimination had significant socioeconomic and class roots. The elite law firms of the day did not hire Jewish law students who otherwise met their merit criteria exactly because these students did not fit their elite socioeconomic and cultural WASP status.<sup>81</sup> The experience of Jewish male law students thus demonstrates that social and cultural capital is highly visible both in law school and in law practice and is hard to cover, and that aspects of socioeconomic status, such as social capital, including effective networking, and cultural capital, including the possession of self-esteem, are inherent to one’s success as a law student and as a lawyer.

In sum, if the history of legal education and of the legal profession teaches us something, it is that socioeconomic status, social capital, and cultural capital play an inherently integral role in determining one’s professional fate. In particular, one’s socioeconomic status plays an important role in determining the quality of one’s legal education. And not

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76. SHAFFER & SHAFFER, *supra* note 45, at 127–64 (arguing that blue-collar lawyers feature a particularly strong work ethic).

77. Pruitt, *supra* note 26, at 1086–88.

78. Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 4, at 1837.

79. *Id.* at 1812.

80. *Id.* at 1837–39, 1852; Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 *UMKC L. REV.* 885, 928 (2008).

81. Wald, *supra* note 4, at 1813–25; Wald, *supra* note 80, at 918–25.

only are socioeconomic status, social capital, and cultural capital tremendously important to one's legal education and legal career, they are highly visible and hard to cover.<sup>82</sup>

## II. THE CONSEQUENCES OF VISIBILITY: SOCIOECONOMIC AND RACIAL PREFERENCES REEXAMINED

Sander argues that the invisibility of socioeconomic preferences is desirable, both because recipients of preferences would likely not know that they received preference and therefore would not come to doubt their own intellectual self-esteem, and because recipients would not be visible to others and therefore would not suffer stigmatization or become targets of resentment.<sup>83</sup> Because socioeconomic status is visible and because students of lower socioeconomic status are unlikely to be able to pass or completely cover it, the purported benefits Sander attributes to the invisibility of socioeconomic statuses are misguided.

The visibility of racial preferences has led to what some have called the costs of affirmative action. The literature argues that recipients of racial preferences sometimes experience self-doubt and low self-esteem.<sup>84</sup> In the law school context, knowing that their classmates have performed better than they have in college and on the LSAT might cause recipients of preferences feelings of insecurity, and lead to self-segregation, which in turn impact and compromise the educational experience at law school.<sup>85</sup> Moreover, recipients of racial preferences sometimes experience bias, stereotyping, and resentment as some law professors and classmates assume that recipients of racial preferences only got into law school because of their race, and experience similar bias and stereotyping again when applying for a job.<sup>86</sup> The bias further hurts self-

82. Sander and Lempert are not alone in failing to notice and explore the consequences of the visibility of socioeconomic status. Kenji Yoshino, who popularized the terms passing and covering, has been criticized for failing to explore class and privilege as aspects of identity that people often attempt to cover. See Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1294-96 (2007).

83. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

84. JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 229 (2000) (noting that affirmative action "creates private doubt," depriving its recipients of "the unalloyed sense of personal, individual responsibility for their accomplishments").

85. See, e.g., John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 331 (1994) ("Affirmative action is wrong because its beneficiaries, by definition, cannot meet the standards and cannot do the work."); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 856 (1997) ("Some critics of affirmative action argue that its pervasiveness has caused successful minorities to suffer a stigma: the belief that minority achievements are the result of affirmative action, not individual merit."). Others, however, have discounted the impact of stigma on recipients of affirmative action. See, e.g., Randall Kennedy, *Commentary, Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1986); CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES* 81 (1996) ("[A]ffirmative action has a cost . . . [and] part of the cost is the risk of stigma . . . [however,] the stigma I may suffer is a small price compared to the price I would pay if I faced closed doors . . .").

