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Winter 2013

### A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias

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## COLLEGE of LAW

**Legal Studies Research Paper Series**

**Research Paper #176  
March 2012**

### **A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias**

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# A PLACE IN THE ACADEMY: LAW FACULTY HIRING AND SOCIOECONOMIC BIAS

*Michael J. Higdon*\*



*“Everywhere you look in modern America—in the Hollywood Hills or the canyons of Wall Street, in the Nashville recording studios or the clapboard houses of Cambridge, Massachusetts—you see elites mastering the art of perpetuating themselves.” – The Economist, January 1, 2005<sup>1</sup>*

## INTRODUCTION

The Japanese Macaque, or Snow Monkey as it is often called, is one of those wild animals, like the Koala Bear and the Meercat, that we humans tend to find particularly “cute.” As such, images of the Snow Monkey abound—so much so that, even if you did not know the name of the animal, you have likely seen one. In fact, if you have ever seen an image a primate soaking in a hot spring while surrounded by snow, without a doubt, you were looking at a picture of a Snow Monkey (or *Macaca fuscata* if you want to get technical).<sup>2</sup> Adding to the cute factor is the fact that this behavior is apparently learned given that only one group of Snow Monkeys—those at

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\* Associate Professor, University of Tennessee College of Law. I would like to thank the University of Nevada, Las Vegas Boyd School of Law and the University of Tennessee College of Law, both of whom were willing to look past my “non-elite” J.D. and give me a chance to do what I love the most—teaching law.

<sup>1</sup> *A Growing Body of Evidence*, THE ECONOMIST 22-23 (January 1, 2005)

<sup>2</sup> See ANIMAL LIFE: SECRETS OF THE ANIMAL WORLD REVEALED 412 (noting how they are “famous for their bathing habits”).

Jigokudani Monkey Park in Yamanouchi, Japan—bathe in hot springs.<sup>3</sup> And, indeed, there is something quite charming about the sight of a snow-covered landscape, occasionally punctuated by hot baths brimming with what appears to be *extremely* satisfied monkeys.

These images, of course, only provide a snapshot of the Snow Monkey's life. And when we go beyond the pictures, we learn something about the Snow Monkey that is not quite so "cute." Specifically, when you see a Snow Monkey soaking in a hot bath, you are not likely looking at just any old Snow Monkey, but one from the elite social class.<sup>4</sup> In fact, if you could somehow take the picture and zoom out, you would see other Snow Monkeys who are not soaking in a hot bath, but are instead shivering in the cold. They do not bathe in the hot springs because, quite simply, they are not allowed.<sup>5</sup> The higher status monkeys prevent them from gaining access. And what, might you ask, determines status within the Snow Monkeys—is it intelligence, skill, strength? No. Snow Monkeys are matrilineal and, as such, each merely inherits the status of his mother.<sup>6</sup> Thus, unless born to the "right" monkey, gaining access to the hot springs is nearly impossible.

For these reasons, when I see pictures of Snow Monkeys today, I fail to see the "cute" as I am instead distracted and somewhat dismayed by the rigid class system that I know is being played out behind the scenes. But perhaps I am being unfair. After all, Snow Monkeys certainly do not have a monopoly on class-based hierarchy—instead, such systems exist everywhere, not only in "the wild" but also throughout human civilization. Even the American legal system is not exempt. Critical legal scholars, for instance, have written extensively about the numerous ways in which the law helps maintain class-based hierarchies.<sup>7</sup>

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<sup>3</sup> Peng Zhang, Kunio Watanabe, & Tokida Eishi, *Habitual Hot-Spring Bathing by a Group of Japanese Macaques (Macaca Fuscata) in Their Natural Habitat*, 69 AMERICAN JOURNAL OF PRIMATOLOGY 1425 (2007).

<sup>4</sup> *Id.* at 1427 (noting how bathing is most widespread among those macaques in the dominant groups).

<sup>5</sup> *Id.* at 1429 (discussing how dominant monkeys "may guard the warm water" and how subordinate monkeys are "frequently chased from the pool by the dominant individuals").

<sup>6</sup> See YEHUDI A. COHEN, HUMAN ADAPTATION: THE BIOSOCIAL BACKGROUND 139 (2010); T. Maruhashi & H. Takasaki, *Socio-ecological Dynamics of Japanese Macaque Troop Ranging*, in EVOLUTION AND ECOLOGY OF MACAQUE SOCIETIES 146 (John E. Fa & Donald G. Lindburg eds. 1996).

<sup>7</sup> See LINDA GAYLE MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION-MAKING 17 (1999) ("Critical legal studies grew out of a leftist political critique of law and attempted to further the legal realist project by making explicit the extent to which the classical conception of an objective system of legal rules perpetuated the interests of economic elites and promoted class-based privilege."); see also Guyora Binder, *Critical Legal Studies*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL

One of the areas, however, in which one might be surprised to find class-based discrimination is in American legal education. Indeed, we Americans like to think that such distinctions do not exist in our country—after all, this is the land of opportunity and that opportunity extends to all.<sup>8</sup> Further, to the extent discrimination does exist in the United States, it is typically law professors who are on the front-lines when it comes to identifying and fighting such practices. Nonetheless, class-based discrimination does indeed exist in American law schools. Professor Richard H. Sander, for example, recently wrote about the socioeconomic profile of the students who attend the “elite” law school in the United States and how the overwhelming majority of them, even ethnic and racial minorities, are from the higher socio-economic classes.<sup>9</sup>

The purpose of this Article, however, is to focus on another area of legal education where discrimination on the basis of class is actively taking place. Specifically, I am referring to the criteria most law schools apply when hiring faculty members. Currently, to secure a job as a law professor, the most important factor is where that person received her J.D. As noted in the recent book *Becoming a Law Professor: A Candidate’s Guide*: “Like it or not, the data says that *the most important aspect* [of being a successful applicant] is having received a J.D. from an Ivy League or Ivy League equivalent law school.”<sup>10</sup> For those applicants who did not attend such a school, the authors state that they “would consider such a candidate a Nonstandard Model candidate whose success on the market would be the exception rather than the rule.”<sup>11</sup> Others have even gone as far as likening the ability of such a candidate to getting a law teaching job as “walking on water.”<sup>12</sup> In fact, study after study has found that the overwhelming majority of law professors in the United States graduated from a top-tier law

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THEORY 267 (Dennis Patterson ed., 2010) (noting how critical legal studies “contributed to the emergence of other intellectual movements critiquing the role of law in maintaining hierarchies based on sex, race, and sexual orientation.”).

<sup>8</sup> See D. RAE, D. YATES, J. HOCHSCHILD, J. MORONE & C. FESSLER, EQUALITIES 64 (1981) (describing “equality of opportunity” as “the most distinctive and compelling element of our national ideology”).

<sup>9</sup> Richard H. Sander, *Class in American Legal Education*, 88 DENV. U.L. REV. 631 (2011)

<sup>10</sup> BRANNON P. DENNING, MARCIA L. MCCORMICK, AND JEFFREY M. LIPSHAW, BECOMING A LAW PROFESSOR 24 (2010).

<sup>11</sup> *Id.* at 25; see also *supra* Part I.B.

