

## FOREWORD: SOCIAL CLASS, RACE AND LEGAL EDUCATION

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In *Class in American Legal Education*, Professor Sander offers here an impassioned argument for class-based preferences for admission into the legal academy. As we understand his arguments, class-based preferences would be rooted in “individual circumstances, not group membership” and thus would offer more “fairness” than similar race-based programs.<sup>3</sup> Further, class-based preferences would create much-needed socioeconomic diversity, which race-based programs have failed to create, and also would alleviate the threat of “mismatch.” Based on his previous highly controversial work, Sanders argues that race-based admissions policies at elite law schools place students of color into academic environments for which they are not adequately prepared and to which they are fundamentally “mismatched.”<sup>4</sup> Sander’s assertions are based not just on his own theoretical framework, but also are informed by a number of data sets, which he has coded and analyzed.

In this special symposium of the *Denver Law Review*, ten distinguished scholars respond to Professor Sander’s fundamental argument that class preferences should be substituted for racial preferences in ad-

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3. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 664 (2011).

4. *Id.* at 666 (“[A]ny schools giving more emphasis to SES preferences, and less emphasis to racial preferences, would likely reduce mismatch effects to the extent they exist.”). For extensive critiques and commentary regarding Sander’s mismatch argument see Ian Ayers & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2004); Cheryl Harris & William Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander’s Affirmative Action Study*, 46 J. BLACKS HIGH. EDUC. 102 (2004); Beverly Moran, *The Case for Black Inferiority? What Must Be True If Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005); David L. Chambers, et al, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); David Wilkins, *A Systemic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005); andre douglas ponds cummings, “Open Water”: *Affirmative Action, Mismatch Theory and Swarming Predators—A Response to Richard Sander*, 44 BRANDEIS L.J. 795 (2006); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 (2008); Anthony Baker, *After the Gold Rush*, 36 J.C. & U.C. 249 (2009).

missions to law schools.<sup>5</sup> The central notion that socioeconomic status is an important consideration among many for law school admissions received support from every author in the symposium.<sup>6</sup> It was, however, the only point in *Class in American Legal Education* that generated such consensus. Indeed, just one contributor—Richard D. Kahlenberg—was fully aligned with Sander’s complete set of arguments. Even if it stands alone, Kahlenberg’s strong endorsement should not be overlooked. “Low-income students of all races have been the invisible men and women of American legal education,” he writes. “But in the nonfiction realm, Richard Sander may be their Ralph Ellison.”<sup>7</sup>

Still, given the current legal, social and political landscapes, Professor Sander’s arguments demand intense scrutiny. Already, the Supreme Court has dealt a heavy blow to school-integration initiatives in the K–12 context,<sup>8</sup> despite the fact that public schools are more racially segregated now than they were in 1970.<sup>9</sup> As this issue of the *Denver Law Review* heads to press, threats to traditional race-based affirmative action in higher education persist.

Many cautiously watch *Fisher v. University of Texas*. The plaintiff, Ms. Fisher, fell below the top 10% of in-state high-school students who automatically gain admission and therefore was part of the aspiring students considered for the remaining 12% of the open slots.<sup>10</sup> Within those remaining 12% of seats, the University of Texas began to again consider race in its admissions decisions in 2004 following the Court’s opinion in *Grutter*.<sup>11</sup> This change was implemented after empirical research demonstrated that the Top Ten Percent Law had not created “sufficient minority representation” in classes.<sup>12</sup> The University prevailed in the Fifth Circuit

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5. See *id.* (suggesting that class-based affirmative action serve as a “partial substitute for current racial preferences”).

6. See, e.g., Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U. L. REV. 683, 705 (2011); Richard D. Kahlenberg, *Reflections on Richard Sander’s Class in American Legal Education* 719, 719 (2011).

7. Kahlenberg, *supra* note 6, at 719; see also Richard D. Kahlenberg, *The Broad Significance of Fisher v. Texas*, CHRON. HIGHER ED. (Jan. 8, 2012), available at [http://chronicle.com/blogs/innovations/the-broad-significance-of-fisher-v-texas/31270?sid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/blogs/innovations/the-broad-significance-of-fisher-v-texas/31270?sid=at&utm_source=at&utm_medium=en).

8. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

9. See generally ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, *THE CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* (2003), available at <http://pages.pomona.edu/~vis04747/h21/readings/AreWeLosingtheDream.pdf>.

10. This rule was adopted in 1997 by the Texas Legislature. See TEX. EDUC. CODE § 51.803 (West 2006). The Law provides for automatic admission to the top 10% of each high school in Texas. These students receive automatic admission to University of Texas, Austin. According to the Fifth Circuit in the *Fisher* case, in 2008, 81% of the entering class was admitted under the Top Ten Percent Law, filling 88% of the seats allotted to Texas residents. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 227 (5th Cir. 2011).

11. *Id.* at 226.

12. *Id.* at 225 (citing a University of Texas proposal to consider race and ethnicity in admissions).

Court of Appeals, but the case is now pending certiorari review before the U.S. Supreme Court.<sup>13</sup>

In a recent *Washington Post* article, well-known conservative columnist, George Will, recommended that the Court grant certiorari in *Fisher* in reliance on an *amicus* brief submitted by none other than Richard Sander and brief co-author Stuart Taylor.<sup>14</sup> The Sander-Taylor brief relies in large part on his arguments (and the critiques) in this Symposium Issue of the *Denver Law Review* on Social Class and Legal Education.

Whether it is *Fisher* or some other case in the near future, the Supreme Court will revisit the diversity rationale and affirmative action; indeed, the majority opinion in *Grutter* talked of an eventual end-point for race-based programs, albeit 25 years down the road.<sup>15</sup> This special Symposium provides a critical opportunity for readers to consider not only Richard Sander's position in this debate, but also the responses of well-known legal scholars to his assertions about "class" (and race) and what factors should and should not inform law-school admissions policies.

In Part I of this Introduction, we provide a condensed summary of Sander's arguments. In Part II, we examine and expand on three of the major lines of critique of Sander's article offered by the contributors: (A) positioning race vs. class; (B) asserting that class preferences would allow beneficiaries to be "invisible" and that such invisibility is desirable; and (C) relying on data with significant limitations as to the many assertions Sander makes. In Part III, we offer some concluding thoughts. Although our job here is to position and summarize key points of the Symposium, we strongly discourage readers from treating our Introduction as an abridged version. The arguments set forth by each and every author here deserve full attention and consideration.

#### PART I: CLASS IN AMERICAN LEGAL EDUCATION

*Class in American Legal Education* is consistent with Sander's prior scholarship advocating for the elimination of what he views as admissions preferences for students of color.<sup>16</sup> Sander clearly positions *Class in American Legal Education* as the next installment in dismantling race-based considerations in law school and replacing them with social class preferences. His arguments revolve around his own analysis of a number of data sets that he has coded in a manner consistent with his theoretical

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13. *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *petition for cert. filed*, (U.S. Sept. 15, 2011) (No. 11-345).

14. George F. Will, *The Unintended Consequences of Racial Preferences*, WASH. POST, Nov. 30, 2011.

15. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

16. See generally Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

framework. This Symposium provides an opportunity for legal academics and others to examine Sander's claims carefully.

Sander begins his discussion of diversity in legal education by pointing out that academic discussions on this topic always focus on racial diversity and almost never discuss "class diversity." He asserts that most law students in American law schools are from relatively elite backgrounds. Contrasting his perspective with what he defines as the pervasive viewpoint among legal academics, Sander argues that both black and Hispanic students are represented in law schools in relation to their representation in the larger population, but that the same is not true for students from low and moderate social class backgrounds. Using a number of datasets, including "After the JD" (AJD), Sander claims that almost half of the students in law school come from the top tenth of the social class distribution. Simultaneously, he claims that lower social class students make up only about one-tenth of the students in law schools.<sup>17</sup> After arguing that there is underrepresentation of lower social class students in American legal education, Sander compares the AJD dataset to an historical dataset of information about undergraduate students collected by Warkov et.al.<sup>18</sup>, and suggests that there has been no improvement in the representation of lower SES students in the last 40 years.<sup>19</sup>

After exploring his assumptions about class and race, Sander proposes that law schools would be better off to use social class for preferences to expand diversity in legal education. His argument seems to revolve around the notion that class preferences could be much smaller than racial preferences and that there is sufficient overlap of class and race that would increase racial diversity as a by-product of increasing social class diversity.<sup>20</sup> Sander suggests four advantages of adopting SES preferences:

1. SES preferences are based on individual circumstances rather than group membership.
2. SES preferences target those with actual needs.
3. SES preferences are invisible. Lower SES students can not be easily identified among their peers.