86. In his autobiography, Justice Clarence Thomas described the process of his job search after law school as humiliating, having experienced the stigma and bias of affirmative action first hand. CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 86-87 (2007).

esteem, an inherent component for success in law school and law practice, and feeds into the insecurity of racial minority students. This vicious cycle tends to become a self-fulfilling prophecy: competent students who are put down and experience a biased legal education end up not performing as well, supposedly “proving” the biased assumptions of racial preference.

To the extent that the costs of affirmative action impose harm on its beneficiaries, the visibility of socioeconomic status and the relative lack of social and cultural capital, are likely to result in a similar effect on students of lower socioeconomic status.<sup>87</sup> Once it becomes common knowledge that law schools are granting socioeconomic preferences,<sup>88</sup> the visibility of socioeconomic status will likely reveal the identity of preference recipients, causing them self-doubt and making them likely targets of bias and stereotyping. Therefore, Sander is mistaken in suggesting that socioeconomic preferences are going to be superior to racial preferences in the sense of not imposing the costs of affirmative action.

Indeed, in some ways the visibility of socioeconomic preferences may be harder to overcome than the visibility of racial preferences. If Sander is right that racial preferences tend to benefit racial minorities of higher socioeconomic status,<sup>89</sup> then once matriculated, such racial minorities are more likely to possess the self-esteem and networking skills necessary for success in law school, at least relative to minorities and other students of lower socioeconomic status. To be clear, all beneficiaries of affirmative action face significant bias and stereotyping challenges, yet, nonetheless, racial minorities of higher socioeconomic status are actually likely to possess the social and cultural capital necessary for attaining success in law school. Students of lower socioeconomic status, however, will not only face the devastating stigma, bias, and stereotyping of affirmative action, they are also more likely to actually not possess the requisite social and cultural capital so essential for professional success.

Moreover, lower socioeconomic status may frustrate class-based affirmative action efforts in yet another way less applicable to racial-based

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87. Malamud, *supra* note 6, at 735 (“Sander should acknowledge that very-low-SES students might well experience some of the down-sides he insists accompany race-based affirmative action.”).

88. Sander suggests that students benefiting from socioeconomic preference may not be aware that they received such a preference. Sander, *Class in American Legal Education*, *supra* note 1, at 666. This suggestion is naïve: public universities that would implement class-based affirmative action in conjunction with their admissions policies would be subject to regulations requiring them to disclose their admission policies. Moreover, as noted by Justice Ginsburg in her dissent in *Gratz v. Bollinger*, “If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.” 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting).

89. Sander, *Class in American Legal Education*, *supra* note 1, at 655. *But see* Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 988–97 (1997) (arguing that alternatives to racial-based affirmative action are unattractive even if such policies tend to benefit minorities of higher socioeconomic status).

affirmative action. Two recent trends make students of lower socioeconomic status less likely to apply to law school or enroll even if admitted. First, law school education, both private and public, has become significantly more expensive, in real dollars, over the last fifteen years.<sup>90</sup> This of course impacts all law students, but constitutes a more significant hurdle for students of lower socioeconomic status. Second, the economic downturn accelerated ongoing trends that make it harder to find a job after graduating from law school, and even harder to find a well-paying position that could help address mounting student loans.<sup>91</sup> The combined effect of both trends has been a perceived decline in the value of legal education, at least in terms of a cost-benefit analysis, with some arguing that legal education is simply not worth its cost.<sup>92</sup>

The perceived decline of the value of legal education impacts all prospective and current law students, as well as practicing attorneys. Yet, it may have an additional negative impact on prospective students of lower socioeconomic status. In America, “law is king,”<sup>93</sup> opined Thomas Paine, lawyers are the aristocracy,<sup>94</sup> the high priests of a civic religion,<sup>95</sup> and members of the ruling class,<sup>96</sup> at least in terms of social and cultural status. This perspective, however, is more likely to be shared by affluent Americans hailing from higher socioeconomic classes. Therefore, even if legal education is becoming a less attractive cost-benefit proposition, such analysis is more likely to deter students of lower socioeconomic status who cannot afford to pay for it, and less likely to deter students of affluent backgrounds, who not only can afford to pay the higher costs, but also apply to law school for reasons other than cost-benefit analysis—the pursuit of an elevated social and cultural status as members of

