

Structural Nepotism: On the Reluctance of Law Schools to Include Social Class Origins among their Faculty Diversity Goals

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I. On the Oligarchical Nature of Organizations¹

In his landmark 1911 study, Robert Michels detailed the reasons political parties founded on democratic and egalitarian principles become elitist.² He described how a leadership emerges that then adopts standards favoring replacement leaders whose values and characteristics closely mirror its own.³ Thus begins a self-perpetuating oligarchy that manages the organization's operations through its perceived superior knowledge of the group's mission and everyday workings.⁴ Even when the merit criteria for picking new leaders change, the shift happens piecemeal, so the newcomers differ only slightly in character from those already in power.⁵ Michels likened his idea to having a "new conductor, but the music is just the same."⁶ His research led him to conclude, "Who says organization says oligarchy."⁷

For Michels, elitism is inevitable in bureaucracies. In 2006, Peter Schmidt offered a modern-day retelling of Michels' notion of institutionalized

1. According to the American Bar Association, assembling demographically diverse classes of students encourages new ways of thinking about how the law is developed, interpreted, and applied. The ABA further argues that a multicultural learning environment fosters greater political participation among groups that have traditionally "lack[ed] clout and/or ancestral power." ABA PRESIDENTIAL DIVERSITY INITIATIVE, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* (2010), at 9, http://www.americanbarfoundation.org/uploads/cms/documents/aba_diversity_report_2010.pdf.
2. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 241 (Eden Paul trans., 2001).
3. *Id.* at 181.
4. *Id.* at 92, 143.
5. *Id.* at 234.
6. *Id.* at 266, n.330.
7. *Id.* at 241.

favoritism, in this case deciding which students are admitted to college. He described the clubbish nature of higher education in the United States: “How colleges define merit is shaped by the values and self interests [sic] of the definers To borrow from George Orwell’s *Animal Farm*, if pigs were to decide who is fit to rule the barnyard, their criteria for leadership would almost certainly include a snout, a curly tail, and hooves.”⁸

Pierre Bourdieu⁹ provided a framework for appreciating Schmidt’s remark about how universities in the United States decide who qualifies to be a student.¹⁰ For Bourdieu there are three major constituents of wealth, and youngsters raised in circumstances abundant in these forms of wealth are more likely to attend and graduate from college. His three elements of wealth are typically interconnected. First, there is financial capital, meaning cash on hand, liquid assets, or illiquid holdings. The latter category includes land or market instruments usually not readily converted to cash. Second, there is social capital, which entails knowing of people who might help you gain something you want, such as being acquainted with an important someone who writes a strong referral letter that helps your son or daughter gain entry into a prestigious college. Cultural capital is Bourdieu’s third element of wealth, and it means understanding how to perform tasks. This attribute of wealth can range from having the skills of a master chef or certified plumber to knowing how to succeed in higher education.

An example of the latter involves having college-educated parents versus those parents who never went beyond high school, if that far. Parents with a college degree are more likely to recognize the benefits of, among others, attending a prestigious prep or high-quality public school as well as the advantages of completing a preparatory course before taking the ACT, SAT, LSAT, or GRE. These parents are also better equipped to advise their children on less obvious academic matters, such as scheduling classes to balance the workload, helping with researching and selecting a college, and providing guidance on writing and rewriting term papers. Universities may give special consideration to legacies, the offspring of parents (or other close relatives) who graduated from the same college to which their children are applying. According to Kahlenberg, “By rewarding birth rather than merit, legacy preferences are un-American, and yet they are also uniquely American, rarely (sic) found in other leading universities across the globe.”¹¹ The recent college

8. PETER SCHMIDT, *COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION* 64 (2007).
9. See Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in *POWER AND IDEOLOGY IN EDUCATION* 487–511 (Jerome Karabel & A.H. Halsey eds., 1977); Pierre Bourdieu, *The Forms of Capital*, in JOHN RICHARDSON, *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 248–49 (1986).
10. Hereinafter the terms colleges and universities are used interchangeably.
11. Richard D. Kahlenberg, *Affirmative Action for the Rich: Legacy Preferences in Higher Education*, *N.Y. TIMES* (May 10, 2013), <https://www.nytimes.com/roomfordebate/2011/11/13/why-do-top-schools-still-take-legacy-applicants/affirmative-action-for-the-rich>.

admissions scandal in which parents used their social, financial, and cultural capital to assure that their children were admitted to the nation's top schools is a sordid illustration of the interconnectedness of Bourdieu's aspects of wealth.¹² Writing about formal education in the United States, Ayers argued, "Choose the Right Parents! If you choose parents with money, access, social connection, and privilege, your choices and your chances will expand; if not, sorry, you're on your own."¹³ In short, classism and class privilege are inherent in the socioeconomic system.