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17. Sander, *supra* note 3, at 637.

18. See Lempert, *supra* note 6, at 702 n.58 (noting that he based his analysis on the data that forms the basis of Warkov's book).

19. Sander, *supra* note 3, at 644.

20. The majority of his arguments revolve around an experiment tried by UCLA after Proposition 209 forbid the use of racial preferences in California. See Sander, *supra* note 3, at 660.

4. Consistent with his previous work, Sander suggests that SES preferences would eliminate the harms associated with “mismatch.”<sup>21</sup>

## PART II: THREE TRENDS WITHIN THE CRITIQUES

The arguments made for and against Sander’s proposals fill many pages within this Symposium. In this section, we focus on three trends of critique that emerge across many of the articles presented here.

### A. *Positing Race versus Class*

For many contributors, the notion that law schools should or must choose between class- and race-based preferences in their admission programs undermines the credibility of Sander’s overall arguments.<sup>22</sup> As Arin Reeves asserts:

The narrative model of pitting SES against race . . . is so irrelevant, that one can question the logic of introducing race into a theory that neither requires it nor requests it to withstand scrutiny. In other words, if one were to take all references to race out of Sander’s narrative—the theory that law schools need to explicitly focus on SES in order to open ‘doors of opportunity,’ improve ‘mobility in American society’ . . . [it should] stand on its own merit. . . . Increasing SES-based diversity in law schools is not dependent on unraveling race-based diversity.<sup>23</sup>

Indeed, the persistence of an either/or approach to class- and race-based preferences in Sander’s arguments leads Danielle Holley-Walker to conclude, “If the replacement of race-based affirmative action is the true goal of the promotion of SES diversity, then its merits should be considered on that basis.”<sup>24</sup> And, on that basis, several contributors dedicate attention to reaffirming the ongoing need for race-based affirmative action on numerous fronts, including the benefits of racial and ethnic diversity in the educational environment as identified in *Grutter*, continued racial disparities, the dangers of colorblind rationales, and, more

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21. Sander, *supra* note 3, at 666 n.4; Sander, *supra* note 17, at 375 n.18.

22. Arin N. Reeves, *Race as a Red Herring? The Logical Irrelevance of the Race vs. Class Debate*, 88 DENV. U. L. REV. 835 (2011); Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861 (2011); Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729 (2011); Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751 (2011); Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s in a Definition?*, 88 DENV. U. L. REV. 807, 808–09 (2011); Danielle Holley-Walker, *Race and Socioeconomic Diversity in American Legal Education: A Response to Richard Sander*, 88 DENV. U. L. REV. 845 (2011).

23. *Id.* at 837.

24. Holley-Walker, *supra* note 22, at 846.

specifically, the detrimental effects of “race neutral” admissions policies on applicants of color.<sup>25</sup>

At the same time, Sander asserts that class-based preference programs should produce at least some racial diversity among their beneficiaries.<sup>26</sup> L. Darnell Weeden concurs with this view: “A race-neutral SES admissions policy is a necessary and proper tool to effectively generate graduating classes at elite law schools that reflect the interesting intermix of SES and racial diversity in American society.”<sup>27</sup> Other commentators, however, were much more skeptical. Deborah C. Malamud, for example, explained that race-based affirmative action seeks to create a “critical mass” on our campuses:

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 numbers 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.<sup>28</sup>

To many of the authors, it seems unlikely that race-neutral socioeconomic entry policies, standing alone, would open pathways for enough students of color to achieve or maintain the “critical-mass” goal at elite schools, or in many others.<sup>29</sup>

Finally, throughout the Symposium articles, there is much discourse both about the intersection of race and class in U.S. society and the dangers of conflating those issues.<sup>30</sup> Race is not a substitute for class, and class is not a substitute for race, yet they are intricately intertwined in the American experience. In our view, however, more focus likely is needed on the socioeconomically elite white students and disproportionately white “legacy admits” who still fill a disproportionate number of seats in our nation’s law schools. As Deirdre Bowen points out:

96% of living alumni at Ivy League schools are white. That being the case, it is rational to expect that their beneficiaries will be mostly white as well. These legacy students have a huge advantage in the application process. For example, at Harvard, non-legacies have a 15% chance of admission while nearly 40% of legacy applicants are

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25. Reeves, *supra* note 22, at 839–42; Onwuachi-Willig & Fricke, *supra* note 22, at 828–32; Bowen, *supra* note 22, at 760–65.

