

Denver Law Review

Volume 88
Issue 4 *Special Issue - Class and American
Legal Education*

Article 6

December 2020

Class Privilege in Legal Education: A Response to Sander

Deborah C. Malamud

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 *Denv. U. L. Rev.* 729 (2011).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

CLASS PRIVILEGE IN LEGAL EDUCATION: A RESPONSE TO SANDER

DEBORAH C. MALAMUD[†]

I commend Professor Richard Sander for calling our attention to the many ways in which the admissions and financial aid policies of law schools—especially elite law schools, on which I will focus in my Response—work to perpetuate class privilege. I am not a quantitative social scientist, and so I must leave questions about Professor Sander’s methodology to the experts, a group well-represented in the collected responses to this Article. I will assume for purposes of this Response that Sander is right that the class distribution in elite law schools is sharply skewed in favor of the most privileged. I will also assume, without defense, that socioeconomic integration is an important social good.¹

[†] AnBryce Professor of Law, New York University Law School. My thanks to Richard Lempert and Eli Wald for comments, to Gretchen Feltes for superb librarianship, and to NYU’s AnBryce Scholars for letting me be part of their lives.

1. I make this assumption without conceding that the imperative for socioeconomic integration in the United States is as strong as the imperative for racial integration (let alone stronger, which one might take to be Sander’s assumption). It remains my view that race-based differences in opportunity “weigh[] [more] heavily on the moral scale” than do purely class-based differences. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 993 (1997). For a strong philosophical defense of the importance of race-based integration and of affirmative action as a means of achieving and maintaining it, see ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 112–16, 148–54 (2010). The question of the place of mixed-race and immigrant students, especially black students (given the larger “plus” diversity programs offer to black applicants), in an integrationist narrative (particularly one which, like Anderson’s, is rooted in historical, durable group-based inequalities) is a complex one. It is best dealt with in “mend it” rather than “end it” terms. See, e.g., Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1277–78 (2008) (arguing for a bright-line rule prioritizing “ascendant blacks” over black/white biracial and black immigrant applicants for affirmative action purposes); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1220–21 (2007) (arguing for a standards-based approach, based on the consideration of evidence of black racial self-identification as part of a *Grutter*-esque full file review of black candidates). It is also important to be aware that “race” and “class” are not the only competitors in the ring, where admissions policies are concerned. There are other diversification values and pressures that might well dominate the higher-education debate in the future. I have in mind, for example, the diversity benefits of enrolling immigrants and foreign students in response to globalization, with the political push-back inherent in the use of preferences for that purpose, should public attention focus on their use. See, e.g., JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2002); Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 61–62 (1992); cf. Edna Chun & Alvin Evans, *Bridging the Diversity Divide: Globalization and Reciprocal Empowerment in Higher Education*, 35 ASHE HIGHER EDUC. REPORT, no.1, 2009, at 9–11 (discussing globalization, but, oddly, using it as a justification for traditional race-based diversity efforts).

I strongly disagree, however, with Sander's decision to link his class analysis to his critique of race-based affirmative action.² I address this point in Part I of my Response. If the issue of class-based closure of opportunity is of normative importance, it ought to be able to stand on its own bottom. That has been the premise of my work on class-based affirmative action, and I remain convinced by it.³ Even as a strategic matter, it does little good to alienate potential allies by requiring them to sign on to descriptive and normative critiques of race-based affirmative action as the cost of entry into an alliance in favor of greater class diversity in elite legal education. The elite undergraduate schools that have revamped their financial aid policies to further class diversity have maintained their commitment to race-based affirmative action. Sander need not rest his support for class-based affirmative action on the suggestion that it serve as a "partial substitute for current racial preferences."⁴ He should recognize that "[o]pposition to [race-based] affirmative action has become a bottleneck," in which advocacy for greater class equity in admissions "gets hopelessly entangled."⁵ By conflating the issues, he needlessly calls into question the seriousness of his own advocacy on issues of class.

Separated from the issue of race, Sander's argument is that the skewed class composition within the student bodies of elite law schools calls for a redistributive response. I respond to this argument in Part II. The extent to which one shares a normative commitment to redistribution might well depend on who gains and who loses. Sander provides UCLA Law School's short-term experiment as a success story in redistribution from high to low SES applicants,⁶ but points to unique factors that make

2. I am not "on record" in relation to the debate on Sander's critique of race-based affirmative action in law schools. Consistent with the premise of my Response, I will not use this short contribution as an occasion to enter that debate. In my own work, I have acknowledged that the diversity rationale pushes institutions towards a focus on their own institutional goals, rather than on the consequences of affirmative action for the lives of its intended beneficiaries. See Malamud, *supra* note 1, at 958–59. I believe Sander has made it impossible (and rightfully so) to ignore those consequences—although I am more persuaded by his critics on the merits of the question of what those consequences are in fact.

3. See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1848 (1996).

4. See Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 664 (2011). Richard Kahlenberg's scholarship is motivated, as is Sander's, by a critique of race-based affirmative action. William Bowen's is not. One of the main sources Sander cites as "encouraged by" Kahlenberg in fact concludes that both minorities and low-SES students are underrepresented in elite undergraduate schools, and that both class-based and race-based affirmative action are appropriate. *Id.* at 632 & n.5 (citing Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION (Richard Kahlenberg ed., 2004)); Carnevale & Rose, *supra*, at 152–54.

5. Carnevale & Rose, *supra* note 4, at 154.

6. Sander, *supra* note 4, at 661–64. It would be helpful to have more complete data on the SES-redistributive effects of the UCLA program. Elsewhere, Sander distinguishes (at the top) between the top decile and top quartile, and (at the bottom) between the bottom and second quartiles. See *id.* at 646–49 tbls.5, 6 & 7.

it unlikely that its success could be replicated on a national scale.⁷ In order to achieve large shifts, the trades will need to take place across shorter distances—to benefit candidates in the lower-middle and middle-SES ranges (whom I will refer to as “middling-SES” candidates).

For reasons I will explain below, I believe that elite schools already do appreciate the “diversity” added by stellar low-SES candidates with gripping personal stories, and I do not think it would be difficult for them to marginally increase the number of such students they admit. Whether they would be committed to providing adequate grant-based financial aid to persuade them to enroll is another question; the answer might depend on whether they are prepared to make a high-profile, programmatic commitment to low-SES diversity.⁸

I think it less likely, in contrast, that elite law schools would adopt the reforms that would be necessary to bring about major changes in their middling-SES enrollments. On the admissions front, doing so would require schools to downplay the value of the myriad kinds of distinction they seek in their entering classes. On the financial aid front, it would require them to take a more realistic view of middling-SES families and their attitudes towards going into debt for elite education.