In 1962, Bachrach and Baratz published "The Two Faces of Power."¹⁴ They explained that one face of power involves proposing an issue for consideration, putting an idea on the table.¹⁵ Today this quality might involve local government officials asking citizens to vote on a referendum to increase property taxes to fund a new school. The authors' second face of power entails preventing an item from being considered, keeping a question off the table. They call this lack of action a "nondecision."¹⁶ An example would be the United

12. See, e.g., Katie Jerkovich, *Lori Loughlin and Husband Plead Guilty in College Admission Scam, But Judge Refuses to Accept Pleas Just Yet*, DAILY CALLER (May 22, 2020), <https://dailycaller.com/2020/05/22/lori-loughlin-mossimo-giannulli-plead-guilty-in-college-admission-scam-judge-refuses-to-accept/>; Jennifer Medina, Katie Benner & Kate Taylor, *Prosecutors Uncover 'Largest College Admissions Scam Ever,'* N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html>; Theresa Waldrop, *Hot Pockets Heiress Michelle Janavs Sentenced to 5 Months Imprisonment in College Admissions Scam*, CNN (Feb. 26, 2020), <https://www.cnn.com/2020/02/25/us/michelle-janavs-sentence-college-admissions-scam/index.html>; Lisette Voytko, *Lori Loughlin Gets 2 Months Jail Time And Husband Gets 5 In College Admissions Scandal*, FORBES (Aug. 21, 2020), <https://www.forbes.com/sites/lisettevoytko/2020/08/21/lori-loughlin-gets-2-months-jail-time-and-husband-gets-5-in-college-admissions-scandal/#5ce1fb7b2276>. The following sources provide a good starting point for appreciating Bourdieu's insights and details about the countless advantages accruing to those whose parents have large amounts of one or more of these forms of wealth: ROBERT COLES, *PRIVILEGED ONES: THE WELL-OFF AND THE RICH AMERICA* (1977); RICHARD H. DE LONE, *SMALL FUTURES: CHILDREN, INEQUALITY, AND THE LIMITS OF LIBERAL REFORM* (1979); THIS FINE PLACE SO FAR FROM HOME: VOICE OF ACADEMICS FROM THE WORKING CLASS (C. L. Barney Dews & Carolyn Leste Law eds., 1995); BETTY HART & TODD R. RISLEY, *MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCES OF YOUNG AMERICAN CHILDREN* (1995); BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* (1994); NANCY ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* (2016); RICHARD D. KAHLENBERG, *THE REMEDY CLASS, RACE, AND AFFIRMATIVE ACTION* (1996); RESILIENCE: QUEER PROFESSORS FROM THE WORKING CLASS (Kenneth Oldfield & Richard Gregory Johnson III eds., 2008); STRANGERS IN PARADISE: ACADEMICS FROM THE WORKING CLASS (Jake Ryan & Charles Sackrey eds., 1984). These works demonstrate how inequality of educational opportunities and related benefits are closely tied to socioeconomic origins and how these advantages help explain the findings of Mertz et al., among others, discussed later in this paper.
13. William Ayers, *Barack Obama and the Fight for Public Education*, 79 HARV. ED. REV. 385, 391 (2009).
14. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 947 (1962).
15. *Id.* at 948.
16. *Id.* at 949 (emphasis in the original).

States Senate majority leader refusing to call for a vote on a U.S. Supreme Court nominee.

Bachrach and Baratz explained how the dominant political culture perpetuates a set of beliefs that most people take for granted and therefore raise no questions because an overwhelming majority of the population simply assumes society should operate this way. These commonly accepted beliefs are a part of Bachrach's and Baratz's second face of power. Each culture has its own commonly accepted truths.¹⁷ Private- and public-sector elites are primarily responsible for deciding which questions are and are not considered legitimate.¹⁸ Family members, schoolteachers, and media commentators reinforce these principles by citing instances that buttress the prevailing narrative.

This second face of power—questions not asked—is, of course, not invincible. Events and reformers can change how people see existing conditions, sometimes slowly, as happened with passage of the Nineteenth Amendment, or quickly, as with the way most people in the United States shifted their opinion of the Soviet Union from friend to foe not long after the Second World War ended. Successful challenges to a dominant way of thinking can sometimes become, for most people, the accepted view of how society should be arranged, and, as time passes, could never have been considered otherwise—for example, women's having the right to vote. Currently we are learning that many of the norms and informal restraints Americans previously took for granted about the U.S. presidency as being required actions (or renunciation of certain actions) can be upended by a political figure like Donald Trump, a man who seems to care little about such expectations. As with Franklin Roosevelt's time in office, history will judge how many, if any, of Trump's actions and interpretations of the chief executive's role endure.