26. Sander, *supra* note 3, at 664 (“While racial affirmative action has not proven to be an effective way of achieving SES diversity, class-based affirmative action is often quite effective in achieving racial diversity.”).

27. L. Darnell Weeden, *Commentary on Professor Richard Sander’s Class in American Legal Education*, 88 DENV. U. L. REV 851, 853 (2011).

28. Malamud, *supra* note 22, at 734.

29. See *supra* note 22.

30. See *id.*

admitted. The rate of admission for legacy students is greater than that of all students of color, whether admitted to Harvard under an affirmative action program or not. Yet, legacy admits possess lower credentials than other applicants. Furthermore, a recent study shows that affirmative action students and athletic program students outperform legacy admits.<sup>31</sup>

Indeed, in asking law schools to pick class over race, Sander sends the message that it is acceptable to displace “elite” students of color, yet the idea of subjecting white elites to similar displacement, in order to create more room for SES admissions, is so taboo as to be unmentionable. Sander’s obsessive focus on race-based admissions practices is particularly questionable considering the disparate beneficial impact white elites receive from legacy admissions policies, as Bowen so deftly explores.<sup>32</sup>

Instead of positing race versus class, many authors argue that class-based preferences in law school admissions decisions should be done in addition to, not instead of, race-based preferences.

### *B. Asserting Invisibility*

Within Sander’s framework, a key advantage of SES preferences is that the students who would benefit from them would be largely invisible. This invisibility is beneficial on two fronts: (1) because students would not know the role their SES status played in their admissions, their positive self-esteem would remain intact, and (2) because their peers could not look at them and tell whether they had received an SES preference, they would not be subjected to stereotyping and bias by peers. The same cannot be said for students of color admitted under race-based policies, Sander argues.<sup>33</sup>

Commentators dissect these assertions on three primary fronts. First, there is some question whether such invisibility is desirable, especially under the diversity rationale set forth in *Grutter*. Richard Lempert, for example, argues that affirmative action plans are designed to serve three fundamental purposes (advancing equity, enriching educational environments, and benefiting society) and asserts that SES admits advance only the first of these three goals.<sup>34</sup> Eli Wald adds richness to this argument, pointing out that diversity of viewpoints (i.e. enrichment of educational environments) is a key goal of affirmative action policies;

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31. Bowen, *supra* note 22, at 774–75. For arguments in favor of retaining legacy preferences see Richard D. Kahlenberg, *10 Myths About Legacy Preferences in College Admissions*, CHRON. HIGHER ED. (Sept. 22, 2010), available at <http://chronicle.com/article/10-Myths-About-Legacy/124561/>.

32. Bowen, *supra* note 22, at 774–75.

33. Sander, *supra* note 3, at 665–66.

34. Lempert, *supra* note 6, at 706–07.

invisibility, by its very nature, works directly to undermine this.<sup>35</sup> Malamud, meanwhile, offers a slightly different, but related, track of criticism: intrinsic to Sander's arguments of class invisibility, "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."<sup>36</sup> To this argument, we would add that true class proportionality would be difficult to attain, without greatly expanding the number of seats available, or setting aside a portion of seats much larger than those held by students currently admitted with the benefit of race-conscious admissions plans—the only seats Sander targets within his discourse.