I. GETTING PAST THE RACE VS. CLASS RHETORIC

A. *The Numbers: A Drop in the Bucket?*

By juxtaposing race and class, Sander is in essence arguing that law schools have what one might call a “diversity admissions budget,” which operates on a zero-sum basis to allocate deviations from what would otherwise be the outcome of a mechanical, numbers-based admissions policy. Even if one does not agree (as I do not) that elite schools are violating *Grutter* by being mechanical in their use of the “numbers,” elite schools compete with each other in the “rankings” by reporting high admissions “numbers.” It is not unreasonable to think in terms of a “budget” for non-high-indicator numbers, to be shared among all of those candidates deemed desirable despite relatively lower “numbers.” It is useful, then, to consider how much difference it would make, as a

7. *Id.* at 663. This is in part because of the “unique factor” of California’s “substantial number of low-SES, high-achieving Asian students, many of them immigrants or the children of immigrants.” *Id.* at 663 n.88. Race-based affirmative action preferences in favor of immigrants are not popular in this country. See *supra* note 1. It is unclear—but seems unlikely—that socioeconomic preferences for immigrants because of the short-term disadvantages inherent (for many families) in immigration would be any more popular.

8. For seven years I served as the Faculty Director of the AnBryce Scholarship Program at New York University Law School, which has done precisely that, and now enrolls approximately ten low-SES Scholars a year with full-tuition remission and programmatic support. See Richard H. Pildes, *An Introduction to the NYU Journal of Law and Liberty Symposium, “The Unknown Justice”*, 4 N.Y.U. J. L. & LIBERTY 475, 476 (2009) (describing the AnBryce Scholarship Program). I am not aware of similar programs at our peer law schools.

quantitative rather than a symbolic matter, to make the partial substitution Sander calls for here.

Both in this Article and in his earlier work, Sander's critique of race-based affirmative action is most strongly targeted against preferences for African-Americans in elite law schools.⁹ Given that Sander also acknowledges that "racial minorities are responsible for much of the small amount of SES diversity we can currently observe in law schools,"¹⁰ he is oddly ambivalent in his reporting of the greater class diversity of black students when compared to white students. In relation to Table 8 (which deals with the top twenty law schools), Sander flags the "remarkably high SES" of black students.¹¹ But 82% of whites versus 66% of blacks are in the top quartile (and, as he notes, blacks in any given quartile are likely to be less well-off than whites); 33% of blacks versus 17% of whites are in the second and third quartiles.¹² These are not trivial differences. To the extent that Sander is right that "the contribution *racial* diversity makes to socioeconomic diversity in legal education is quite modest,"¹³ the real reason is that minorities are *minorities*. Despite the fact that they are more (I would even say "far more") class-diverse than whites, whites swamp them in numbers, so their greater diversity gets lost in the broader pool.

Sander's critique sounds most strongly against extending race-based preferences to "high-SES" blacks.¹⁴ But how many "high-SES" blacks are there in elite law schools? Is the number large enough so that "voting them off the island" would make a meaningful difference in class diversity, even assuming all of their places were taken by "low-SES" applicants?¹⁵ I think not. Eliminating the highest-SES black students to free

9. See Sander, *supra* note 4, at 666–68; see also Richard Sander, "From the Trenches and Towers," *The Tributaries to the River*, 25 LAW & SOC. INQUIRY 557, 562–63 (2000).

10. Sander, *supra* note 4, at 651.

11. *Id.* at 652.

12. *Id.* at 651 tbl.8.

13. *Id.* at 654.

14. Targeting the highest-SES blacks for exclusion has some adverse consequences, of course. Since the highest-SES blacks will tend to need the smallest preferences and suffer the smallest performance shortfalls, it should be obvious that by excluding them, the average performance numbers of the black student population will drop. That is why schools, when they can, prefer higher-SES blacks. It's not that they are insensitive to race-plus-class inequality, or that they actually prefer mixed-race or African-immigrant blacks to "ascendent blacks." See Brown & Bell, *supra* note 1, at 1245–55 (explaining the increasing percentage of black/white biracials and black immigrants on college campuses and the underrepresentation of ascendent blacks in selective educational programs). They just want to get past the bad days of black students being clustered at the bottom of the class so that race will be less stigmatizing.

15. This thought experiment parallels the clever handicapped-parking riff credited to economist George Akerlof:

Suppose that one parking space in front of a popular restaurant is reserved for disabled drivers. Many of the nondisabled drivers who pass by the space while circling the parking lot in search of a place to park may be tempted to think that they would have an easier time finding a space if the space had not been reserved. Although eliminating the space would have only a minuscule effect on the average parking search for nondisabled driv-

up more spots for lower-SES white students is not going to make much of a difference because their numbers are simply too small to have a large impact.

Here is a rough estimate based on Sander's data (which, again, I will accept for purposes of this Response). His table A2-1 shows that the top tier of law schools (the top ten), with a first-year enrollment of 3,112, has 242 black students (8% of total enrollment). His Table 8, which gives socioeconomic breakdown by law school tier and race, gives data for the top two tiers (the top twenty), rather than the top tier, but it will do for present purposes. Table 8 shows that 34% of black students in top 20% schools come from his bottom three SES quartiles.¹⁶ Assume that, because they are class-diverse, they get to stay. An additional 23% of blacks in top 20% schools come from the lower portion of the top quartile (the 75th-90th percentile). Given Sander's acknowledgment that simplified measures of SES are likely to overstate the SES status of blacks,¹⁷ let us assume for present purposes that they get to stay as well. That leaves the 43% of top-20-school black students who come from Sander's top SES decile as the ones who, in Sander's critique, ought to yield their places to lower-SES candidates chosen without regard to race.¹⁸

Since Sander does not provide data on the proportion of black students in *top ten* schools who are in the top SES decile, let us assume that the number is somewhere between 43% (the proportion of black students in top twenty schools who are in the top SES decile) and 57% (the proportion of all students in the top ten schools who are in the top SES decile). By eliminating black top-decile students from the top ten

ers, the cumulative cost perceived by each passing driver is likely to exceed the true cost simply because people have a difficult time thinking about small probability events.

Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 OHIO ST. L.J. 971, 992-993 (1998). Here, I believe Sander is promoting a distorted assessment of how many handicapped parking spaces there really are in the shopping mall parking lots, rather than of the chances that you, driving around, will actually land one.

16. The comparative figure for whites is 18%—a huge difference. Sander, *supra* note 4, at 651 tbl.8.

17. Prof. Sander cites me for this point, and I thank him. Sander, *supra* note 4, at 7 n.24 (citing Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 456-58 (1997)).