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90. Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 10–15 (2006) (documenting the law school tuition “explosion”); John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, 516–19 (2002); William K.S. Wang, *The Restructuring of Legal Education Along Functional Lines*, 17 J. CONTEMP. LEGAL ISSUES 331, 333 (2008) (summarizing available data on law school tuition increases).

91. Eli Wald, Foreword, *The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051–52 (2010). William Henderson has documented the distribution of lawyers’ starting salaries, concluding, “For many, getting a JD is a very risky financial proposition . . . .” Bill Henderson, *Distribution of 2006 Starting Salaries: Best Graphic Chart of the Year*, EMPIRICAL LEGAL STUDIES, (Sept. 4, 2007, 3:29 PM), [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2007/09/distribution-of.html](http://www.elsblog.org/the_empirical_legal_studi/2007/09/distribution-of.html).

92. See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, January 9, 2011, at BU1, available at <http://www.nytimes.com/2011/01/09/business/09law.html?src=me&ref=general>.

93. THOMAS PAINE, COMMON SENSE 45, 98 (Isaac Kramnic ed., Penguin Classics 1986) (1776).

94. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 302–11 (Arthur Goldhammer trans., Libr. of Am. 2004) (1835) (analyzing the practice of law in the United States and discussing the integral role played by the law and lawyers in American society).

95. See Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1879–1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 51–57 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

96. See Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Disolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 383 (2001).

the legal profession. This, to be sure, is not because students of lower socioeconomic status have different dreams and aspirations than more affluent students, but rather because in the real world the former may not be able to pursue such dreams when their cost-benefit value is declining.

The consequences of the visibility of socioeconomic status cannot be overstated. If students of lower socioeconomic status are less likely to apply to law school to begin with, are less likely to enroll even if admitted, are likely to do worse in law school and in law practice relative to more affluent law students because they do not possess the same social capital, networking capabilities, cultural capital, and intellectual self-esteem, then simply administering socioeconomic affirmative action will be irresponsible on the part of law schools. This by no means suggests that law schools should abandon their commitment to diversity and, when appropriate, to affirmative action. Rather, it suggests that true commitment to diversity, class diversity included, means that law schools should do more than simply extend offers of admission to students of lower socioeconomic status. Social capital skills could be taught while in law school, and law schools should explicitly and proactively help students who do not possess these skills to acquire them. Cultural capital might present more of a challenge, but true commitment to diversity requires law schools to do whatever they can to assist their students to acquire it.

Interestingly enough, Sander himself has previously made arguments along this very line of reasoning.<sup>97</sup> Exploring the costs affirmative action imposes on black law students, Sander has elsewhere argued that “[t]he net trade-off of higher prestige but weaker academic performance substantially harms black performance on bar exams and harms most new black lawyers on the job market.”<sup>98</sup> The very same argument would be applicable to recipients of socioeconomic preferences who would end up in higher prestige law schools and would likely end up with weaker academic performance compared with their more affluent counterparts. Sander might counter that because class-based affirmative action would require smaller preferences, recipients of lower socioeconomic standing would not experience a significant a mismatch,<sup>99</sup> yet his mismatch hypothesis is controversial and unproven.

Questioning the mismatch hypothesis in the context of the trade-off between law school prestige and academic performance, David Wilkins has argued that:

[I]t is precisely because these [affirmative action] policies have been so successful that for the first time blacks with high grades from

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97. See Sander, *Systemic Analysis*, *supra* note 1, at 371–72, 478.

98. *Id.* at 371–72.