<sup>12</sup> Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, Cornell Univ. L. Sch., <http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm> (last visited Feb. 7, 2012) (“Getting a teaching position with a J.D. from a school significantly farther down the food chain would be akin to walking on water, unless you are #1 in your class, have a graduate degree in law or some other discipline, and have a record of good publications.”).

schools.<sup>13</sup>

Now—let me pause here because, at this point, a very fair question arises: Does it not make sense that law schools would prefer to hire faculty who graduated from top law schools? After all, one has to not only have fairly sterling credentials to gain admission to such a school but, while there, will study under some of the leading scholars in the country. For some, then, the answer to this question is an easy yes. As Justice Scalia said when asked about the way in which he hires law clerks: “By and large, I’m going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can’t make a sow’s ear out of a silk purse.”<sup>14</sup> And you know what—Justice Scalia might be right. In this Article, however, I propose that the question is a bit more complex. Specifically, the question I think one should ask is does it make sense that law schools would *only* consider for teaching positions those who graduated from top law schools. Or, in other words, when law faculties (i.e., the ones who control hiring) allow academic pedigree to become the most important factor in the hiring process, are they making the best hiring decisions for their law schools and their student bodies? I posit that the answer is no.

Specifically, as I discuss *infra*,<sup>15</sup> the students who attend top-tier law schools are overwhelmingly representative of the elite socioeconomic class—often times as a result of merely being born to parents who were also a member of that class. As such, hiring faculty members from primarily those ranks undermines a law school’s ability to achieve socioeconomic diversity on its faculty and instead helps perpetuate a class-based monopoly within the legal academy to the detriment of all involved. Given this danger, I propose that academic pedigree simply be one of many factors that a faculty takes into account when deciding who, like them, may enjoy a place in the legal academy “hot spring.”

#### I. THE PATH TO LAW PROFESSOR: ACADEMIC PEDIGREE IS KEY

I think a very natural thing to be curious about at this point in the Article, is at what institution did the author receive his J.D. Well, in an attempt to save the reader the trouble of looking up that information, I graduated from the William S. Boyd School of Law, at the University of Nevada. For purposes of understanding the point of this this Article, though, all that really matters is that I attended a non-elite school. Is it fair

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<sup>13</sup> See *infra* notes 17-21 and accompanying text.

<sup>14</sup> Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES, May 12, 2009, at A13

<sup>15</sup> See *infra* Part II.

to say, then, that this aspect of my life lead me to write on this topic? Of course it did. I would, however, like to provide you with a bit more information about my background and how that contributed to my desire to write this Article. As is always the case, where someone got his or her J.D. is only a small part of the story.

### *A. My Story*

I was born and raised in Donalds, South Carolina – a rural town with a population of 354 people. Raised by a single-mother, I spent the early part of my life living with my grandparents, both of whom worked (right alongside my mother) for minimum wage in a local textile mill, where it was assumed that I too would work someday. To say we lived a modest existence would be an understatement. Nonetheless, I did quite well in school, and when the time came, decided to do something nobody in my family had ever done – attend college. The choice of where to go was fairly easy given that 1) I had no money and 2) Erskine College (located in the curiously named town of Due West, S.C.) offered me a full scholarship. Four years later, I desired to attend graduate school but again, with no money, I went with the school where I could attend free of charge—the University of Nevada, Las Vegas (UNLV). My goal was to become a journalist so I pursued and obtained a Master’s degree in Communication. While in graduate school, however, I became interested in law school. Coincidentally, around this time there was talk of opening a law school at UNLV. Once the opening of the school was formerly announced, I applied and was offered a full scholarship, which I gladly accepted. Throughout each stage of my post-secondary education, I was very much on my own in making decisions. Again, nobody in my family had ever done such things, and I had few resources—as a result of both poverty and ignorance—to guide me.

In law school, I fell in love with the study of law and decided in my first semester that I wanted to become a law professor. When I broached this possibility to some on the faculty whom I regarded as mentors, they kindly explained to me that I was unlikely to ever secure such a position simply because of where I had elected to attend law school. I thought that surely it could not be that black and white and secretly endeavored to eventually prove them wrong. With that goal in mind, I was very successful during my time in law school—I became editor-in-chief of the law review, graduated valedictorian and even secured a clerkship with a judge on the Ninth Circuit Court of Appeals. After a couple of years of practice, I once more called on my mentors from law school and again floated the idea of me becoming a law professor. As they had before, each of them—politely enough—told

me that it was an impossibility. However, one professor did invite me to apply to my alma mater for an opening in the legal writing department. Because the job was not tenure-track, but merely a contract position, I was told that perhaps the faculty would overlook where I got my J.D. (which, again, was from the law school that employs said faculty). Although I was not first choice, I did eventually get the job.

While at UNLV, although not a tenure-track member of the faculty, I nonetheless did most of the things my higher-status colleagues did. I taught doctrinal courses, I served on and even chaired important faculty committees, and I was even voted Professor of the Year by the student body. I also started to publish scholarly articles. At some point, I desired to “upgrade” my status given that I saw few differences in what I was doing and what was expected of the tenure-track faculty, yet saw drastic differences when it came to such things as salary, job security, and academic freedom. So I officially went on the market, blanketing law schools around the country with my materials. Out went the C.V. proudly informing all who would listen of my academic success in law school, my position as editor-in-chief of the law review, my clerkship, my teaching experience, my award for teacher of the year, and my list of published articles (which at that time numbered three, two of which were in “top-50” journals). What came back? Not much.

To be more precise, I did get one phone interview in which I was *twice* asked why I attended UNLV and what was my “trick” for placing articles so well (that this success might have been the result of the articles’ merit apparently had not occurred to them or, if it did, was quickly dismissed). A couple of other schools responded, not to talk to me about the tenure-track positions for which I had actually applied, but for contract positions. Primarily though, what I received were rejections—an avalanche of rejections to be precise—and a steady stream of advice on how if I were “serious” about this, I would pursue an LL.M. at an elite school to put a “gloss” on my resume (and apparently to teach me how to do the scholarship and teaching that I was already doing, all the while incurring two years of student loan debt) or, as a junior faculty member at one institution who had yet to publish anything advised me, get a Ph.D. in “something good, like economics.” When it looked as though all hope was lost, I did, however, get one more phone interview, which led to my one call back, which led to the job I now feel very fortunate (and extremely proud) to have.

So I did get a job as a law professor. Thus, it may seem that I have no basis to complain. Well, I think I do—perhaps not on my own behalf, but the other non-elite J.D.s who were not quite as lucky as me. Nonetheless, my experience does very much inform my criticism of this approach to



hiring. Specifically, my journey to law professor revealed that 1) by and large, when it comes to faculty hiring, the source of one's J.D. has become the primary consideration, seemingly obviating consideration of any other credential and 2) this obsession with academic pedigree has the potential to lead to class-based discrimination.

### *B. The Importance of Academic Pedigree*

A committee of the American Bar Association, noting the concentration of elite J.D.s among American law professors, once remarked: "Were we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system."<sup>16</sup> This quote is from 1980, but the ABA would be equally justified making a similar statement today. In fact, a recent study found that "[a] third of all new teachers graduated from either Harvard (18%) or Yale (15%); another third graduated from other top-12 law schools, and 20 percent graduated from other top-25 law schools."<sup>17</sup> Such findings are consistent with other studies that have revealed that, when it comes to law professors, the overwhelming majority of them received their J.D.s at top law schools. For instance, Professor Brian Leiter looked at the faculty composition at the 43 leading law schools, and found that, out of 7,000 faculty members, 64 percent went to a top-20 law school.<sup>18</sup> Even then, 40% came from one of six schools and 24% from Harvard and Yale.<sup>19</sup> A similar pattern seemingly holds true even for those minority candidates who are successful in finding jobs in the legal academy.<sup>20</sup> As one professor describes it, the ideal minority candidate is one "with a string of degrees and a high ranking from an elite law school."<sup>21</sup>

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<sup>16</sup> *Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education of the American Bar Association* 82 (Chicago, 1980).