18. Of course, Sander acknowledges that black students class-diversify even the top decile. Sander, *supra* note 4, at 19. Note that this assumes that *all* top-decile black students in top-20 schools received racial preferences in admissions, an assumption I am prepared to make only for purposes of this analysis. In fact, even as to top 10 schools, it was never the University of Michigan's claim that black enrollment would drop to zero without affirmative action. Over time, one hopes that the number of black students (some, if not most, of whom would be top-SES decile) who would qualify for admission with no consideration given to diversity will rise—although even Justice O'Connor now acknowledges that 25 years is better seen as a call to action than as a sunset date. Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in *THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* 58, 61-62 (David L. Featherman et al. eds., 2010).

schools, the schools could free up between 104 and 138 spots, which is between three and four percent of their total first year enrollment.

How big a difference would it make if top ten schools redistributed 3–4% of their entering spots from higher-SES blacks to lower-SES whites and Asians? That is a judgment call, as quantitative judgments always are. Is a 3–4% difference a lot or a little? It sounds pretty small, and (for comparison purposes) Sander treats other differences of far greater magnitude as insignificant as a policy matter (like, for example, the difference between the proportion of white and black elite law students in the top SES decile). Perhaps the more important question is why one is looking to squeeze that small number of extra spots solely from the black top-decile SES ranks. I suspect that one could shave away the lowest-achieving of the white denizens of that SES bracket without any noticeable damage to the diversity or quality of the entering class. By cutting out the top-SES members of the black student cohort, in contrast, Sander's plan would result in screening out the black candidates whose credentials most resemble those of the student body as a whole. The effect would be a drop in black student performance, with a parallel increase in the stigma experienced by black students as a group. Furthermore, there is no reason to believe that the trade would benefit low-SES (as opposed to middling-SES) non-black candidates. That does not sound like a reasonable policy choice to me, to put it mildly.

B. Critical Mass, Proportionality, and the Charge of Hypocrisy

Sander suggests that elite schools are being hypocritical in affirming the value of diversity but adopting admissions policies that operate to favor very-high-SES (top decile) and high-SES (top quartile) candidates in vast disproportion to their representation in relevant populations as to which data are available. Sander assumes here that “diversity” really means “proportionality” in elite-school rhetoric, so that the lack of class proportionality belies diversity concerns. In contrast to Sander, I am prepared to take elite schools at their word that what they are seeking through race-based affirmative action is “critical mass,” not proportionality.

How does the concept of “critical mass” operate in the parallel context of class representation? In the shared vocabulary of elite schools and the Supreme Court, critical mass is said to be necessary because of the stigmatized nature of the groups to which the concept is applied. Students from stigmatized minority groups need to be present in sufficient number to feel comfortable within the institution, and their numbers must be large enough to support sufficient internal variation to dispel stigmatizing stereotypes of group members. Intrinsic to Sander's argument about why class-based preferences are less dangerous than race-based

preferences is his view that class is largely “invisible,”¹⁹ and that it is not stigmatizing. If he is right,²⁰ then there is no need for “critical mass” for class, and we are left with only the argument for proportional representation—a different argument from the one that underpins race-based diversity practice both in the law schools and in the Supreme Court.

C. Is Class-Based Affirmative Action for Low-SES Students Cost-Free?

One of the major threads in Sander’s preference for class-based affirmative action is his assertion that, unlike race-based affirmative action, it does not carry social costs for its intended beneficiaries.²¹ Unlike Sander, I believe that class is often made visible through social interaction, and that, when visible, it can be intensely stigmatizing. This is especially true for students at the very bottom of the SES range—the students whose triumphs over hardship make their applications stand out to admissions officers at elite schools. Having been homeless, having been dependent on welfare, having parents who neither valued education in their own lives nor encouraged it for their children, lacking the funds to live near or participate in group activities with your peers—differences of this kind (and worse) from the dominant middle- (let alone upper-middle-) class ethos of the world of higher education can be a source of significant embarrassment for students from lower-SES backgrounds.²² Perhaps for this reason, stereotype threat has been demonstrated as operating in the sphere of class, not only of race.²³

Precisely because dramatic SES difference has some commonalities with racial difference in its stigmatizing effects, Sander should acknowledge that very-low-SES students might well experience some of the down-sides he insists accompany race-based affirmative action. Given that legal employers do not conventionally go out of their way to foster class diversity in hiring, those disadvantages will not be countered by whatever advantages elite-employer affirmative action practices give to minority students in the summer and permanent employment markets.

19. Sander, *supra* note 4, at 665–66.

20. As to the lowest-SES students, I do not think he is. See *infra* note 22.

21. Sander measures costs in diminished bar passage rates. See Sander, *supra* note 4, at 662–63.

22. It may well be that SES disadvantage that comes from immigrant status is less stigmatizing than SES disadvantage attached to multigenerational poverty in the U.S. If that is the case, class-based affirmative action that disproportionately favors low-SES immigrants (or low-SES foreign students) may be the equivalent of race-based affirmative action that disproportionately benefits foreign-born or mixed-race blacks. We may need a concept of “legacy”-class to match the concept of “legacy”-race. Cf. Onwuachi-Willig, *supra* note 1, at 1157–60.

23. See, e.g., Lisa A. Harrison et al., *The Consequences of Stereotype Threat on the Academic Performance of White and Non-White Lower Income College Students*, 9 SOC. PSYCHOL. OF EDUC. 341 (2006) (finding stereotype threat in lower-income students, but not middle-income students); Taniesha A. Woods et al., *The Development of Stereotypes About the Rich and Poor: Age, Race, and Family Income Differences in Beliefs*, 34 J. YOUTH & ADOLESCENCE 437 (2005) (finding that youth of all classes believe that rich children are better at academics). See also Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861 (2011).

Given Sander's general views on the subject of preferences, he should be advising elite-school pioneers in radical class redistribution to take the obligations of their policies as seriously as they take the benefits.

II. THE ISSUE OF CLASS DIVERSITY

Once we break the spurious connection between race-based affirmative action and class inequality in law school admissions, we can turn to the real questions at hand.

What factors combine to bring about the current maldistribution of opportunity? I will focus here, as Sander does, on the factors that are most within the control of the elite law schools themselves: admissions and financial aid decision-making.²⁴

A. High-SES-Friendly Admissions Practices

Sander is right to suggest that many aspects of elite-law-school admissions policies have a tendency to favor high-SES applicants. Sander acknowledges that it is impossible to predict how large an effect reforming admissions policies would have on assuring greater SES diversity.²⁵ In my view, the uncertainties are not simply problems of quantification. Part of the problem is that we do not know the extent to which admissions officers fight against the high-SES-biased tendencies of their usual methods when evaluating applications from lower-SES candidates. The more mechanical one believes the admissions process is at present, the more optimistic one can be about the difference reform will make. Perhaps that is why Sander is more optimistic than I am.