Second, and on the flip side, some assert that low SES students are not nearly as invisible as Sander's portrays them to be. Although several commentators raise questions along these lines, Wald's analysis is perhaps the most thorough, challenging both Sander and Lempert on their assertions that low SES students are invisible. Drawing on Yoshino's covering theory, he argues that, while some low SES students may be able to "pass" as affluent, it would be difficult. Contrary to Sander's assertion, Wald builds a compelling case about the difficulty of hiding one's socioeconomic status and dissects the significance of social and cultural capital to which low SES students often lack access.<sup>37</sup> He uses Jewish male law students as an example of this dynamic: "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."<sup>38</sup> In addition, Wald argues that low SES preferences will still increase the "costs of affirmative action" that Sander seeks to avoid, because low SES students are likely to share many of the problems, including performance issues, Sander criticizes among black students.<sup>39</sup>

Related, the last track of critique comes from commentators who argue that Sander's expectation of invisibility serves to cloak the very real needs lower SES students are likely to possess *because* they are members of lower or "middling" socioeconomic groups. Several commentators zero in on the pipeline issue among SES students.<sup>40</sup> Children

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35. Wald, *supra* note 22, at 878.

36. Malamud, *supra* note 22, at 735.

37. Wald, *supra* note 22, at 863 ("Importantly, socioeconomic status, the possession of social and cultural capital and lack thereof is highly visible, and students of lower socioeconomic status are unlikely to be able to pass for affluent students or cover their status effectively even if they tried.")

38. *Id.* at 871.

39. *Id.* at 875.

40. See Holley-Walker, *supra* note 22; Lempert, *supra* note 6, at 698–99.

who grow up in poverty do not have equitable access to quality K–12 schools—the very kinds of schools that serve to support admission to and boost student performance in undergraduate and graduate institutions. As Holley-Walker points out, “the failure of the American public school system to adequately educate poor children . . . [leads] to an insufficient pool of poor students who are eligible for admission to law school.”<sup>41</sup> Indeed, Daniel Keil argues here that the entire affirmative action debate is missing an important element—a focus on the prevention of the kinds of disparities that later create barriers at the admissions stage.<sup>42</sup> He urges law schools to “signal their commitment to prevention by engaging directly with minority and low SES students facing disparities. This could include anything from adopting a school and committing resources to directly aid students to organizing and supporting individual students, faculty, and staff involved in direct mentoring or tutoring.”<sup>43</sup>

Encouragingly, law schools, including the University of Denver Sturm College of Law, are increasingly turning their attention to such matters and building pipeline partnerships that advance educational opportunities and advancement at the high school level, among students of color *and* those who are low-income or have experienced poverty.<sup>44</sup> In addition to these pipeline realities, several contributors note that SES students are, by their very class status, more likely than their affluent peers to require significant financial aid.<sup>45</sup> As Malamud concludes, “To achieve a major 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 the monetary grants to) middle-SES candidates. I doubt they will be willing to do so.”<sup>46</sup>

### C. Relying on Data with Significant Limitations

A number of the commentators critique Sander’s treatment and analysis of the data he relied upon for his article. The main criticisms are as follows:

- a. Disagreements with Sander’s operational definitions of class;

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41. Holley-Walker, *supra* note 22, at 845.

42. Daniel Kiel, *An Ounce of Prevention is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action*, 88 DENV. U. L. REV. 791, 792 (2011).

43. *Id.* at 801.

44. See generally Catherine E. Smith, *Seven Principles: Increasing Access to Law School Among Students of Color*, 96 IOWA L. REV. 1680 (2011). See also Michelle J. Anderson, *Legal Education Reform, Diversity and Access to Justice*, 61 RUTGERS L. REV. 1011, 1029–34 (2009); Leonard M. Baynes, *Introduction, The Celebration of the 40th Anniversary of Ronald H. Brown’s Graduation from St. John’s School of Law*, 25 J. CIV. RTS. & ECON. DEV. 1, 14–22 (2010).

45. Lempert, *supra* note 6, at 703–04.

46. Malamud, *supra* note 22, at 750.

- b. Use of datasets collected by other researchers to answer research questions other than those raised by Sander; and
- c. Lack of population data or even substantial surveys that address questions about the extent of the problem of under-inclusion of lower social class students in legal education.