II. The Importance of Diversity in Higher Education

Over the years advocates have offered and implemented various policies meant to counter the oligarchical tendencies within different organizations. Whether or not and to what extent these efforts succeed depends on political factors, such as court rulings, public referendums, legislative or executive actions, and public opinion. These reforms have included promoting greater socioeconomic diversity in higher education.¹⁹ For example, a past president of Harvard University, Lawrence Summers, proposed that the United States' commitment to equality and democracy in higher learning include greater emphasis on socioeconomic integration, diversity based on social class origins.²⁰ Bowen, Kurzweil, and Tobin said that admissions committees, when

17. *Id.* at 948.

18. *Id.* at 950.

19. Hereinafter, the terms social class, socioeconomic status, and class are used interchangeably.

20. MARTIN A. KURZWEIL ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 257 (2005). *Integrative* is used here to mean increasing the percentage of law faculty so their

choosing among applicants, should weigh the socioeconomic hardships the applicants have overcome.²¹ The authors said that considering these factors would help offset current selection methods that heavily benefit children born with class privilege.²² Bowen, Kurzweil, and Tobin likened their proposal to “putting a thumb on the admissions scale (maybe even a thumb and a half)” in favor of children from humble backgrounds.²³ Thus, these authors saw this expanded interpretation of merit as one way to mitigate the social, financial, and cultural disadvantages many youngsters face during their early years.

Carnevale and Rose also backed this idea. They urged selection committee members to understand that what *qualified* means has always been “a dynamic concept,”²⁴ noting that, “While all striving has merit, striving against physical, social, economic, and cultural barriers is regarded as especially meritorious. In American culture, merit is measured not only by where one stands, but also by how far one had to go to get there.”²⁵ Carnevale and Rose insisted there is widespread support for this change, arguing that “Americans are still willing to give special breaks to people who show ‘the right stuff’ in overcoming barriers.”²⁶ The characteristics of merit, at least so far, have never been what George Bernard Shaw called a “closed question,” an unassailable truth.²⁷

Advocates of weighing initial disadvantage say, as do reformers supporting other forms of diversity, this change will enrich the campus learning environment. By sharing their stories, these students will help those who started life with substantial amounts of Bourdieu’s attributes of capital be more empathetic toward the less fortunate.²⁸

socioeconomic characteristics closely mirror those of the general population. See J. DONALD KINGSLEY, REPRESENTATIVE BUREAUCRACY (1944) for an early discussion about democratizing administrative organizations.

21. William G. Bowen, Martin A. Kurzweil & Eugene M. Tobin, *A Thumb on the Scale: The Case for Socioeconomic Affirmative Action*, HARVARD MAG. (2005), <http://Harvardmagazine.com/2005/05/a-thumb-on-the-scale.html>.
22. Using the word “privileged” demonstrates the power of double standards. Children born into poverty are commonly labeled underprivileged. Those born of wealthy parents are rarely called over privileged.
23. KURZWEIL ET AL., *supra* note 20, at 183.
24. Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, THE CENTURY FOUNDATION 6 (2003), <https://files.eric.ed.gov/fulltext/ED482419.pdf>.
25. *Id.* at 28.
26. *Id.*
27. GEORGE BERNARD SHAW, THE INTELLIGENT WOMAN’S GUIDE TO SOCIALISM AND CAPITALISM 1 (1928). Throughout his report, Barr contends that what counts for merit when deciding which students can study to become an M.D. has changed markedly over the years. DONALD A. BARR, QUESTIONING THE PREMEDICAL PARADIGM: ENHANCING DIVERSITY IN THE PROFESSION A CENTURY AFTER THE FLEXNER REPORT (2010).
28. In their study of high-achieving low-income students, Hoxby and Avery reported that many of these young people do not submit applications to any selective universities or colleges.