I suspect that elite schools already take some steps to fight those biases when they evaluate compelling candidates at the lower end of the SES range. Put otherwise, I suspect that they are attracted to candidates from markedly disadvantaged backgrounds who have compelling stories to tell in their application essays, and that they already do take a non-mechanical approach to those applications.²⁶ The methods—invite applicants to disclose socioeconomic hardship in their “diversity” essays, and then keep hardship in mind when assessing the candidate's true potential—are already in use. Perhaps if elite schools used these methods more aggressively, they could increase their very-low-SES admissions numbers by some marginal percentage. (Whether this would result in in-

24. The factors *outside* their control, of course, dwarf those inside—a fact no less true of class-based inequality in the United States than of race-based inequality. Cf. O'Connor & Schwab, *supra* note 18, at 62. I view applicant-pool issues as more outside than inside their control, although better outreach would be helpful. See text accompanying note 30.

25. Sander, *supra* note 4, at 655–56.

26. I am not claiming here that these schools give “preferences” of any mechanical sort to low-SES students, or that, in the sense in which Carnevale & Rose use the term, they “actively recruit” low-SES students. Carnevale & Rose, *supra* note 4, at 118. I am claiming, however, that they take low SES into account when assessing applications from students who take advantage of the opportunity to be self-reflective about their backgrounds.

creased enrollment numbers depends in large part on financial aid policies, which I address below).

I am less convinced that elite schools would be willing to revamp their admissions policies to benefit middling-SES students. Doing so would involve “close trades”—swapping the weakest candidates from the bottom-of-the-top SES ranks for the strongest candidates from the top-of-the-bottom SES ranks. If I am right in this judgment, redistributive policy reforms would lose the symbolic Robin-Hood-esque clout of trimming admissions from the top-SES-decile in favor of the bottom quartile.²⁷ I also suspect that the task of evaluating middling-SES candidates’ class backgrounds and the degree to which their relative lack of distinction is a product of their backgrounds would be far more difficult. I will explore these concerns below.

1. The “Numbers”

One need not conclude, as Sander does (and I do not), that elite schools use “the numbers” mechanically to concede that numbers matter. Elite schools have continued to insist on their right to be elite in this sense, and can be expected to continue to do so. Sander’s work can help make these schools more aware of the class effects of their policies, so that they can take steps to diminish them. My suspicion is that elite law schools are already on the look out for very-low-SES students who have been remarkably successful in light of their backgrounds. I think that elite law schools can and should do more of what I suspect they are already doing to find those rare low-SES candidates who they predict can and will thrive at their institutions. Nothing in the admissions process stands in the way of marginal improvements on that score, and the symbolic (and “diversity”) benefits of making those improvements are strong. I suspect, however, that increased efforts would make only a marginal difference in the class distribution of the elite law school student body.

It would be more difficult—and less likely—for elite schools to reorient their admissions policies towards a major redistribution in favor of the middling-SES range. I suspect that it would be far too difficult for them to tease apart the class-linked and the purely individual explanations for lack of distinction.

27. Cf. Carnevale & Rose, *supra* note 4, at 122 (discussing popular views on preferences for children of “low-income” versus “high-income” families, but not discussing trade-offs between high- and middle-income families). Even as to low-income versus high-income tradeoffs, there is majority public support for the tradeoff only if test scores are dead equal. *Id.* at 125. So much for Robin Hood.

a. The LSAT

To the extent that scores on tests like the LSAT correlate positively with socioeconomic status, elite-school reliance on high LSAT scores serves to suppress lower-SES admissions. Elite schools are not about to abandon the LSAT because of its class effects. Even schools that care about racial diversity and are aware of the LSAT's adverse racial impact have not taken that step.²⁸

In any event, eliminating the LSAT would not be a panacea for lower-SES students. There are lower-SES students who do relatively well on the LSAT.²⁹ If a student's undergraduate GPA was depressed because he needed to work full-time to support himself, or if a student's high GPA would otherwise be discounted because she attended a less-competitive undergraduate institution (especially one with which the law school has no past experience), the LSAT score serves as an aid to admission rather than as a barrier. Indeed, for an elite law school seeking class diversity, a relatively high LSAT from a non-feeder school can, and I suspect does, serve as a signal to take a closer look.

Elite schools can, and should, intervene to make LSAT preparation (and law-school-application preparation more generally) available to low-SES potential applicants. One model for doing so is the TRIALS program, a joint program of Harvard Law School, New York University Law School, and the Advantage Testing Foundation. The TRIALS program considers both ethnic and socioeconomic diversity, and enrolls a majority of its students from schools that traditionally send no more than one graduate per year to the partnering law schools.³⁰ More such programs are necessary, but they are a step in the right direction.

How should schools assess the LSAT scores of students from the middle of the SES range? That is a harder question. Even if the number of programs like TRIALS grew to meet demand, they would not (by design) reach middling-SES students who can afford LSAT preparation courses,

28. Sigal Alon & Marta Tienda argue, with respect to undergraduate admissions, that class rank is the fairest criterion, given the class effects of relying on SATs. Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 491 (2007). If, as they argue, low-SES students have poor SAT scores because they attend "underperforming, resource-poor schools," it is hard to argue that being at the top of the class in such a school is the equivalent of being at the top of the class in a school with the resources to present a more challenging curriculum. *Id.*; cf. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 260 (2009) (arguing that graduate schools recognize the greater difficulty and competition students face at elite schools, and so are willing to admit students with lower class ranks from those schools). I do not believe that there is any easy answer to the question of how to assess aptitude and achievement in the face of inequality of educational inputs.

29. "Relatively well" can be in relation to the elite school's usual LSAT admissions range, in relation to the LSAT scores of other graduates of the same college (reported by LSAC Report Form on the same form that reports the candidate's LSAT score), or in relation to what one might expect from the candidate given her socioeconomic background as reflected in her application.

30. *About the Program*, TRIALS, <http://trials.atfoundation.org/program> (last visited April 29, 2011).

but who either never consider taking them or actively choose not to do so. Students from middling-SES backgrounds might not have the “habitus” towards pursuit of admission to an elite law school—at least not to the extent of being willing to do everything within their power to demonstrate the kinds of distinction necessary to achieve it.³¹ That is a different problem, one in which it is harder to disentangle the effects of class-based limited horizons from the effects of personal lack of ambition.³²

b. Undergraduate GPA

Turning to undergraduate GPA, law schools already possess much of the information they need to make non-mechanical use of GPAs. Applications routinely ask students about part or full-time jobs held during term time, and so schools can take term-time employment into account in determining the extent to which the reported GPA fully measures potential law school performance. Applicants are given the opportunity, through essays, to explain the circumstances underlying particularly weak grades (or semesters). And the LSAC Report Form makes it easy to identify the upward trajectory in GPA experienced by a student from a lower-SES background who had a rocky initial adjustment to college. There is no reason to think that elite schools, which do, in fact, read full applications, are failing to take this information into account.

Might coming from a middling-SES background also suppress undergraduate GPA? Just as such students can afford LSAT preparation classes but do not always take them, they might not be oriented towards the level of academic success necessary to gain admission to elite law schools. I do not see how admissions officers will be able to detect the workings of class in individual cases.