<sup>17</sup> Richard E. Redding, "Where Did You Go to Law School?" *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 599 (2003). The study further found that only "14 percent graduated from a school not ranked among the top 25 law schools in the nation" and, among that group, "48 percent were hired by the same school from which they had graduated or by one of seven lower-tier law schools. None obtained a position at a top-25 law school and only 16 percent were hired by a top-50 law school."

<sup>18</sup> See Brian Leiter, *Leiter's Law School Rankings: Where Current Law Faculty Went to School*, [http://www.leiterrankings.com/jobs/2009job\\_teaching.shtml](http://www.leiterrankings.com/jobs/2009job_teaching.shtml).

<sup>19</sup> *Id.*

<sup>20</sup> See Jeffrey L. Harrison, *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring*, 42 J. LEGAL EDUC. 119, 122 (1992) ("In short, the class bias is so overpoweringly important that it actually undermines ongoing efforts to create faculty diversity through minority hiring.").

<sup>21</sup> *Id.* ("Hiring a high-ranking black candidate from Texas Southern Law School or

Now, is it surprising that those who went to the best law schools would be the most successful at obtaining employment in the legal academy? No, of course not. In many ways it makes sense that those who have the academic credentials to get into the top law schools would also be the most qualified to teach law to future generations. That's not the problem. Rather, the problem comes from the fact that, in practice, it is not that those applicants who possess J.D.s from elite schools beat out the applicants from non-elite schools because the former end up having the best credentials. Were that the case, we would need to assume that hiring committees are actively looking at candidates who graduated from elite and non-elite schools. Overall, that is not the case. Instead, the only candidates law schools really even look at are those who graduated from an elite law school—thus, academic pedigree is the *most meaningful credential* one can possess and, without the proper pedigree, all else is largely irrelevant. As one commentator put it, “[a]nyone who graduated from Yale or Harvard and who still has a pulse outranks a person who was first in his class at the University of Podunk.”<sup>22</sup>

As a result, to be eligible for consideration as a law professor, “[t]he formal requirement is that you have received a J.D. degree from an ABA-accredited law school. The informal requirement is that you have received the degree from a school accredited as belonging to the Almighty-Bunch-of-(Educational-)Aristocrats.”<sup>23</sup> Indeed, recognizing the reality of the situation, almost every source available to those seeking jobs in the legal academy advises them on the importance of having a J.D. from a highly ranked school. Consider, for example, what Professor Eric Goldman advises: “In many cases, a law student's choice of law schools may realistically prevent them from getting a law professor job. A student at a top-5 law school meets the initial criterion. A student at a top-20 law school can have a chance. A student at other law schools faces long odds.”<sup>24</sup> The leading text on the subject of how to get a job as a law professor goes a step further, noting that for a graduate of a non-elite school to find success on the teaching market is “the exception rather than the rule.”<sup>25</sup> Finally, consider the advice that was given to Professor David Case, an alumnus and now law

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North Carolina Central is a stretch many are unwilling to make.”).

<sup>22</sup> Kevin H. Smith, *How to Become a Law Professor Without Really Trying: A Critical, Heuristic, Deconstructionist, and Hermeneutical Exploration of Avoiding the Drudgery Associated with Actually Working as an Attorney*, 47 U. KAN. L. REV. 139, 147 (1998).

<sup>23</sup> *Id.* at 146 (“There is no official list of these anointed schools, but they include (in alphabetical order) Columbia, Harvard, Michigan, Stanford, University of Chicago, Yale, and the other schools that float in and out of the list of top-ten schools.”).

<sup>24</sup> Eric Goldman, *Goldman's Observations, Law Teaching Careers—Part IV* (March 3, 2005), [http://blog.ericgoldman.org/personal/archives/life\\_as\\_a\\_law\\_professor/](http://blog.ericgoldman.org/personal/archives/life_as_a_law_professor/).

<sup>25</sup> *See supra* note 11.

professor at the University of Mississippi, when he asked a professor at this law school about how he, himself, might go about becoming a professor: “graduates of the University of Mississippi do *not* get jobs as law professors.”<sup>26</sup>

Those who defend this reliance on academic pedigree do so on the basis that “[t]he law school attended serves as an easy proxy for the intellect, academic potential, and quality of legal education received.”<sup>27</sup> Again, however, in practice the hiring committees place so much reliance on alma mater that, instead of merely being a consideration, the source of the candidate’s J.D. drives the entire hiring decision – or, at least, will shape the pool from which the successful candidate is ultimately drawn. As a consequence, those who lack the all-important elite J.D. stand little chance of even being noticed, much less getting a job. Or, as one scholar more politely put it, “some candidates without stellar law school records but with strong research training, a track record in publications, or important legal practice or teaching experience get *overlooked*.”<sup>28</sup>

## II. THE “TOP” LAW SCHOOLS AND THE LAW STUDENTS WHO DO NOT ATTEND THEM

It should come as little surprise to those in the academy that law schools openly discriminate on the basis of where applicants received their J.D. degree. Indeed, as noted above, many have acknowledged this practice, and a few have even been so bold as to point out the absurdity of such an approach. Nonetheless, such criticism has apparently fallen on deaf ears given the fact that not only has this approach to hiring continued, but has become even more pronounced. As one recent study found, “[w]hile law faculties have become more and more diverse in race and gender, there has not been a similar increase in the diversity of new law teachers’ educational backgrounds. If anything, the trend is toward less diversity.”<sup>29</sup>

That being said, what I offer in this section is what I hope will be an even stronger justification for faculty appointment committees to ease up on the emphasis they place on academic pedigree. Namely, to the extent a law school values having a socioeconomically diverse faculty, hiring exclusively from elite law schools makes achieving that goal more unlikely. In order to better understand why that might be, let us first take a closer look

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<sup>26</sup> David W. Case, *The Pedagogical Don Quixote de la Mississippi*, 33 U. MEM. L. REV. 529, 537 (2003).

<sup>27</sup> Redding, *supra* note 17, at 607.

<sup>28</sup> *Id.* at 608.

<sup>29</sup> *Id.* at 606-07 (“The old pattern of hiring graduates of elite law schools continues and, more than ever, those hired are graduates of Harvard or Yale.”).

at the characteristics of those who attend these higher-ranked law schools.

*A. The Lack of Socioeconomic Diversity at the “Elite” Law Schools*

Generally, when a law professor attempts to publish a law review article, he will submit the article to the “top” law reviews, working his way down until he starts to receive offers of publication. From those resulting offers, he will generally accept the one that came from the “best” journal. I cannot help but feel that one of the justifications for relying so heavily on academic pedigree comes from the mistaken assumption that law students take a similar approach when deciding what school to attend—meaning that the students applied to the top law schools and just kept going down the list until one finally admitted them, at which point the student would accept based solely on ranking. Thus, with that understanding, one would assume that a student who attends the law school ranked number 73, was rejected by those schools ranked 1 through 72. Of course, rarely, if ever, will this be true. A number of considerations—and not just academic prestige—will come into play when deciding which law school to attend: geography, cost, and the available programs of study just to name a few. Interestingly enough, studies have also revealed that socioeconomic status plays an enormous role in law school selection.