III. Law Student Diversity

Concern about socioeconomic diversity has expanded in theory and practice to include law students. Lani Guinier, the Bennett Boskey Professor of Law Emerita at Harvard Law School and daughter of a former Harvard professor,²⁹ argued that “[f]or the educational institutions in our democracy to be spaces of better deliberation for all of us, they must become more diverse and inclusive.”³⁰ For her, this change entails increasing the percentage of students who are not from “privileged backgrounds.”³¹ Guinier proposed that once law schools admit these “children of parents who did not go to college or in some cases didn’t even go to high school,” officials should not stop there.³² They should provide mentoring and support services to ensure these newcomers complete their studies.³³ She further argued that faculty and administrators should move all students toward a greater social class awareness by addressing socioeconomic issues on and off campus.³⁴ Guinier insisted her approach would better prepare all students for the inevitable resistance they will face when they raise questions about the importance of social class in understanding how laws are developed and applied, or sometimes not applied. Ultimately, according to Guinier, these orientation efforts will encourage all students to appreciate the numerous and varied viewpoints that have influenced and will influence the way members of their profession interpret and implement the law.³⁵

Lisa Pruitt, a law professor at the University of California Davis, agreed with Guinier’s reasoning, saying law schools should recruit, enroll, and provide support services to greater numbers of students from socioeconomically disadvantaged backgrounds.³⁶ She directed her commentary primarily at the

This finding was revealing given that these top-rated schools are frequently less expensive for these young people to attend than the resource-poor, nonselective colleges and universities where they apply. Hoxby and Avery attribute this lower effective cost to the ready financial assistance these selective colleges and universities make available to high-achieving low-income applicants. Those who do enroll in the more selective schools have high graduation rates. Caroline M. Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Dec. 2012), <https://www.nber.org/papers/w18586>.

29. Margaret Lee, *Lani Guinier*, in *NOTABLE BLACK AMERICAN WOMEN*, BOOK II, 261-63, at 262 (Jessie Carney Smith ed., 1996).

30. LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* 37 (2015).

31. *Id.* at 23.

32. *Id.* at 63.

33. *Id.* at 4, 40.

34. *Id.* at 71.

35. *Id.* at 119.

36. Lisa R. Pruitt, *The False Choice between Race and Class and Other Affirmative Action Myths*, 63 *BUFF. L. REV.* 981 (2015).

United States' elite programs.³⁷ Pruitt believed that because these institutions are often leaders in reforming higher learning, if they adopt her arguments and reasoning, other schools will follow.³⁸ No matter the program's ranking, she, like Guinier, insisted that increasing socioeconomic diversity among students at these elite schools will enhance the learning environment. Although Pruitt's primary focus was on white working-class students, she, again like Guinier, emphasized that much of her reasoning and many of her recommended reforms apply as well to poor and working-class students of "all colors."³⁹ This is why she titled her article "The False Choice Between Race and Class and Other Affirmative Action Myths." Pruitt proposed that once enrolled, these new students must be urged to reveal the lessons of their youth, saying these recollections will help other students, and presumably faculty and administrators raised in more fortunate circumstances, to understand better how class origins affect people's social and educational opportunities and thinking.⁴⁰ She was saying, in effect, that not only is it important for law schools to enroll more applicants with modest beginnings, these diversity efforts must include faculty and administrators' nurturing an environment that encourages students raised in poor or working-class surroundings to feel comfortable recounting the hardships they faced as youngsters. These newcomers must not be made to fear that many members of the campus community will look down on them for recounting examples of their deprivations. Otherwise, they will think they need to hide their class backgrounds and will do so by exhibiting middle- and upper-class values and actions. Feeling obligated to conceal their past evinces how classism affects what subjects are and are not discussed in and out of school, another demonstration of Bachrach's and Baratz's second face of power.

These orientation efforts should go beyond building class consciousness for everyone involved in the educational process. They must entail mentoring students from socioeconomically disadvantaged backgrounds so they will prosper in their studies and subsequent careers.⁴¹ Pruitt mentioned, for example, a University of California Berkeley program that teaches participants about matters that can help or hinder their current and future success. Topics covered include professional etiquette, law firm culture, and networking.⁴² Understanding these "ladders to success" will provide students with knowledge more readily available to those classmates whose parents and other acquaintances are attorneys.⁴³ Pruitt considered these recruiting and

37. *Id.* at 987.

38. *Id.* at 992.

39. *Id.* at 983, 1004, 1011, 1036, 1056, 1059.

40. *Id.* at 983, 986, 987.

41. *Id.* at 988, 1031.

42. *Id.* at 1031.