Sander is concerned with grade inflation at elite undergraduate institutions as a factor favoring high-SES law school applicants. Grade inflation is a factor, but it is not entirely clear how much should be done about it. The equitable argument in favor of grade inflation at elite undergraduate institutions, after all, was that students should get a “boost” because of the (greater) academic excellence of the students against whom they are competing and the (more) advanced nature of the curriculum, when compared to lesser institutions of higher learning. There is certainly some merit to these arguments: one must be careful not to over-correct, lest students be deterred from attending schools that are more

31. Cf. Eric Grodsky & Catherine Riegle-Crumb, *Those Who Choose and Those Who Don't: Social Background and College Orientation*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 14 (2010) (drawing on PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans.) (1984)).

32. Grodsky & Riegle-Crumb, *supra* note 31, at 15 (arguing that there is a strong class component to educational habitus but also great individual variation within class).

competitive and more challenging.³³ The student with the “inflated” 3.8 GPA from Harvard would arguably have had a higher GPA at a less competitive school.

That being said, elite law schools are not without information to evaluate grade inflation. Admissions officers know the grading policies of feeder schools.³⁴ For less familiar undergraduate institutions, they can make use of the LSAC Report Form, which shows the mean GPA of other students from the same school who took the LSAT. Latin honors (if interpreted on the transcript) can serve as a rough estimate of class rank.

2. Limited Range of Feeder Schools

Sander is right that elite law schools draw from a narrow range of elite undergraduate institutions, and that the class diversity of these schools leaves much to be desired.³⁵ The problem is likely to get worse. To the extent that law schools relied in the past on the flagship institutions of the top state university systems to produce SES-diverse applicants, they will need to modify their strategy in the years to come. As Sander points out, tuition pressures on state flagships are pricing out low-SES students.³⁶ Competition from top-SES students is putting the pinch on the middling-SES group. State flagships are becoming more attractive to high-SES students, because private undergraduate tuition is also rising, and because families are economizing at the undergraduate level in order to save money to cover the costs of increasingly-necessary graduate and professional education.³⁷ The middling-SES student a top-five law school might have recruited from the University of Michigan ten

33. The deterrence problem is one of the critiques of plans like the Texas Ten Percent plan—it rewards students who are at the top of weaker schools, and punishes those who take on tougher curricula and competition at stronger schools but fall outside the top ten percent of the class.

34. Grade inflation at top feeder schools is hardly a secret. See, e.g., ESPENSHADE & RADFORD, *supra* note 28, at 260–61 n.54–55 (reporting that 65% of Princeton grads have B+ GPAs and above, and half of Harvard grads have GPAs in the A-minus/A range).

35. It is important to note that there are two components to this problem: the applicant pool and the admissions decision. On applicant pool issues at the undergraduate level, see Dawn Koffman & Marta Tienda, *Missing in Application: The Texas Top 10% Law and Campus Socioeconomic Diversity 23* (March 2008) (paper presented at the 2008 Meetings of the American Educational Research Association), available at <http://theop.princeton.edu/reports/wp/ApplicantSocialClass.pdf> (“[C]hanges in admission criteria designed to broaden college access for low-income students, such as eliminating the SAT filter or guaranteeing admission to top-performing students, will not alter the socioeconomic composition of college campuses *unless the applicant pool is changed*.”).

36. Cf. Koffman & Tienda, *supra* note 35, at 25 (showing sharp downward shift in students at top 50 state flagship campuses receiving Pell grants).

37. Recent studies suggest that it is middle-class students, not low-income students, who are most likely to choose state flagships over highly selective private universities. They are the ones most likely to be crowded out by higher-SES students seeking bargains they don’t need. See ESPENSHADE & RADFORD, *supra* note 28, at 296; cf. Koffman & Tienda, *supra* note 35, at 20–21 (noting that, post 10% plan, 22% of top-ten students apply to the University of Texas from poor high schools, versus 44% from high schools in the top-decile of wealth, and puzzling over why, “despite the admission guarantee in effect since 1998, the socioeconomic composition of the applicant pool to [the University of Texas’ two flagship campuses] has barely changed,” and why Rice University, a more expensive private school, gets a higher share of low-income applicants than do the public flagships).

years ago might be at Michigan State or Eastern Michigan University now. If those schools are smart and well-funded, they will have “Honors Programs” or other methods for giving their most talented students both the experience and the credential of a flagship-like experience. If they do not have such programs, it will be harder for their graduates to gain admission to elite law schools.

The downward-placement trajectory of talented lower-SES students has two unfortunate implications. Unfamiliarity is a two-way street. Elite law schools may not know what to make of a high GPA coming out of a lower-tier undergraduate institution from which they have not recruited in the past. Lower-tier institutions are far less likely to encourage their most talented students to apply to top-tier law schools. Both of these problems can be solved by outreach, and elite schools already engage in some outreach activities (like, for example, sending representatives to law school fairs hosted by regional associations of college pre-law advisors). Internet resources, like the LSAC’s own website, make a wide range of information available to students from outside the “feeder-school” range. Beyond these efforts, it seems unlikely that elite-school admissions offices would find more outreach to be cost-justified, given its likely returns.³⁸

As noted above, eliminating the LSAT (or radically deemphasizing it) would only worsen the feeder-school bias problem. Relatively high LSATs are the most reliable signal low-SES students from unknown feeder schools have to offer.

To deal with the problem of uncertainty in the evaluation of applicants from outside the elite school “feeder network,” one possible strategy is for elite law schools to use their transfer application process as a mediated alternative pipeline. Regional law schools with greater experience with local lower-tier undergraduate institutions in their geographical areas are in a better position to evaluate records from those schools. Performance at the top of the class at a regional law school would provide valuable additional information on the likelihood that a student from a non-feeder undergraduate institution will perform well at an elite school. Given the dominance of elite law schools in the production of law-teaching candidates, trusted feeder relationships might well develop between lower-tier law faculty and the admissions offices at the higher-tier schools they attended.³⁹ Elite schools could easily monitor their transfer students’ performance, and fine-tune their recruiting practices accordingly. As a matter of principle, an elite law school might well decide to

38. The LSAC does not have socioeconomic information on LSAT-takers, which means that schools have no way of using LSAC searches to identify promising lower-SES candidates.