As Lempert asserts, “Although Professor Sander’s index may be the best he can do given available data, it not only has shortcomings as a measure of relevant social class characteristics but it would be less than ideal if its sole purpose were to measure socio-economic status as the term is used in social sciences.”<sup>47</sup> The questions about operational definitions of “social class” pose issues of validity that need to be addressed by Sander.<sup>48</sup> The focus on social class is complicated by the fact that most studies of students (undergraduate and law school students and graduates) are not able to measure family income. This omission creates problems affecting generalizability. In addition, many of the datasets relied upon by Sander in his formulation of class have missing data, and Sander adopted a method of addressing the missing data that he considered suitable, but one that raises questions of general acceptance by other scholars.<sup>49</sup> Further, with respect to measuring social class, Sander does not address how researchers could create measures of wealth, currently missing from most of the studies employed in his analysis. Without wealth measures, the data are surely incomplete. As Onwuachi-Willig and Fricke assert:

Sander claims to be measuring SES, but he never takes into consideration that racial status is highly important in American society, conferring both social and economic benefits and detriments. In fact, he seems to suggest that race itself comes with no disadvantages. His failure to adjust for the disparate racial impact of certain tools for measuring SES renders racial inequality invisible. Of particular significance is Sander’s unnecessary averaging of family household SES data (as noted in Part I.A), his exclusion of income data in relation to occupations, and most starkly, his lack of data on wealth, which would more fully complete the stories about intergenerational wealth. The true SES of many black families is much lower than Sander emphasizes, thus greatly destabilizing his argument that high-SES blacks are being unfairly advantaged over low-SES whites.<sup>50</sup>

Finally, there is no attempt on Sander’s part to adjust for cost of living, which varies dramatically in a comparison of large and small cities and different regions in the U.S.

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47. Lempert, *supra* note 6, at 688.

48. *Id.* at 687; see also Bowen, *supra* note 22, for a discussion of these issues.

49. This consensus is best represented in the pieces authored by Lempert, Bowen, Onwuachi-Willig & Fricke, and Malamud.

50. Onwuachi-Willig & Fricke, *supra* note 22, at 816.

Aside from issues raised by Sander of whether there is invisibility of social class, Sander is unable to provide any data on the proportion of lower class students who matriculate to undergraduate colleges. He does not present data on the proportion of these same students who apply to law school. These are problematic omissions, since it becomes impossible to assess whether Sander's solution to diversifying law students is even capable of being achieved.<sup>51</sup>

### PART III: CONCLUDING THOUGHTS

This special issue of the *Denver Law Review* opens another stage in the debate about diversity in legal education, providing readers with a critical opportunity to carefully consider Richard Sander's propositions, as well as those of scholars who align with—and critique—his assertions. We'd like to add six parting thoughts to the discourse:

*I.* In his reply to the commentators, Sander devotes a substantial portion to the reintroduction of his mismatch theory, which originally appeared in the *Stanford Law Review*. Unfortunately, he crafts his reply as if people have conceded the correctness of his approach, ignoring the large body of literature from scholars who fervently critiqued his mismatch theory.<sup>52</sup>

*II.* When Sander speaks of invisibility, we must stop and ask: What is it that these students are disappearing into and why is that a lofty objective? Presumably, they are assimilating into middle- and upper-class norms, especially as they are practiced by white elites who still claim a disproportionate number of law-school seats. Although low SES white students may be able to “pass” and assimilate under these conditions, students of color will not (and have not.) They remain visible. The expectation that they attempt to be invisible, even if that were possible, harkens back to a relic of our racist past.<sup>53</sup>

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51. The Comments authored by Lempert, Bowen and Malamud address some of these omissions.

52. Sander has written previously and extensively in response to critics of his mismatch theory; he just failed to do so here. See Richard H. Sander, *Mismeasuring the Mismatch: A Reply to Ho*, 114 YALE L.J. 2005 (2005); Richard H. Sander, *A Reply to Critics*, 57 STAN L. REV. 1963 (2005). For additional references to the critics of Sander's work on mismatch, see Bowen, *supra* note 23, at 751 n.3. In addition, see some of the work of Marta Tienda in particular for issues on mismatch and attention to the Texas Top 10% Law. See Marta Tienda, *Equity, Diversity and College Admission: Lessons from the Texas Uniform Admission Law*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF PROPOSITION 209 (Grotsky & Kurlaender eds. 2010); Sunny Xinchun Niu & Marta Tienda, *The Impact of the Texas Top 10% Law on College Enrollment: A Regression Discontinuity Approach*, 29 J. POLICY ANALYSIS & MGMT. 84 (2010); Angel Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas*, in ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60 (2010).