99. Sander, *Class in American Legal Education*, *supra* note 1, at 666.

lower-status schools have a plausible chance of gaining entry into high-paying positions in the legal profession. These tentative gains, however, are unlikely to continue if the number of black graduates from highly ranked schools were to decline dramatically.<sup>100</sup>

This is because the network effects, that is, social capital, of attending high-status law schools continued to advance the careers of black lawyers who were “rollin’ on the river” of the prestige benefits of those institutions for many years after graduation.<sup>101</sup>

Regardless of the relative importance of school prestige and academic performance, Sander’s concern with the impact of poor academic performance on the careers of recipients of affirmative action highlights the need to pay close attention to the factors that impact academic performance, including social capital, networking, cultural capital, and intellectual self-esteem. Ironically, both academic performance and law school prestige are not only products of social and cultural capital, but upon graduation, become elements of one’s social and cultural capital. While Sander and his critics have debated the latter aspects of social capital, Sander fails to notice the former—that academic performance in law school is very much a product of the visible aspects of socioeconomic status and social and cultural capital, including networking and intellectual self-esteem.

Visible affirmative action policies, race-based and class-based alike, impose costs on recipients of preferences, as well as on non-recipients. While Sander believes that class-based preferences are likely to be less costly than race-based preferences, the visibility of socioeconomic status, the relative lack of social and cultural capital, and the perceived decline in the value of legal education suggest quite the opposite, that is, that socioeconomic preferences are likely to be as costly, if not more expensive (once factoring in the cost of increased financial aid), than race-based preferences. Put differently, Sander is wrong to assert that administering class-based preferences is going to be cheaper than implementing race-based affirmative action. Yet, as we shall see, the visibility and cost of class and racial preferences is not a reason to abandon class-based diversity, or race-based preferences, because the benefits of diversity, for both recipient and society, may easily outweigh the costs.

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100. David B. Wilkins, Response, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1919 (2005).

101. See David B. Wilkins, *Rollin’ on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527, 554 (2000).

### III. VISIBILITY AND CLASS DIVERSITY

#### A. *The Questionable Desirability of Invisibility*

In touting the invisibility of socioeconomic preferences as an advantage relative to the visibility of racial preferences, Sander makes a questionable assumption: that invisibility, passing, and covering are inherently desirable. Specifically, Sander believes that because recipients of socioeconomic preferences would not be visible to others, they would not suffer stigmatization or become targets of bias and stereotyping.<sup>102</sup> Lempert similarly argues that students of lower socioeconomic status will generally seek to blend into the crowd and shed their class identity, and that such invisibility would be desirable, signifying progress and upward mobility.<sup>103</sup>

If racial minorities could pass or cover and avoid some of the costs of affirmative action, perhaps some would choose to do so. And if socioeconomic status was invisible or completely coverable perhaps some students of lower socioeconomic status would choose to avoid the stigma, bias, stereotyping, and self-doubt that comes with preferences and affirmative action. Yet, it is noteworthy that invisibility, just like passing and covering, is not inherently either desirable or undesirable.<sup>104</sup> Some people, in some circumstances, may choose to pass, cover, or be invisible, while others would not. For some, the cost of passing, covering, or being invisible may be too high a price to pay to avoid the consequences of preferences. One may be proud of her background, of her parents and of her circumstances and not wish to remain silent about them. To be clear, passing, that is, remaining invisible, and covering are legitimate choices. Yet, while remaining invisible has its benefits, successful passing and covering entails significant costs that some may find too high to incur.

Once again, the experience of Jewish male lawyers is instructive in this regard: Once admitted to elite law schools, some Jewish students who were able to pass as WASPs or cover their Jewish identity, chose to do so and accepted positions in elite Wall Street firms.<sup>105</sup> To these Jewish lawyers, the costs of passing and covering were outweighed by the promise of an otherwise well-deserved career path at the elite firms. Importantly, however, others chose to embrace their Jewish identity, accepted the prevailing discriminatory hiring and promotion realities at the WASP

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102. Sander, *Class in American Legal Education*, *supra* note 1, at 665–67.