For instance, in his article *Class in American Legal Education*, Professor Richard Sander found that “[t]he vast majority of American law students come from relatively elite backgrounds”<sup>30</sup>—a finding that is consistent with surveys conducted year after year, from the early 1960s to the present.<sup>31</sup> Further, his study found that “this is especially true at the most prestigious law schools, where only five percent of all students come from families whose SES [(i.e., socioeconomic status)] is in the bottom half of the national distribution.”<sup>32</sup> Specifically, Sander reveals that:

At the most elite twenty law schools . . . , only two percent of students come from American households with low SES (that is, SES in the bottom quartile), while more than three-quarters come from households with high SES (SES in the top quartile) and well over half come from households with very high SES (SES in the top decile). One way of describing the disparity is *that roughly half the students at*

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<sup>30</sup> Sander, *supra* note 9, at 632.

<sup>31</sup> *Id.* at 633 (citing studies). See also SEYMOUR WARKOV, *LAWYERS IN THE MAKING* (1963); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 475 (1997).

<sup>32</sup> Sander, *supra* note 9, at 632.

*these schools come from the top tenth of the SES distribution, while only about one-tenth of the students come from the bottom half.*<sup>33</sup>

In sum, Sanders found that the representation of those with low socioeconomic status “at elite law schools is comparable to racial representation fifty years ago, before the civil rights revolution.”<sup>34</sup>

For lower-ranked law schools, the disparity—albeit still a reality—is much smaller. Whereas the percentage of students from the bottom half of the socioeconomic spectrum was only 5% at those law schools in the top ten of U.S. News rankings, the percentage rose to 12%, 19%, and 21% for those schools ranked 11-20, 51-100, and 101 and below, respectively.<sup>35</sup> Likewise, the percentage of students from the top decile of the socioeconomic spectrum dropped from 57% at the top ten law schools to 49%, 36%, and 27% in those same categories.<sup>36</sup> Thus, “the eliteness of student backgrounds is less overwhelming at less elite law schools.”<sup>37</sup>

Somewhat suprisingly, Sander’s study found that racial minorities “are responsible for much of the small amount of [socioeconomic diversity] in law schools.”<sup>38</sup> For instance, “[t]wo-thirds of blacks from the top two tiers of law schools” are in the top quartile of socioeconomic status.<sup>39</sup> These findings lead much credence to one of the criticisms of race-based affirmative action—namely that “preferences can and often do go to the most advantaged people of color, who because of an advantaged

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<sup>33</sup> *Id.* at 637.

<sup>34</sup> *Id.* at 649. As Sander points out, “[i]n 1964, blacks accounted for 1.3% of American law students; depending on whether we calculate their representation relative to pool of college graduates or relative to the general population, their representation rate was between 10% and 30%—similar to the rates of representation for the low-SES categories.” *Id.*

<sup>35</sup> *Id.* at 639. The percentage at schools ranked 21<sup>st</sup> to 50<sup>th</sup>, 10%, was roughly equivalent to the percentage at those ranked 11<sup>th</sup> through 20<sup>th</sup>, 12%.

<sup>36</sup> *Id.* Again, the percentage at schools ranked 21<sup>st</sup> to 50<sup>th</sup>, 48%, was roughly equivalent to the percentage at those ranked 11<sup>th</sup> through 20<sup>th</sup>, 49%.

<sup>37</sup> Sander, *supra* note 31, at 475 n.8.

<sup>38</sup> Sander, *supra* note 9, at 651. Sander notes that, although “blacks and Hispanics are numerically well-represented in law schools compared to the general pool of college graduates,” nevertheless this “is not true of low- and moderate-SES college graduates.” *Id.* at 633.

<sup>39</sup> *Id.* at 652. Likewise, for Asians, Sander found that their “SES measures are nearly as high as those for whites.” *Id.* Hispanics represented “the greatest SES diversity”; however, the Hispanic parents involved in the study had an occupational SES number that was twelve points higher than their educational SES, leading Sander to conclude that “[m]any of these parents, in other words, have modest educational credentials but high-status occupations and, probably, relatively high incomes.” *Id.*

background can beat out their less privileged counterparts.”<sup>40</sup> Thus, by and large, affirmative action programs may be benefitting minority students, but not those minority students from modest socioeconomic backgrounds.

Again, Sander’s results are consistent with other studies dealing with the socioeconomic status of those who attend the elite schools. For instance, a 2004 study found that at top-tier colleges, “seventy-four percent of the students come from the top quartile of socioeconomic status, while only three percent come from the bottom quartile, and only ten percent from the bottom half.”<sup>41</sup> These studies have resulted recently in a number of excellent books on the subject, including William G. Bowen’s *Equity and Excellence in American Higher Education*,<sup>42</sup> Gary A. Berg’s *Low-Income Students and the Perpetuation of Inequality*,<sup>43</sup> and Richard D. Kahlenberg’s *America’s Untapped Resource: Low-Income Students in Higher Education*.<sup>44</sup>

There seems little dispute, then, that such disparity exists in higher education—the more important point, however, is why such disparity exists in the first place.

### B. Inequality of Opportunity and Cultural Inheritance

Under the “economics of discrimination” theory, discrimination is inefficient and, as such, applying meritocratic standards, the problem is one that will eventually correct itself.<sup>45</sup> As a result, no intervention is necessary.

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<sup>40</sup> Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1061 (1996)

<sup>41</sup> Steve D. Shadowen, Sozi P. Tulante and Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 122 (2009) (citing ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 11 (2003)).

<sup>42</sup> WILLIAM G. BOWEN, MARTIN A. KURZWEIL, & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 73 (2005) (discussing the problems posed by “the limited college access and attainment of students from families in the bottom income quartile or from families with no experience of higher education”).

<sup>43</sup> GARY A. BERG, LOW-INCOME STUDENTS AND THE PERPETUATION OF INEQUALITY: HIGHER EDUCATION IN AMERICA 2 (2010) (concluding, on the basis of recent statistics concerning “social mobility and education,” that there exists “a marked difference in higher education access, retention, and impact of degree after graduation based on socio-economic status”).

<sup>44</sup> Richard D. Kahlenberg, *Introduction*, in AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 1, 2 (Richard D. Kahlenberg ed., 2004) (“Low-income students face three major inequalities in education: they go to college in fewer instances than others; they complete college at lower rates; [and] they attend four-year colleges generally, and selective schools particularly, with substantially less frequency.”).

<sup>45</sup> See generally GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971);

For instance, once law schools eradicated discriminatory admissions practices, women began attending law school in greater numbers with the result being that, today, women account for approximately half of American law students.<sup>46</sup> As Professor Eli Wald points out, however, “formal diversity does not appear to be the natural and inevitable state of affairs for racial, socioeconomic, and other minorities who are significantly underrepresented in law schools and in the legal profession.”<sup>47</sup> Instead, for those groups, we need to take a look at why they are not better represented—is it because that group has simply chosen to “opt out” or is there some form of discrimination taking place. Further, Wald cautions that, when considering whether a group has simply opted out, we need to keep in mind that frequently “underrepresentation is not an issue of informed choice, but rather an issue of either discrimination, inequities, or both.”<sup>48</sup>

When it comes to the question of why those from lower socio-economic backgrounds are more likely to not attend law school and even less likely to attend an elite law school, it appears that much of that “election” flows from the various inequalities associated with simply having poorer parents. Indeed, “[i]t is commonly acknowledged that if a child is born poor, she has less chance of getting ahead than a child born into the upper or upper-middle classes—even if the poor child is just as naturally talented or hard working as her more advantaged peer.”<sup>49</sup> In fact, “[s]tatistically, the least academically qualified students from wealthy families have as much chance of going to college as the highest performing kids from low-income families.”<sup>50</sup> Both quotes, however—as provocative as they might be—still beg the question: Why?