53. See generally Wald, *supra* note 22; GAYLE WALD, *CROSSING THE LINE: RACIAL PASSING IN U.S. LITERATURE AND CULTURE* (2000). For a more critical take, see Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001).

III. Related, we must recognize that students of color are subjected to bias and stereotyping *beyond* the trigger of any admissions policies.<sup>54</sup> Eliminating race-consciousness from admissions policies will not eliminate racial stereotyping and bias on our campuses, or in the profession of law. Critical mass plays an important role for these students' well-being and academic performance.

IV. Low SES students and students of color experience many of the same barriers. Their "pipeline issues" at the K-12 level are similar, for example, even if they are not exactly the same. Sander needs to do a better job explaining why he thinks low SES students, once they have gained admissions preferences, will do better than have students of color once they arrive on the campuses of our nation's most elite law schools. What is it about these students that frees them of the "mismatch" dangers that so concern him with students of color? Following his train of arguments, why should we expect low SES students to experience *less* of a mismatch than do students of color who purportedly share class privilege (and are thus, in his worldview, already class assimilated) with their white law-school peers? The end game needs to be on ensuring the success of all of our students.

V. In our view, Sander's attempt to cloak the needs of low SES students threatens to make them even more vulnerable in the law school environment.<sup>55</sup> Further, he ignores the intersections of race and class, the built-in opportunity for attracting allies to support his class-based arguments, and the possibility of purposefully nurturing communities of support on our campus that unify students at the intersections of racial and class identities.

VI. Sander ignores the publication of a number of articles and the Final Project Report for the Educational Diversity Project,<sup>56</sup> the first results from a major national study on the im-

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54. See A.T. Panter, Charles E. Daye, Walter R. Allen, Linda F. Wightman & Meera Deo, *Everyday Discrimination in a National Sample of Incoming Law Students*, 1 J. DIVERSITY HIGH. EDUC. 67 (2008).

55. See Wald, *supra* note 22, at 873 ("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.")

56. See CHARLES E. DAYE, ABIGAIL T. PANTER, WALTER R. ALLEN & LINDA F. WIGHTMAN, *THE EDUCATIONAL DIVERSITY PROJECT: ANALYSIS OF LONGITUDINAL AND CONCURRENT STUDENT AND FACULTY DATA* (2010), available at <http://www.lsac.org/lisacresources/Research/GR/GR-10-01.asp>. For the Project website see <http://www.unc.edu/edp/about/index/htm>. Readers interested in this topic should look for a forthcoming article on diversity in legal education authored by Charles Daye and Abigail Panter.

pact of diversity in legal education.<sup>57</sup> This study based at the University of North Carolina examines the relationship between race and other factors on educational diversity of incoming law students in the U.S. For the first time, the researchers are able to distinguish the effects of measures of Contact Diversity and Classroom Diversity on student outcomes. They are able to show positive relationships between these two types of diversity and measures of Cognitive Openness and Attitudes Favoring Equal Opportunity. This new research was able to distinguish and separate school level effects from those measured at the student level.<sup>58</sup>

Sander's proposal and the vast range of perspectives offered by commentators in this symposium issue of the *Denver Law Review* represent substantive additions to the continuing debate about how diversity can best be achieved in the hallways and classrooms of legal academia and the profession of law. We extend our sincere thanks to all of the participants and now invite you, the reader, to delve into the vital discourse contained within—and beyond—these pages.

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57. See Nisha C. Gottfredson, A.T. Panter, Charles E. Daye, Walter F. Allen & Linda F. Wightman, *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Models in Data with Categorical Indicators*, 44 MULTIVARIATE BEHAVIORAL RESEARCH 305 (2009); Nisha C. Gottfredson, A.T. Panter, Charles E. Daye, Walter A. Allen, Linda F. Wightman and Meera E. Deo, *Does Diversity of Undergraduate Institutions Influence Student Outcomes?*, 1 J. DIVERSITY IN HIGHER EDUC. 80 (2008).

58. See Gottfredson et.al., *The Effects of Educational Diversity*, *supra* note 58 (2009). In this article they develop and employ a multilevel latent model analysis.