103. Lempert, *supra* note 11, at 711–15.

104. Interestingly, Yoshino, although popularizing the ideas of “passing” and “covering,” missed this very point, assuming that passing and covering are always coerced and therefore undesirable. Horwitz, *supra* note 82, at 1284, 1294; *see also* Dinovitzer, *supra* note 59, at 445 (arguing that social capital is not inherently positive or negative).

105. Wald, *supra* note 4, at 1836–39.

firms, and opted to practice with the emerging Jewish law firms.<sup>106</sup> For those who can pass or cover, the choice of whether to remain or become invisible is far from obvious.

Indeed, the complexity of assessing the desirability of invisibility is revealed even in instances where the minority group in question does not have the option of passing and covering, and is forced to visibility. A rich body of literature examining the experience of women law students in legal education reveals that some women experience law school as a male-designed institution, causing them to feel alienated, isolated, and silenced, and pushing them to become, in meaningful ways, “gentlemen” as a condition precedent for becoming lawyers.<sup>107</sup> Other women, on the other hand, perceive law school as a meritocratic institution, thrive in it, and report an enriching and fulfilling educational experience.

Would alienated female law students choose to pass and cover for men law students if they could? Some would. Indeed, some women law students report that in order to succeed in law school they attempt to cover perceived undesirable feminine characteristics. Other women strongly oppose covering, seeing it as a coercive measure, exactly the one that causes them to be disillusioned with law school and law practice. To them, the appropriate response to prevailing male-designed features of law school is reform of legal education, not coerced gender covering.<sup>108</sup>

Visibility, as we have seen, is a relative characteristic, with some identities, for example, gender and racial, being more inherently visible and harder to cover than others, such as class. From the perspective of students of all identities and statuses, a decision to remain or seek invisibility is as legitimate as a choice to embrace visibility. Law schools must embrace both postures—visibility and invisibility—as legitimate, and, in

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106. Wald, *supra* note 80, at 923 (documenting the choice of some Jewish lawyers to opt out of competing for a position with the elite WASP firms).

107. See LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 28–29 (1997); Bashi & Iskander, *supra* note 70, at 391–92, 403, 409 (“Despite gender parity in entering J.D. classes, law schools are not adequately preparing female law students for success . . . . As individuals, law school professors treat women differently from men, and as institutions, law schools cultivate and reward patterns of behavior that are more likely to be found among men than among women . . . .”); Paula Gaber, “Just Trying to Be Human in This Place”: *The Legal Education of Twenty Women*, 10 *YALE J.L. & FEMINISM* 165, 166–70 (1998) (analyzing the experience women were having in law school and how their conscious career paths may affect their experiences); Beth Goldstein, *Little Brown Spots on the Notebook Paper: Women as Law School Students*, 84 *KY. L.J.* 983, 1004–07 (1996) (presenting the narrative experiences of sixteen women involved in law school retention programs); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 *U. PA. L. REV.* 1, 4–5 (1994); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 *STAN. L. REV.* 1299, 1299–1302 (1998) (discussing the experiences of women law students in the 1980s and examining the premise that “women experience law school differently” than men).

108. See Eli Wald et al., *Looking Beyond Gender: Women's Experience at Law School* 41 (Univ. of Denver Sturm Coll. of Law Legal Research Series, Working Paper No. 11-04, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1757882](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757882).

particular, should not assume and encourage passing and covering, and should not consider invisibility, when possible, desirable. Yet students' choices regarding visibility have a significant impact on law schools' institutional perspective and approach to diversity.