In large part, the solution rests in the economic inheritance that befalls those born into a higher socioeconomic background. As Professors Walter J. Blum and Harry Kalven, Jr. once wrote: “The critical economic inheritance consists of the day to day expenditures in the children’s health,

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RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 390-91 (1992).

<sup>46</sup> See Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173 (2005) (noting that while “women comprise about one-half of the ABA-accredited law school graduating class,” they “account for only 16.81% of the partners in law firms nationwide.”)

<sup>47</sup> Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO J. LEGAL ETHICS 1079, 1095 (2011).

<sup>48</sup> *Id.* at 1096.

<sup>49</sup> Kahlenberg, *supra* note 40, at 1060-61. Kahlenberg goes on to quote sociologist Christopher Jencks, who stated, “If we define ‘equal opportunity as a situation in which sons born into different families have the same chances of success, our data show that America comes nowhere near achieving it.” *Id.* at 1061.

<sup>50</sup> BERG, *supra* note 43, at 55.

education and welfare which in the aggregate are, at least in our society, gravely disparate.”<sup>51</sup> Wealthier parents provide greater economic inheritance and, when it comes to gaining admission to an elite institution, such inheritance provides a tremendous advantage. This is so because the standards that law schools use to determine merit “are still, to a degree, culturally manufactured, building on a candidates’ possession of social and cultural capital.”<sup>52</sup> In other words, schools of higher education are relying on—as Professor Richard Fallon has described—“prevailing standards of excellence in performance, and thus distributive criteria tracing to those standards, [that] are tilted to promote characteristically upper- and middle-class perspectives, tastes, or interests.”<sup>53</sup>

In some instances, these “standards” are downright discriminatory. In his 2005 book, *The Price of Admission*,<sup>54</sup> Daniel Golden discusses some of the more disturbing admission practices employed at the nation’s elite colleges and universities. For instance, using (as one of many) the story of Finn M.W. Caspersen, he profiles the way in which donations by a parent can assist a student in gaining admission:

Caspersen, a Harvard Law alumnus who also sits on the COUR [i.e., Harvard’s Committee on University Resources] executive committee, formerly headed consumer lending giant Beneficial Corp., which specializes in making high-interest loans to consumers with poor credit. He and his wife have endowed several faculty chairs at the law school and donated to its library, where the rare-book room is named after them. Caspersen, who now runs a private investment firm, chairs a \$400 million fund-raising campaign that the law school launched in 2003. Four Caspersen children—Finn junior (who also has a Harvard bachelor’s degree), Erik, Samuel, and Andrew—have enrolled at Harvard Law. The Caspersens declined comment.<sup>55</sup>

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<sup>51</sup> Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. OF CHICAGO L. REV. 417, 503 (1952).

<sup>52</sup> Wald, *supra* note 47, at 1097.

<sup>53</sup> Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1936 (1996)

<sup>54</sup> DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2006).

<sup>55</sup> *Id.* at 26-27. Golden quotes Professor David R. Herwitz, who “served for year’s on the law school’s admission committee” as one who defends the admission of all four Caspersen children. Professor Herwitz is quoted in the book as saying, “Any school, particularly one with a long tradition, becomes something of a family. What kind of crazy



In addition, Golden points out the role that legacy status (i.e. being the child of an alumnus) has on helping an applicant gain admission:

A 1990 review of Harvard admissions by the federal Office for Civil Rights, examining why Harvard was more likely to accept white students than Asian Americans with similar academic records, found that legacy status frequently determined an applicant's fate. Among comments written by admissions staff reviewing applicant files were: "Dad's . . . connections signify lineage of more than usual weight." Plus: "Two legacy legs to stand on." "Without lineage, there would be little case. With it, we will keep looking." "Not a great profile, but just strong enough numbers and grades to get the tip from lineage." Federal investigators concluded that preference for legacies, a "a predominantly white" group, "can work to the advantage of an applicant by offsetting weaker credentials . . . There is also some evidence to suggest that certain alumni parents' status may be weighed more heavily than others."<sup>56</sup>

Finally, as an example of outright discrimination, Golden uses the example of Lee Coffin, dean of undergraduate admissions at Tufts, to point out the way in which financial need can greatly hurt—and even kill—an applicant's chances of gaining admission:

In 2004, Coffin moved 193 low-income candidates, who would have required an average of more than \$25,000 a year in grants, from Tufts' pool of admitted students into its rejected pile to avoid exceeding the university's \$7.8 million aid budget for freshmen. "In a need-blind universe, we would have taken them all, and you would be teaching them," Coffin told the faculty. The about-face, Coffin added, "made me sick." The last-minute discarding of the 193 applicants made the Tufts student body wealthier, whiter, and academically weaker than it would have been otherwise, Coffin said. Despite growing up in poverty, 52

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world would it be if people who had gone to the school and made contributions would be told: your kid is very close, but is not close enough." *Id.*

<sup>56</sup> *Id.* at 129. In 2002, for example, Harvard "admitted just 11 percent of applicants overall—but 40 percent of legacy applicants." *Id.*

percent of students jettisoned for financial reasons ranked in the top tenth of their high school classes, and nearly half surpassed Tufts' median SAT scores.<sup>57</sup>

Reading these examples, one cannot help but be reminded of the words of Justice Harry Blackmun: "It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness," he wrote in *Bakke*, "and yet to be aware of the fact, as we are, that institutions of higher learning . . . have given conceded preferences . . . to the children of alumni, to the affluent who may bestow their largess on the institutions, and those having connections with celebrities, the famous and powerful."<sup>58</sup>

I provide the above examples, not to suggest that every one who attends an elite university somehow gained admission through family connection or wealth. Indeed, I assume that the majority of those students were admitted on the basis of merit. Instead, I use these three examples as some of the most extreme (and, in my opinion, egregious) ways in which societal standards of "quality" can eliminate from consideration one from the lower socioeconomic spectrum. However, even standards that appear more meritocratic can operate to exclude those from poorer backgrounds.

For instance, the prevailing norm in legal education is that LSAT score, when combined with undergraduate GPA, is the best predictor of success in law school.<sup>59</sup> For this reason, schools place a lot of emphasis on these two numbers. However, this emphasis can easily give those from higher socioeconomic backgrounds an advantage. How? Well, when it comes to standardized tests, like the LSAT, students from higher socioeconomic backgrounds "are more likely to afford private high schools, tutors, test prep courses, and other perquisites that usually translate into higher test scores."<sup>60</sup> As Professor Wald points out, "expensive study aids help secure higher LSAT scores."<sup>61</sup> Likewise, when talking about undergraduate grade point average, the more elite the undergraduate institution, the more likely the student is to benefit from grade inflation. In fact, studies have found that the "extent of grade inflation and compression appears to be positively correlated with institutional selectivity."<sup>62</sup> As a

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<sup>57</sup> *Id.* at 193.