39. Such ties might explain, for example, Supreme Court justices’ rare but important deviations from the monopoly of a handful of top feeder law schools in their hiring of law clerks. When a justice makes an unprecedented hire, “cherchez le (former) clerk” on the “new” school’s faculty.

use the transfer process for this kind of diversity—rather than choosing transfer candidates from the same feeder schools that shape their 1L classes.⁴⁰

3. Legacy Preferences

Access to legacy admissions is a resource parents wield in the battle against intergenerational regression to the mean. Elite law schools (including most public elite law schools) are dependent on donations from alumni, and there is no presumptive reason to expect that law schools will ignore legacy-admission pressures. Legacy preferences are problematic, but Sander is not arguing that they operate as significantly in elite law schools as they do in elite undergraduate institutions. I have no reason to question that conclusion. It seems, then, that ending legacy preferences will not make much of a difference to the pursuit of greater class equality in elite legal education.⁴¹

4. “Soft” Entrance Variables

I believe that Professor Sander is right that many of the “soft” considerations that play into admissions decisions weigh in favor of high-SES applicants. This is more of a problem for me than it is for Sander, because I think that the elite-school admissions process is less mechanical than Sander thinks it is. The less mechanical the process is, the more work (and the more damage) soft variables can do. The problem, from a reform standpoint, is that the “soft” variables that favor high-SES students are legitimate.

Elite schools have good reason, in my view, to prefer students who have some coherent idea of why they are going to law school, and who have either prior high-level (meaning non-clerical) job experience in the white-collar world or prior experience in graduate school. Often the two—a sense of direction and some (at least potentially) relevant past experience—are related. Taken together, these factors make for students who are more self-sufficient, better positioned to maintain their morale through the often morale-numbing first year of law school, more interesting in the classroom, and better able to navigate both the advanced curriculum (which is massive in many elite schools) and the job-hunting process.

40. Elite schools would also need to make sure that transfer students have the opportunity to join prestigious journals, and their placement offices would need to advocate for their transfer students in the all-important 2L summer-hiring and judicial-clerkship markets. Otherwise, the greater opportunities that come from elite-school attendance would be illusory for transfer students. And, of course, law schools using a transfer strategy would need to make their full array of financial-aid options available to transfer students. I expect that most elite schools would need to change their policies to achieve these goals.

41. If one cares about comparisons of *relative* privilege within Sander's broad SES criteria, legacy preferences are more problematic in elite law schools with steady (or declining) prestige rankings than in those whose rankings have markedly risen in the years between the parent's graduation and the child's application.

As Sander correctly notes, access to “interesting” jobs is not uniformly distributed across the class spectrum. College students who need to make money cannot afford to take the unpaid term-time and summer internships that are increasingly the required step-ladders to good post-college jobs. Schools with fewer resources might lack the staff to help place students in internships, and lower-SES students are less likely to have family contacts who can fill the gap with “interesting” job leads. (Large post-graduate internship programs like Teach for America help to fill this gap; it would be helpful to know the role that class and race play in the selection process for such programs.)

This does not mean that only high-SES candidates are served by having “soft” admission criteria that are given significant weight in the admissions process. Admissions officers at elite schools are, I suspect, very open to the “up from adversity” stories their application essays solicit (at least when they come from candidates whose “numbers” are in the ballpark of good-enough). The lowest-SES cohort would be very poorly served by a reform in the admissions process that moved away from the consideration of “soft” factors.

What this means, I believe, is that soft variables advantage the extremes (low- and high-SES) and disadvantage the middle (middling-SES). Middling-SES students are at risk if they (a) apply to law school straight out of college for lack of a great job opportunity, or (b) take post-college jobs that decrease, rather than enhance, the cache of their undergraduate records. For applicants in this situation, the only distinguishing feature in their applications may turn out to be letters of recommendation from professors. But good letters of recommendation are hard to come by at schools with unfavorable student-faculty ratios. Taking the large lecture classes that predominate in the large, popular majors at large state universities is not helpful. In that setting, especially, getting strong recommendation letters requires the ambition to work closely with faculty, which in turn requires a level of self-confidence in asserting oneself outside of the classroom that is itself, arguably, a class-linked characteristic.

The question, though, is what elite law schools can be expected to do in the face of this situation. They could, I suppose, apportion a little more of the class to those students who fit the “middling” portfolio of “soft” factors as a form of class-based preference. But the kind of “individualized consideration” that the Supreme Court applauded in *Grutter*⁴²—and that elite schools actually practice—sits ill at ease with preferences for students whose sole distinction is not yet having distinguished themselves. Perhaps the best one can do is to urge elite-school admissions officers to educate themselves on how much easier it is for

42. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

the children of the super-privileged than it is for the children of middling-SES families to “score” the self-actualizing experiences and strong letters of recommendation that produce winning applications. But increased sensitivity is not likely to make much of a difference in the numbers, absent some alternative way of choosing among the vast numbers of candidates with good-enough numbers but not much else to show for themselves.⁴³

III. FINANCIAL AID POLICIES

For purposes of this Response, I will assume that elite law schools (public and private) are not going to cut back on the rising faculty salaries, ambitious programming (e.g., clinical programs), and rising student and other administrative services that have contributed to their steeply rising tuition costs. Rising costs surely help to explain why the increased availability of student loans has not markedly changed the class composition of elite school enrollments.⁴⁴ In the face of those costs, financial aid programs have become increasingly important.

Sander acknowledges that his data do not permit us to know the relative contribution of the admissions and financial aid processes to the class-skewed enrollments of elite law schools. What is clear, however, is that Sander’s rhetorical argument—the opportunity-cost tradeoffs between race-based affirmative action and class diversity—is predicated almost entirely on the admissions side of the divide. To the extent financial aid policy is to blame for the class pattern in elite law school enrollments, there is even less reason for Sander to pair advocacy for class-based reform on his critique of race-based affirmative action.

A. *The Law School Financial Aid Model*

Law schools operate on a financial aid model in which “the gold standard” is full-tuition remission—not “tuition plus stipend.” What this means is that even “fully funded” law students—whether they are fully-funded under a needs-based or a merit determination—borrow large amounts of money to cover three years worth of living expenses, books, and the expenses associated with job search (not always reimbursed). Thus, even an increase in need-based tuition assistance will not change the fact that lower-SES students must be willing to take on substantial indebtedness in order to attend law school.

43. This sounds harsh, but I come from a middling-SES background myself and know first hand how strong the leveling tendencies within it can be.

44. Sander, *supra* note 4, at 643 (discussion of Warkov’s data). Rising tuition costs is an obvious “other development” that has tended to neutralize the class-diversifying effects of student loan availability and affirmative-action admissions policies.

B. Determining "Need"

How closely does what the law schools deem to be "official need" track what we might call "actual need"? Years of conversations with students who have shared their concerns suggest two different family-related scenarios that cause a gap between "actual" and "official" need. The first (and most common) is the gap between "official" and "actual" levels of parental contributions to their children's legal education. For students whose parents have some resources, there is wide (and at least in part class-based) variability in the willingness of parents to contribute—at all, or to the extent expected by the school's aid formula. Middling-SES students may well find that their parents are unwilling to contribute to their legal education. Under current federal law, all law students are considered independent of their parents for purposes of federal loan programs, but law schools are free to consider parental income and assets in allocating need-based grants.⁴⁵ Middling-SES parents who contributed to their child's undergraduate education may reasonably feel "tapped out" by the time law school comes along. Their contributions are less likely than those of higher-SES parents to have come solely at the cost of deferred discretionary spending. Instead, middling-SES parents might well have curtailed retirement savings, increased borrowing against home equity, or deferred spending on health or home maintenance in order to help pay their child's undergraduate tuition.