*B. Visibility, Invisibility, and Class Diversity*

While law schools should honor the choices of some students to pass and cover, they should also be prepared to support the educational experience of those who cannot avoid visibility and of those who choose visibility over invisibility. Indeed, true commitment to diversity in legal education must mean more than simply admitting a diverse class of students and relying on the invisibility of the diverse group to lower the costs of affirmative action and diversity. To be sure, admitting a diverse class is a very important first step. The past exclusion of ethnoreligious, gender, and racial minorities and the current exclusion of socioeconomic minorities reminds us that diversity in admission decisions is not to be taken for granted. Law schools, however, must remain committed to diversity even after they make admission decisions,<sup>109</sup> and, in particular, assist their students in building and acquiring social and cultural capital. They must support and enhance the educational experience of all of their students, those who fully participate in legal education as it stands today, those who choose to pass for or cover aspects of their identity, and those who reject passing and covering or cannot pass and cover and are visible in ways that may hinder the quality of their legal education.

Moreover, even as they respect the choice of some of their students to pass and cover, law schools (and Professors Sander and Lempert) must bear in mind that invisibility, passing, and covering contradicts, in meaningful ways, the very essence of diversity and of affirmative action efforts meant to enhance it. If the concept of racial, gender, and socioeconomic preferences in law schools' admissions policies is, at least in part, to promote the diversity of the viewpoints, backgrounds, and life perspectives of the students who compose a class, then invisibility would work directly to undermine that underlying goal.<sup>110</sup>

Sander's contention that the invisibility of socioeconomic status is desirable is therefore mistaken for two reasons. First, it trivializes and usurps an important decision facing minority students. While some minority students may choose to remain invisible, pass, or cover, others may wish to bear the costs of visibility so they can celebrate its benefits.

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109. See Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from A Diverse Student Body*, 35 PEPP. L. REV. 663, 703 (2008) (exploring strategies for effective incorporation of and retention of diversity in law schools beyond the admission stage).

110. Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011) (exploring various justifications for diversity applicable to lawyers and the legal profession).

Assuming or encouraging invisibility is, therefore, both inappropriate and undesirable. Second, invisibility and successful passing and covering inherently undermines diversity and affirmative action measures meant to promote it by silencing the very plurality and richness of perspectives diversity is supposed to promote. While law schools certainly should not encourage visibility nor push minority students into playing the “model minority” role in order to foster to goals of diversity, treating invisibility as desirable on the ground that it may reduce the costs of affirmative action might end up sustaining affirmative action while undermining the very diversity of opinions it is meant to achieve.

If socioeconomic status was invisible or completely coverable, and if students of lower socioeconomic standing would all choose to cover their class identity, then Lempert would arguably be more persuasive in asserting that “[w]hen it comes to contributing to diversity within law schools . . . class-based affirmative action may add little of value.”<sup>111</sup> But class identity is not completely coverable, and even if it was, some students of lower socioeconomic status would legitimately choose not to cover their identity. As a result, class diversity may be of significant value at law schools.

Consider the following example. A student from a lower socioeconomic class expresses his or her views about the relationship between corporate bailouts and public welfare. Assuming invisibility or successful passing or covering, no one would necessarily be aware that his or her perspective is at least partly informed by having been brought up on food stamps. As a result, the student’s views might be dismissed by classmates as knee-jerk liberalism, and might hold less weight or credibility than they would if people knew that the student was poor, and that his or her views were informed by intimate familiarity with public welfare programs.<sup>112</sup>

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111. Lempert, *supra* note 11, at 711.

112. I thank my colleague Alan Chen for suggesting this example. See also Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s in a Definition?*, 88 DENV. U. L. REV. 807, 825 (2011) (criticizing Sander’s characterization of invisibility as desirable and noting that “[b]ecause [a] low-SES, white student could remain invisible, his classmates never had the opportunity to learn from him . . .”); Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751, 782 n.180 (2011) (“Sander also touts the invisibility of SES preferences. I am not sure if those who lived in the type of poverty that Sander’s SES preferences are designed to help would necessarily agree.” (internal citations omitted)).