<sup>58</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 404 (1978) (Blackmun, J., concurring).

<sup>59</sup> See generally David A. Thomas, *Predicting Law School Academic Performance from LSAT Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007 (2003)

<sup>60</sup> GOLDEN, *supra* note 54, at 121.

<sup>61</sup> Wald, *supra* note 47, at 1098.

<sup>62</sup> THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS

result, undergraduates at elite colleges and universities have a distinct advantage in securing admission to law schools at those same elite institutions. In fact, one of the possible explanations for this grade inflation is “the result of pressure from highly articulate students and their tuition paying parents who demand grades that make them more competitive for postgraduate education and careers.”<sup>63</sup> For all these reasons, by and large, the standards that law schools rely so heavily on when determining who will gain admission “reflect ability to pay for them” thus rendering “financial resources and inequalities key components in meeting law schools’ purportedly objective merit standards.”<sup>64</sup>

With these barriers in place, those from the lower socioeconomic strata face greater difficulties in gaining admission to an elite law school; however, these barriers are even more pernicious given that, because of the very existence of these obstacles, poorer students are less likely to even apply in the first place. As Joseph Soares succinctly put it in his book, *Power of Privilege: Yale and America’s Elite Colleges*, “[i]t is not an exaggeration to say that college-bound youths in the United States know where they belong.”<sup>65</sup> For instance, one study looked at a group of students who had all performed very well on the Preliminary Scholastic Aptitude Test (“PSAT”) and where they subsequently applied to college. Of that group, students whose families earned less than \$20,000 (the lowest income category) applied to those schools belonging to the Consortium on Financing Higher Education—a group of 31 elite private colleges and universities—at a rate of 33%.<sup>66</sup> In contrast, those students from families in the highest income category (\$90,000 and above) applied to these same schools at a rate of 71%.<sup>67</sup> In what some have described as an example of bounded rationality,<sup>68</sup> “[l]ow-income students understand the nature of the college class system and are not even trying to be admitted to many of the

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LIFE 260 (2009).

<sup>63</sup> *Grade Inflation*, in *ENCYCLOPEDIA OF CROSS-CULTURAL SCHOOL PSYCHOLOGY* 486 (Caroline Clauss-Ehlers ed., 2010).

<sup>64</sup> Wald, *supra* note 47, at 1098.

<sup>65</sup> JOSEPH SOARES, *THE POWER OF PRIVILEGE: YALE AND AMERICA’S ELITE COLLEGES* 11 (2007) (“And our youths sense of place” is determined by “cultural capital.”).

<sup>66</sup> BOWEN, *supra* note 42, at 86. Bowen cites another study, by Richard Spies, that found “of all high-testing students from low-income families, about one-third apply to one or more of the 40 selective colleges that he chose as a reference group . . . . However, more than half of the high-testing students from high-income families applied to these schools.” *Id.* at 96-97.

<sup>67</sup> *Id.* at 86. For those in the middle income category, the rate was 39%. *Id.*

<sup>68</sup> PATRICIA McDONOUGH, *CHOOSING COLLEGES: HOW SOCIAL CLASS AND SCHOOLS STRUCTURE OPPORTUNITY* 10 (1997) (“High school seniors cannot and do not consider all of the 3,000 possible collegiate choices.”).

elite the universities.”<sup>69</sup>

As a result of all these admissions practices and the way in which they both discriminate against and dissuade those from lower socioeconomic backgrounds from gaining admission to the more elite colleges and universities in this country, many have argued that these institutions help promote “social reproduction,” whereby “affluent parents use formal education as a main way to hand down privilege to their children.”<sup>70</sup> Daniel Golden agrees: “Although they are tax-exempt, non-profit institutions subsidized by our tax dollars and receive billions of dollars in government funding and research grants, they are shirking their mission to unearth and nurture diamonds in the rough. Instead, they help to enshrine an American aristocracy.”<sup>71</sup>

### III. THE OBSESSION WITH ACADEMIC PEDIGREE AND THE HARMS OF SOCIOECONOMIC DISCRIMINATION

Given the extreme concentration of students from high socioeconomic backgrounds at the elite institutions, a hiring practice that uses academic pedigree as a litmus test to acceptability is a veritable recipe for socioeconomic discrimination. Now, allow me to unpack that sentence a bit so as to explain what I am and what I am not saying. If a hiring committee were to compare the abilities of a top graduate from an elite law school and those of a top graduate from a non-elite law school, I would have no quibble with the committee ultimately deciding that the student from the elite school was better qualified. Such a comparison, however, rarely takes place. Instead, despite the fact that most of the evidence we have on this point is merely anecdotal, any comparison that takes place is more likely to be something akin to, “Candidate X went to an elite law school, Candidate Y did not. Thus, Candidate X is a more capable candidate.” In fact, this is the comparison that seemingly takes place even if Candidate Y excelled in every way at the non-elite law school, while Candidate X merely graduated from the elite law school. In short, when it comes to getting a teaching job at an American law school, simply getting admitted to and graduating from a top law school will always give one a leg up on the competition.<sup>72</sup> Applicants like Candidate Y rarely even get a chance to make their case—they are eliminated early on based almost entirely on the source of their J.D.

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<sup>69</sup> BERG, *supra* note 43, at 49. Berg argues that, “[i]n this way, years of exclusionary admissions policies has led to widespread segregation of college choice by class and race.”

<sup>70</sup> MITCHELL L. STEVENS, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES* 14 (2007).

<sup>71</sup> GOLDEN, *supra* note 54, at 10.

<sup>72</sup> See *supra* note 22 and accompanying text.

Now, are there currently law professors in this country who came from low socioeconomic backgrounds? Yes, I know of some (in fact, I am one of them). Did any of these law professors, despite their low socioeconomic status, attend an elite institution? Yes, I know of some of those too. However, what we know about hiring practices would suggest that these individuals are very much in the minority. Although there exists no formal study on the socioeconomic backgrounds of those who teach at American law schools, how could those from lower socioeconomic backgrounds not be in the minority given that only one-tenth of the students at the top twenty law schools (again, the source of almost all law professors) came from the bottom-half of those on the socio-economic spectrum. Or, put another way, “a person whose family [socioeconomic status] place them in the top decile was *twenty-four* times as likely to grow up and attend an elite law school as was a person whose family placed them in the bottom *half* of the national distribution.”<sup>73</sup>

Thus, unless the majority of those hired from elite law schools are those scant students from low socio-economic backgrounds, we have a real cause for concern. Specifically, when appointment committees rely almost exclusively on academic pedigree when making hiring decisions, they are very much running the risk of failure when it comes to building a socio-economically diverse faculty. Of course, such a risk would only be problematic if socio-economic diversity were something that was important. It is my contention that such diversity is important for a number reasons.

As an initial matter, “lack of diversity undermines the very meaning of law and of what it means to be a lawyer in the United States.”<sup>74</sup> Indeed, the ABA has pointed out that “[w]ithout a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from mechanics of justice.”<sup>75</sup> This is so because “[t]he United States occupies a special place among the nations of the world because of its commitment to equality, broad political participation, social mobility, and political representation of groups that lack political clout and/or ancestral power.”<sup>76</sup> Thus, one would expect lawyers, as the “high priests of our civic religion, to be leading the fight against discrimination wherever it might occur, but certainly within the lawyers’ own ranks. Further, law schools are critical in this regard given that the legal academy serves as “a significant

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<sup>73</sup> Sander, *supra* note 9, at 637.