Middling-SES parents may also be unsympathetic, as a matter of principle, to requests that they contribute to their child's legal education. Parental tolerance for long post-adolescent periods of economic dependency may itself vary with class. Middling-SES parents may be particularly likely to reject requests for help from children who have worked full-time before going to law school—a practice that is encouraged by elite law schools' preferences for students with interesting job experience. Parents who understand the importance of graduate-level education might not believe that it is important for their child to go to law school (as opposed to lower-cost options) or to go to the "best law school" that admits her. They may not have the sophistication to recognize the risks inherent in accepting merit-based grants from lower-tier law schools.⁴⁶ Even parents who are enthusiastic about law school (or elite law school) for their children may take the view that legal salaries are high enough to justify any amount of student borrowing.

45. The Free Application for Federal Financial Aid includes website's Q and A on financial independence states that law school applicants are deemed financially independent for purposes of federal loans. The FAFSA form questions on parental income and assets, and law schools require financial aid applicants to fill out the form. For purposes of school-provided grant-based aid, schools are free to make their own determinations of whether applicants are financially independent of their parents.

46. See David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, April 30, 2011 (discussing renewability criteria for merit-based aid); Mark Hansen, *Boxer Presses ABA on Law School Data Reporting*, ABA JOURNAL, March 23, 2011.

For students in the lower reaches of the SES range, who either do not have parents or whose parents have too few resources to be expected to contribute, “official” need and “actual” need may fall out of alignment for a different family-related reason. For these students, the problem is not that their parents are not supporting them; it is that they are supporting their parents—or their siblings, or other relatives. “Official” financial aid formulas do not consider “non-legal” dependents (and federal financial-aid funds cannot legally be used to support non-legal dependents). But for the lowest-SES superstars likely to be admitted to an elite law school, the opportunity costs of attending law school include foregoing wages they would otherwise be using to feed and house their families and to help their siblings avoid the worst privations of poverty.

C. *Is Debt Too High a Portion of Elite School Financial Aid Packages?*

I am assuming here that elite law school financial aid packages meet the full level of “official” need, with some combination of tuition-remission and loans.⁴⁷ Many applicants find the loan portion of their financial aid package too high. As a philosophical matter, elite law schools seem to be committed to the view that it is appropriate to incur significant indebtedness for legal education, because the cost is more than offset by improved lifetime earnings (or other lifelong improvements in non-monetary “utility”). The elite law schools’ approach to financial aid works only for those students who are willing to borrow. Should they be?

1. The Relevance of Undergraduate Indebtedness

In calculating “official” need, the financial-aid calculator used by FAFSA does not take the candidate’s undergraduate indebtedness into account. This is understandable from the standpoint of a view of need based on annual budgets, in which only debt repayment obligations that require payouts during law school count as expenses. But undergraduate indebtedness is highly relevant to the question of how much debt a student should be expected to take on during law school. Indeed, there is strong evidence that undergraduate debt is a major deterrent to graduate and professional school enrollment.⁴⁸ Potential students are voting with their feet, and elite schools are not paying attention.

Schools could, of course, elicit information on undergraduate indebtedness outside the FAFSA process, but I have no evidence that they do so. I can see no justification for this stance. In deciding that a certain

47. Cf. Carnevale & Rose, *supra* note 4, at 120 (showing increase in the percentage of undergraduate students at all four-year colleges whose “need” was not met).

48. ESPENSHADE & RADFORD, *supra* note 28, at 267 (citing evidence that “42 percent of college graduates who do not pursue graduate school blame student loan debt”). The question of whether students who blame debt for their decisions are, in fact, actually motivated by debt, is a tricky one. Cf. David L. Chambers, *The Burdens of Educational Loans: The Impacts of Debt on Job Choice and Standards of Living for Students at Nine American Law Schools*, 42 J. LEGAL EDUC. 187, 227 (1992).

level of debt is appropriate for law school, given anticipated post-graduation salaries, one would think that the student's *total* level of indebtedness would be the relevant figure, not merely the portion of the debt that is attributable to law school attendance.⁴⁹

2. The Relevance of Post-Law-School Debt Forgiveness

Elite schools are increasingly realistic about the fact that non-monetary utility doesn't pay the rent, and have moved to self-funded debt forgiveness programs targeting students doing public-interest or public-sector work. They prefer ex-post debt forgiveness to an ex-ante shift to tuition-remission grants because, as expensive as debt forgiveness is, it is cheaper than providing grants to those students who will earn the "big law" salaries that enable many of their graduates to significantly pay down their debt in their early years of law practice. Funds allocated to debt forgiveness programs are not likely counted in official financial aid data, but certainly these programs must "count" for something.

Anecdotal evidence—the student demand for debt forgiveness programs—certainly suggests that these programs do indeed matter. Do applicants count the prospect of an ex-post debt-forgiveness dollar as heavily as they count each extra dollar borrowed ex ante? Would a rational applicant do so? Debt-forgiveness programs are not designed as income-shortfall insurance. The programs have restrictions. They do not cover periods of unemployment (or part-time employment), and they may be tied to distinct types of employment (e.g., public interest or public service) rather than to salary levels.⁵⁰ Banks and other lenders are likely to consider the full dollar value of student loans, without promise of debt-forgiveness, in determining eligibility for home loans. For these reasons, it is reasonable for students to prefer to avoid debt—just as it is reasonable for schools to prefer the lower (future) cost of debt-forgiveness to the higher (present) cost of tuition-remission grants.

C. *Eliteness Tradeoffs and Risk Aversion*

Especially when combined with high levels of undergraduate debt, I suspect that risk aversion is the major factor contributing to the enrollment decisions of students from the middling-SES range. Picture an applicant who has received a needs-based financial aid offer from an elite school which includes a substantial loan component, and has also re-

49. Here the data are staggering. Espenshade & Radford report that 23% of graduates of four-year *public* colleges graduate with too much debt to repay their loans by working as teachers, and 37% borrow too much to work as social workers. ESPENSHADE & RADFORD, *supra* note 28, at 266–67 (The figures for four-year private colleges are 38% and 55% respectively).

50. Catherine Rampell, *At Well-Paying Law Firms, A Low-Paid Corner*, N.Y. Times, May 23, 2011 (noting that some elite law firms are hiring "career associates" at markedly lower salaries (e.g., \$50,000–\$60,000, versus \$160,000), which "make it even more difficult for newly minted lawyers to pay off their law school debt").

ceived an all-grant merit-based financial aid offer from a non-elite school. Do we know what the “rational” applicant should do?