Lempert does concede that “some students from lower class backgrounds with elite undergraduate educations make distinct contributions to a law school’s education environment which students from more advantaged backgrounds could not or would not make”; however, Lempert “still maintain[s] that with respect to diversity standpoint an elite law school is likely to get fewer benefits from admitting more lower SES students than one might expect.” Lempert, *supra* note 11, at 712 n.85. As is likely obvious by now, I believe Lempert underestimates the value of class diversity.

As Justice O'Connor wrote in describing the University of Michigan Law School's affirmative action plan in *Grutter v. Bollinger*<sup>113</sup>:

*The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."*<sup>114</sup>

The Michigan Law School's program and the Court's decision in *Grutter* thoroughly embrace the notion that the goal of diversity is not simply the demographic composition of the entering class, but the holistic enhancement of all students' education by the introduction of perspectives from across the universe of the human experience. Invisibility, passing, and covering would not necessarily mask the perspectives (although they might), but they would certainly cover the origins of those perspectives in ways that would undermine the very goal of socioeconomic affirmative action.

Lempert suggests that a good test for measuring the value of diversity in legal education is to assess the scope and quality of extracurricular activities that exist in law schools.<sup>115</sup> Reporting that Michigan Law School "has never started a low SES law journal, nor have there been groups organized along SES lines to invite speakers to the law school or to ask for the creation of new courses,"<sup>116</sup> and that he cannot "recall ever hearing a non-minority student explicitly reference a personal experience associated with his family's poverty or low SES,"<sup>117</sup> Lempert concludes that class diversity is likely to add little value to legal education. While assessing extracurricular activities is a plausible measure of the value of diversity, Lempert's anecdotal observations are subject to serious question. As Deborah Malamud points out, "having been homeless, having been dependent on welfare, having parents who neither valued education . . . nor encouraged it . . . differences of these kind . . . can be a source of

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113. 539 U.S. 306 (2003).

114. *Id.* at 315-16 (alterations in original) (emphasis added) (citations omitted).

115. Lempert, *supra* note 11, at 713.

116. *Id.*

117. *Id.*

significant embarrassment for students from lower-SES backgrounds.”<sup>118</sup> Rather than suggesting that class diversity has little value, Lempert’s observations may show instead that students of lower socioeconomic status were covering their class identities. A plausible approach might be not to abandon class diversity but rather to make legal education more supportive and welcoming to students of lower socioeconomic status such that some may choose visibility over invisibility and enrich the educational experience of all students.

Lempert further believes that the invisibility of socioeconomic status and the desirability of such invisibility render class diversity of little value to social contributions beyond law school. He argues that “[i]t is doubtful whether elite law school graduates from lower SES backgrounds would show a . . . disproportionate tendency to serve people like them.”<sup>119</sup> Lempert offers no support for this speculation and appears to invoke a narrow construction of “giving back.”<sup>120</sup> Diversity, especially within the legal profession, is justified on the ground that it is closely aligned with equality.<sup>121</sup> Fundamentally, diversity initiatives embody an effort to overcome bias, address discrimination, and pursue equality, all core values of the legal profession and the rule of law. “The United States occupies a special place among the nations of the world because of its commitment to equality, broad political participation, social mobility, and political representation of groups that lack political clout and/or ancestral power,” noted the American Bar Association, explaining the “democracy rationale” of diversity, and pointed out that “[w]ithout a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from mechanisms of justice.”<sup>122</sup>

Next, diversity is intimately related to access to lawyers and justice and to the quality of representation of the under-privileged. It is not the case, of course, that only minorities or lawyers of lower socioeconomic background can or should represent other minorities or lower class clients. Nonetheless, ample research suggests that empathetic lawyers who actively listen to their clients, as opposed to imputing to them generic goals, in part because they do not understand their clients, their goals, their backgrounds, and their ways of reasoning, offer more effective representation.<sup>123</sup> And while all lawyers, irrespective of their identities, could do their jobs effectively, a diverse bar, class diversity included, is more likely to be able to meet and be

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118. Malamud, *supra* note 6, at 735.