<sup>74</sup> Wald, *supra* note 47, at 1101. As Wald points out, “because law is the social glue of our society, because it is premised on the fundamental values of equality, fairness, and the rule of law, the legal profession ought to be a leader in the quest for diversity.” *Id.*

<sup>75</sup> AM. BAR ASS’N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (Apr. 2010).

<sup>76</sup> *Id.*

constituency in the bar's battle for increased diversity."<sup>77</sup>

Of course, these reasons only speak to the need for diversity in general—the question remains whether diversity, specifically *socioeconomic* diversity, should be an important goal among law faculties. I join the ranks of those who believe that it should—primarily for the same reasons law faculties have sought to achieve race and gender diversity. First, the diversity of the student body should be reflected in the diversity of the faculty. As Dean Kevin A. Johnson of the U.C. Davis School of Law recently put it: “Although it is somewhat cliché to say it, law students want and need role models.”<sup>78</sup> For instance, when talking about racial minorities, Dean Johnson states that “[t]he presence of historically underrepresented minorities on law faculties sends a message to students of color—and most effectively ‘teaches’ them—that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers, judges, and policy makers.”<sup>79</sup> The same can be said of those students from lower socioeconomic backgrounds. Beyond teaching them that they too have a place in the law, professors who emerged from lower socioeconomic backgrounds may also have an advantage when it comes to teaching substance to students of lower socioeconomic background. As Professor Jeffrey L. Harrison once said, “[i]n many instances, an increase in class diversity would mean an increased likelihood that professors and students would have a common experiential base from which to work.”<sup>80</sup>

Second, if law schools are truly marketplaces of ideas, then faculty diversity enhances that environment by broadening the number of available perspectives. Instructive in this regard is the language Justice O'Connor used in *Grutter v. Bollinger* where she noted that diversity among law students seeks to “ensur[e] their ability to make contributions to the character of the Law School.”<sup>81</sup> Faculty diversity serves the same purpose. As one scholar notes: “might it not be possible—some would contend probable—that a woman teaching the law of rape, abortion, or employment discrimination might present the law to students in different ways, with different perspectives, experiences, and—at a most fundamental level—

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<sup>77</sup> Wald, *supra* note 47, at 1079 (citing Robert W. Gordon, “The Ideal and the Actual in the Law”: *Fantasies and Practices of New York City Lawyers, 1879-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 51-74 (Gerald W. Gawalt ed., 1984)).

<sup>78</sup> Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1557 (2011)

<sup>79</sup> *Id.* at 1558.

<sup>80</sup> Harrison, *supra* note 20, at 121; see also Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

<sup>81</sup> 539 U.S. 306, 325 (2003).

knowledge than her male counterparts.”<sup>82</sup> Again, the same can be said for professors from lower socioeconomic backgrounds. Is it not at least arguable that they would bring a different perspective to the classroom—one that some of the students in the classroom can relate to first-hand and one to which the other students likely need some exposure?

Finally, the different perspective that these individuals bring to the classroom would also contribute to their scholarship, thus benefiting the entire academy. One need only look to the momentous contributions such movements as Critical Race Theory and Feminist Legal Theory have brought to the academy to see the potential benefit that other minority groups could bring to the table. As Kevin Johnson eloquently puts it:

Bedrock premises of the U.S. legal system fully embrace the understanding that a diverse set of perspectives makes a difference in decision-making. For instance, the highest courts in the federal and state systems, as well as intermediate appellate courts, have a group of justices, rather than a single one, deciding cases. Similarly, U.S. courts opt not for a single judge as decision maker but require juries that decide civil and criminal cases to be comprised of a number of jurors (ordinarily twelve) pulled from a cross-section of the community. Based on similar reasoning, the commitment to diversity makes perfect sense in law teaching and scholarship as well.<sup>83</sup>

#### IV. A PROPOSED SOLUTION

My solution—at least in my mind—is a modest one. Instead of basing hiring decisions almost exclusively on academic pedigree, treat alma mater as just one of many factors. Whatever qualities a hiring committee decides to look for in applicants—the typical ones being performance in law school, service on a law review, clerkship experience, publication history, teaching experience—avoid the temptation to allow those factors to be completely

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<sup>82</sup> Johnson, *supra* note 78, at 1559-60. Likewise, “an African-American man might understandably bring an entirely different set of perspectives, experiences, and knowledge to bear on the classroom discussion of the phenomenon of racial profiling by police in a criminal law or criminal-procedure course than the average white colleague might be able to offer.” *Id.* at 1560.

<sup>83</sup> *Id.* at 1563. Johnson also advocates that faculty diversity should play a role in how law faculties are evaluated: “There, too, one can expect a multiplicity of perspectives to improve the quality of debate and deliberation on contentious, as well as ordinary, issues, which positively impacts both law teaching and legal scholarship.” *Id.*

decimated by attendance at a non-elite law school. A law school, when it engages in faculty hiring, is very much mistaken if it believes that the graduates of elite institutions are not only the best and the brightest but that those graduates also represent a number of diverse backgrounds. Indeed, as I have discussed *supra*, when it comes to socioeconomic diversity, such an assumption is patently false.

Before I continue, let me make plain that I am in no way advocating that those who hire law faculty institute some form of class-based affirmative action. As others have detailed, such an approach would be problematic for several reasons. First, the question arises as to who should benefit from such a program? Specifically, as Richard Kahlenberg has noted, “How is class to be defined? Should only the poor benefit or lower-middle income Americans as well?”<sup>84</sup> Even if these questions could be adequately answered, as Richard Fallon aptly points out, “many of the disadvantaging conditions associated with poverty specifically involve childhood poverty, not present economic status.”<sup>85</sup> How then would a law faculty adequately inquire about an applicant’s childhood poverty level and what “proof” would be satisfactory? These extremely difficult questions would make implementation of such a program nearly impossible.

Now, would my approach solve the problem of socio-economic diversity within the legal academy? Of course not. After all, it is not just the students at the elite law schools who more often than not come from higher socio-economic backgrounds, but in general, the students at all law schools. So all law school hiring—as long as the J.D. continues to be a requirement—is likely to discriminate in terms of socioeconomic. However, the risk of discrimination is greatly magnified when the hiring comes almost exclusively out of the elite schools, where the socioeconomic disparity is more extreme. As previously noted, “the eliteness of student backgrounds is less overwhelming at less elite law schools.”<sup>86</sup>

Perhaps some law schools are already following this approach to hiring. I am proud to say that my employer, the University of Tennessee College of Law, is one of those—we have tenured/tenure-track faculty not only from the schools like Harvard, Yale, Columbia, New York University, Berkeley, and Michigan, but also from schools like William and Mary, Pennsylvania State, University of Missouri, Texas Tech, and the University of Nevada

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<sup>84</sup> Kahlenberg, *supra* note 40, at 1065. See also Michael Kinsley, *Class, Not Race*, WASH. POST, Aug. 1, 1991, at A15 (“Does Clarence Thomas the sharecropper’s kid get more or fewer preference points than the unemployed miner’s son from Appalachia?”).

<sup>85</sup> Fallon, *supra* note 53, at 1927. “As a result, present economic status—as measured, for example, by an income tax return—would not always be a good proxy for the kind of disadvantage for which economically based affirmative action would aim to compensate.” *Id.*

<sup>86</sup> See *supra* note 37.