The applicant faced with that choice needs to measure her own risk aversion. Will she graduate at the top of the class of the non-elite school, so that excellent jobs (at least at the local or regional level) will await her? If she goes to the elite school, will her interests (and her academic performance) land her a “big law” job that will generate the excess income to pay off the loans?⁵¹ If she gets a “big law” job, will she be able to tolerate its intensity for long enough to pay off her loans? What will be the costs of debt repayment in deferred consumption—for example, the costs of deferring home ownership and retirement savings, or the costs (especially for women) of deferring child-bearing?⁵² It is not clear in these situations that the “right answer” is to go to the “best” school you are admitted to—especially if you know that your parents will not be able to help you with a home down-payment or with child-care costs later down the line.⁵³

There is also the question of how students from middling-SES families view the potential benefits of elite-law-school attendance. Such students may have gone to school in-state, and may not have developed a desire to work in national markets. Their families might well prefer to have them stay closer to home. Their parents may have held on to middle class status by avoiding excess debt, and may have taught their children to be risk-averse where debt is concerned. (Or their parents may have just slipped out of the middle class because of debt, in which case their fear of borrowing would be all the greater.) Middling-SES candidates may well come from households in which home and family (that is, owning a home and being married with children relatively early in life) are an important part of the meaning of success. In such families, a lifestyle in which “settling down” is deferred until one’s mid-thirties because of educational debt might feel like downward mobility. Perhaps an admissions counselor at an elite school would advise such a student that she cannot measure the value of elite education based on preferences developed in non-elite settings: “your aspirations will grow with your opportunities” would be the standard advice.⁵⁴ But that answer is speculative.

51. The same calculations would be made by a “rational” applicant faced with the differential loan burdens of schools with different costs.

52. On the latter score, if female students are prescient in their decisionmaking, they may be aware that the high-income pot at the end of the elite-school rainbow—the “big law” job—requires much the same set of tradeoffs, for reasons of lack of time rather than lack of resources.

53. There is an extensive economics literature on the return to elite higher education. For a subtle attempt to pin down effects at the undergraduate level (albeit one based on 1970s data), see Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables* 29–31 (Nat’l Bureau of Econ. Research, Working Paper No. 7322, 1999), available at <http://www.nber.org/papers/7322>.

54. Cf. Grodsky & Riegle-Crumb, *supra* note 31, at 15 (arguing that habitus changes as people encounter fields inconsistent with their worldviews).

Massive debt-loads are real. Who is to say whether the candidates who are not persuaded by it are making the wrong decision?

D. Merit-Based Versus Need-Based Financial Aid

Elite law schools could significantly increase the tuition-remission component of their need-based financial aid packages by raising more money for needs-based financial aid or by allocating more funds to need-based aid. Instead, at least in schools that are struggling to compete for the very top candidates in the market, Sander may be right that the trend is in the opposite direction.

The question is a bit more complex than it seems. First, the line between need- and merit-based aid is a difficult one to draw, in that schools likely consider “merit” in deciding how much of the candidate’s “official” need will be met by tuition remittance and how much by loan. Second, class-based financial aid awards would show up on the “merit” rather than on the “need” side of the line if they are based on low-SES background rather than on current “need” as reported on FAFSA forms.⁵⁵

That being said, much merit-based aid goes to students with little or no financial need. Sander is absolutely right that the “merit” criteria for merit-based financial aid are skewed in favor of higher-SES candidates.⁵⁶ “Merit,” most generically, can mean very high LSATs and GPAs. In the competition for programmatic merit funding (e.g., scholarships for students interested in particular legal fields), “merit” can mean high-level prior internship or post-college job experiences that are disproportionately available to higher-SES candidates.⁵⁷

Here, I think there is only one answer. Schools that want to offer “merit”-based tuition remission to attract the strongest possible candidates should be free to do so, but not by shifting funds (or fund-raising opportunities) from their need-based financial aid programs.

In sum, it seems quite likely that many candidates who are admitted to elite law schools choose not to attend because they are deterred by the amounts of debt they are expected to incur. I do not know how often admitted low- and middling-SES students make that trade-off; if the pattern follows that documented at the undergraduate level, it is middling-

55. This is the case with NYU’s AnBryce Program. As a matter of classification, the NYU Law School’s AnBryce Program would likely be defined as merit-based rather than need-based. Eligibility is not based on “need” in the financial-aid-formula sense, but on personal and family socioeconomic considerations more broadly defined.

56. Schools could, of course, offer merit-based financial aid that finds “merit” in students from more modest SES backgrounds.

57. At least from my exposure to faculty hiring and programmatic innovation in elite law schools, middling-SES students are likely hurt by the fact that the kinds of legal issues middle class families face—labor/employment law, family law, consumer bankruptcy, ordinary torts, domestic real estate issues—are not the kinds of “sexy” issues that elite schools call attention to in their programming and faculty hiring.

SES students who are most likely to economize in this fashion.⁵⁸ This is an area in which elite schools should engage in self-study. Students with attractive financial aid offers from lower-tier schools routinely try to negotiate similar aid packages from their “top choice” schools. When the result is unsatisfactory and the candidate turns the elite school down, it should come as no surprise.

Perhaps the elite schools could do a better job of persuading these candidates that the costs (and risks) are worth the benefit. Then again, it is by no means clear that the scholarship presently exists to support the claim. Perhaps one of Sander’s major contributions will be stimulating the scholarly community to generate the kinds of studies that have recently been published on elite undergraduate education. Until then, I believe that Sander has made the case that elite law school financial aid policies will need to change if elite schools are to enroll classes as socio-economically diverse as the classes they admit.

CONCLUSION

While Professor Sander has performed a valuable service by calling attention to the issue of class privilege in elite legal education, his decision to link his advocacy for class diversity to his critique of race-based affirmative action is problematic. Measures to increase class diversity ought not come at the expense of (or even as a “partial substitution” for) existing commitments to racial diversity.

On the issue of class, much of the rhetorical force of Sander’s argument is in its call for redistributing opportunity from the top-decile to the bottom-quartile of the SES range. I agree that the moral case for reaching out to the low-SES candidates is very strong, and elite law schools that provide funding and appropriate programmatic support for these candidates are to be commended. But elite law schools seeking to reach a broader socioeconomic student population will need to recognize that, as a practical matter, the inclusion of students from the bottom of the SES range is likely to remain a small-numbers phenomenon. To achieve a major downward shift in the class privilege of their top-decile-heavy student bodies of the sort Sander advocates, these schools will need to cultivate their appreciation for (and increase their monetary grants to) the middling-SES candidate. I doubt they will be willing to do so.

58. See *supra* note 37.