119. Lempert, *supra* note 11, at 714.

120. *Id.* at 713.

121. Wald, *supra* note 110 at 1101.

122. AM. BAR ASS’N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS (Apr. 2010) at 9.

123. See generally William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991); Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747 (2008).

perceived as able to meet the goals of access to lawyers, justice, and effective representation.<sup>124</sup>

Finally, as I argued elsewhere, “law not only means effective access to lawyers, and through them to equity, justice, and first-class citizenship, but also access to upward social mobility and key leadership positions because in the United States, political leaders are often drawn from the ranks of the legal profession.”<sup>125</sup> Moreover, “[t]his understanding of the role of diversity reframes and expands it from one that is focused on the needs of minority communities, to an account that re-envision[s] opportunities for minority lawyers as leaders within the profession and society.”<sup>126</sup> As importantly, it also questions simplistic measures of the value of diversity which focus on whether minority lawyers (racial and class minorities alike) directly serve minority communities.<sup>127</sup> Because socioeconomic status is not invisible, class diversity, especially within the legal profession, may be of great value. Law schools and the legal profession ought to pursue it, alongside other types of diversity, and act proactively to make legal environments more welcoming and supportive of visible class identity.

#### CONCLUSION

In *Class in American Legal Education*, Sander argues, passionately and compellingly, that law schools should not simply employ the rhetoric of diversity, but should pursue it vigorously, and should promote diversity of all sorts, not only racial diversity.<sup>128</sup> When it comes to racial diversity, Sander maintains that it is not enough for law schools to simply admit students of color, if the result is that many fail to graduate or pass the bar exam and do poorly as lawyers after graduation.<sup>129</sup>

It is at this junction that Sander begins to pursue a less persuasive line of reasoning. Sander believes that given the costs and consequences of racial-based affirmative action, it ought to be abandoned or at least partially replaced with class-based affirmative action. As this Response shows, however, Sander is wrong to argue that class-based affirmative action is not going to be as costly as racial-based affirmative action. To the contrary, because socioeconomic status is highly visible and plays such an important role in both legal education and the practice of law, class-based affirmative action is likely to be as, if not more, costly than racial-based affirmative action.

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124. Wald, *supra* note 110 at 1101–3.

125. *Id.* at 1103 (internal citations omitted).

126. *Id.*

127. For a recent thought-provoking challenge to simplistic ways of thinking about what it means to be and appropriately act like a minority, see TOURÉ, WHO'S AFRAID OF POST-BLACKNESS?: WHAT IT MEANS TO BE BLACK NOW (2011).

128. See Sander, *Class in American Legal Education*, *supra* note 1, at 632, 664.

129. See Sander, *Systemic Analysis*, *supra* note 1, at 481; see also Sander, *Racial Paradox*, *supra* note 1, at 1773–76.

More importantly, whereas Sander appears to believe that the solution to costly affirmative action policies is to abandon them or replace them with less costly alternatives, the appropriate solution for law schools is not to abandon affirmative action policies, but rather to meet their challenges head on. Accordingly, to the extent that racial-based affirmative action imposes significant costs on its recipients and non-recipients, law schools ought not to abandon racial preferences, rather, they need to enhance the educational experience of racial minorities.<sup>130</sup> Similarly, the fact that socioeconomic status is visible does not mean that law schools should not pursue class diversity. Rather, it means that, in addition to implementing socioeconomic preferences, law schools should be prepared to support the educational experiences of students of lower socioeconomic status and pursue measures that will help recipients of socioeconomic preferences acquire and build social capital, including networking skills and cultural capital, including the development of intellectual self-esteem.

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130. Likewise, and contrary to Lempert's position, to the extent that class-based affirmative action imposes significant costs on its recipients and non-recipients, law schools ought not to abandon class preferences, rather, they need to enhance the educational experience of lower socioeconomic minorities.