(just to name a few). In my opinion (and, I am proud to say, the opinion of many of my colleagues), such diversity contributes to the education of our students, the continuing education of our colleagues and as a result, the overall strength of our institution. Sadly, on most law school faculties, such diversity is rare—to say the least.

Further, I am not so naïve to think that my proposed solution would place those from lower socio-economic backgrounds on equal footing with other candidates. Just as the cultural inheritance of wealth makes it more likely that those from the higher classes will get into to the more elite institutions, so too does that inheritance aid these students in achieving other accomplishments that law faculties look for when hiring new faculty. For instance, those who go to the elite institutions are more likely to obtain prestigious clerkships, which is another proxy of quality that law schools rely on when hiring. As noted earlier, one Supreme Court justice has explicitly stated his preference for hiring those graduates of the top law schools.<sup>87</sup> Similarly, those from higher socioeconomic backgrounds may also have greater networking opportunities and even pre-existing connections with established scholars—relationships that can greatly assist in securing eventual employment either through serving as a mentor to the candidate's scholarship or even serving as references to potential employers.

Given the nature of our society, I do not feel that these obstacles are anything we can realistically do anything about. Thus, short of a lottery system, those from the more privileged backgrounds will almost always have a number of advantages when it comes to securing law faculty positions. Nonetheless, to me, our inability to effectuate change on those fronts makes it all the more imperative that we absolutely change the things we can control. And what we are capable of doing, should we so choose, is to treat academic pedigree as merely one piece of the hiring puzzle that we actively supplement with other information that helps us make a determination of suitability. Again, that information too will be somewhat biased in favor of those from elite backgrounds, but at least we are providing opportunities for all to prove their mettle instead of foreclosing opportunities based solely on that person's choice of where to attend law school.

In fact, I have often thought that an interesting experiment would be one in which an appointments committee had to wade through the annual pile of applicants without the “benefit” of knowing where the applicant went to law school. How interesting would it be to see the candidate pool that would result if those committees had to rely instead on skill sets relevant to law teaching. Perhaps the candidate pool would remain unchanged: I am,

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<sup>87</sup> See *supra* note 14 and accompanying text.

however, after my own experiences and the experiences of others I have watched over the years, quite dubious.

#### CONCLUSION

To sum up, I would like to reference two relatively recent best sellers. The first is *Moneyball*, in which Michael Lewis writes about the somewhat revolutionary way in which the Oakland A's started identifying prospective ball players for recruitment.<sup>88</sup> In one part of the book, he talks about the league's obsession with "runs batted in" (or RBIs):

The fetish made of "runs batted in" was another good example of the general madness. RBI had come to be treated by baseball people as an individual achievement—free agents were *paid* for their reputation as RBI machines when clearly they were not. Big league players routinely swung at pitches they shouldn't to lard their RBI count. Why did they get so much credit for this? To knock runners in, runners needed to be on base when you came to bat. There was a huge element of luck in having the opportunity, and what wasn't luck was, partly, the achievement of others. "The problem," wrote James, "is that baseball statistics are not pure accomplishments of men against other men, which is what we are in the habit of seeing them as. They are the accomplishments of men in combination with their circumstances."<sup>89</sup>

In many instances, academic pedigree is the same: less a statement of individual accomplishment and more a reflection of circumstances that placed that person in a position to achieve that academic pedigree. Indeed, when it comes to having an academic pedigree from an elite institution, the achievements of others are often at play given the role a higher socioeconomic status (i.e., the success of one's ancestors) plays in gaining admission.<sup>90</sup> Nonetheless, our current approach to law school hiring treats academic pedigree, just like RBIs in baseball, as an individual accomplishment worthy of overriding weight.

I in no way intend to suggest that academic pedigree is worthless or even that those who have an elite academic pedigree were merely lucky. On the contrary, an elite J.D. can demonstrate great intellect and likely came at

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<sup>88</sup> MICHAEL LEWIS, *MONEYBALL* (2003).

<sup>89</sup> *Id.* at 71.

<sup>90</sup> *See supra* Part II.B.

the expense of huge personal sacrifice. So I would argue that we should not ignore the source of one's J.D., but merely treat it as one factor when hiring law faculty. To illustrate, I move to the second book I wish to discuss—*Outliers*, by Malcolm Gladwell.<sup>91</sup> In that book, Gladwell deals with the question of why some people achieve success while others do not. At one point in the book, Gladwell makes a particularly poignant observation when he discusses how height relates to the ability to play professional basketball:

Does someone who is five foot six have a realistic chance of playing professional basketball? Not really. You need to be at least six foot or six one to play at that level, and, all things being equal, it's probably better to be six two than six one, and better to be six three than six two. But past a certain point, height stops mattering so much. A player who is six foot eight is not automatically better than someone two inches shorter. (Michael Jordan, the greatest player ever, was six six after all). A basketball player only has to be tall enough—and the same is true of intelligence. Intelligence has a threshold.<sup>92</sup>

Similarly, the intelligence necessary to be an effective law professor also has a threshold and, after that, one needs to look to other indications of ability. Now, in determining whether a candidate meets that initial threshold, academic pedigree can be useful. It cannot, however, be the only measure in large part because, as I have discussed *supra*, academic pedigree will not yield a sample representative of the entire academically gifted population.<sup>93</sup> Thus, one needs other factors to determine if an applicant meets that initial threshold of acceptability. And, for all candidates, once it has been determined that they meet this minimum standard, I question whether academic pedigree has much relevance beyond that. I think at that point, it should be other factors that determine how likely that person is to obtain success as a legal academic.

Sadly, most law schools do not take such an approach, but instead use academic pedigree as the litmus test for acceptability, using demonstrated skills only to break the tie that may result from two different applicants from elite institutions. Such a process excludes many applicants who, despite having a J.D. from a non-elite institution, otherwise demonstrate a strong aptitude for legal scholarship and teaching. If those graduates of elite law schools nonetheless were representative of the general population, not

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<sup>91</sup> MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008).

<sup>92</sup> *Id.* at 80.

<sup>93</sup> *See supra* Part II.

only in terms of race and gender, but also in terms of socio-economic status, perhaps this system of hiring would be more defensible—after all, it is more efficient and all are represented in the pool that will produce tomorrow’s law professors.

The pool, however, is hardly representative of those from the lower reaches of the socio-economic spectrum and as such, those from poorer backgrounds are effectively prevented from breaking in to the legal academy. Up to this point, we have tried to justify these hiring practices on the basis that “elite J.D. = likelihood of success.” In *Moneyball*, the Oakland A’s had to confront similar justifications for the way in which baseball scouting had previously been conducted. As the character Peter Brand remarks, “People are overlooked for a variety of biased reasons and perceived flaws.”<sup>94</sup> In response, the Oakland A’s took a position that was—at the time, extremely controversial: “a young player is not what he looks like, or what he might become, but *what he has done*.”<sup>95</sup> Likewise, hiring committees need to take a broader look at accomplishments relevant to teaching – choice of school alone is far too simplistic and far more likely to produce discriminatory results. Indeed, under the current approach to law school hiring, if anything, the pool of applicants has much more in common with the hot springs at Jigokudani Monkey Park—by and large, class is more likely to result in access.

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<sup>94</sup> *Moneyball* (Columbia Pictures 2011).

<sup>95</sup> LEWIS, *supra* note 88, at 38.