43. *Id.* at 1031 (citing Andrew Cohen, *Student Group Mentors and Guides First Generation*

integrative policies in terms of socioeconomic origins necessary now more than ever, given the steady upward redistribution of wealth that has occurred over the past several decades.⁴⁴ For her, this trend helps explain why law schools are graduating increasing numbers of students who reflect little of the country's socioeconomic makeup.⁴⁵ Because so many of today's policymakers are attorneys, and consistent with Michels' theory of organizational behavior, she accuses law schools of fostering an "insular plutocracy," a government increasingly unrepresentative of its constituents.⁴⁶

Pruitt recognized that some critics will insist that her recommended reforms cannot succeed because the law school socialization process of learning the accepted way attorneys should and should not think and behave will undermine her proposals.⁴⁷ This acculturation might include instruction in how lawyers are expected to dress and speak, and the terminology of the profession. She countered this socialization argument by saying that instilling dignity and pride in the law students who grew up poor or working-class can thwart these threats.⁴⁸ Rather than being embarrassed by their family backgrounds, these students will be emboldened to provide insights about what it means to have been raised in environments far different from those of many of their classmates.⁴⁹ Similar policies on ethnicity, race, and gender have greatly changed and enriched higher learning by bringing a wider range of teachings and publications, among other benefits, to the study and practice of law. The same benefits will derive from expanding the definition of diversity to include social class origins. Everyone involved in the educational process will profit from knowing more about how people's socioeconomic backgrounds shape their relationship with the legal system and their thinking about society's other institutions. An example of this change might involve viewing panhandling as a crime while not judging advertising the same way, as legal begging.

In a 2013 *Yale Daily News* article titled "Study finds class affects Law School experience," Aleksandra Gjorgievska recounted findings of an unpublished team research project overseen and edited by two Yale law students, Chase Sackett and Grant Damon.⁵⁰ Gjorgievska summarized their findings: "[A] majority of J.D. candidates who responded to a survey the team distributed last

Professionals, Berkeley L. (Oct. 15, 2014), <http://law.berkeley.edu/article/student-group-mentors-and-guides-first-generation-professionals>).

44. *Id.* 993; see also *Distribution of Household Wealth in the U.S. Since 1989*, Fed. Reserve Board, <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/>.

45. Pruitt, *supra* note 36, at 988.

46. *Id.* at 986.

47. *Id.* at 990, 1013.

48. *Id.* at 1031.

49. *Id.*

50. Aleksandra Gjorgievska, *Study finds class affects Law School experience*, YALE DAILY NEWS (Mar. 28, 2013), <https://yaledailynews.com/blog/2013/03/28/study-finds-class-affects-law-school-experience/>.

fall believe their class background and socio-economic status have influenced their experiences at the school.”⁵¹ She noted that many of the 243 respondents thought upper-class students had greater access to informal networks that can help them succeed. In follow-up interviews, the report’s authors found most professors and students welcomed the study, saying it spurred interest in how socioeconomic issues play out within the law school, primarily “because class is a factor in student life that members of the Law School community often neglect.”⁵² Gjorgievska noted that only about twenty percent of the survey participants thought their professors were empathetic toward their students’ social class origins.⁵³ She mentioned, for instance, that some professors made offensive comments about the less fortunate.⁵⁴ Respondents also noted that several faculty members assigned costly texts.⁵⁵ Apparently instead of providing less expensive options such as materials available online and supplying the campus bookstore with photocopied documents otherwise inaccessible, faculty required students to purchase expensive textbooks.

At one point, Gjorgievska wrote, “many respondents said they think the Law School student body is ignorant about issues of class.”⁵⁶ Elsewhere, she quoted Sackett as saying,

*At many universities nationwide, the issue of class is under the surface, even at universities with open cultures regarding issues such as race, gender and sexual preference. But social class comes through [here], even in everyday conversations, such as when students talk among each other about where they went on vacation.*⁵⁷

Evidently, insensitivity to the socioeconomic hardships some students face is intrinsic to the law school culture. Sackett recommended that Yale Law School include discussions about social class in the school’s orientation discussions on diversity’s many benefits.⁵⁸ He also thought it a good idea if program officials reconsider the requirement that students receive an instructor’s permission before enrolling in certain classes.⁵⁹ His advice derived from the survey finding that students of working-class origins reported feeling

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 2, 3.

less comfortable than their better-off cohorts interacting with faculty.⁶⁰ Sackett acknowledged that permanently changing the Yale Law School culture is mostly up to the professors, given their significant influence over governance.⁶¹

IV. Faculty Diversity

In 1994, Paul Light published “‘Not Like Us’: Removing the Barriers to Recruiting Minority Faculty.”⁶² His article eloquently tackled the question of merit and its implications for predetermining hiring outcomes. For Light, achieving a greater pluralism within the professoriate requires redefining *qualified* as well as “chang[ing] . . . how we view diversity.”⁶³ His proposed reform would counteract the tendency of like hiring like, or what amounts to the structural favoritism Michels said was ingrained in bureaucracies. Light insisted that these new recruiting efforts must avoid—again without mentioning Michels by name—the “new conductor, but the music is just the same” problem.⁶⁴ In his mind, overcoming this challenge means not replicating past practices by hiring women and racial minorities who are mostly younger “versions of ourselves,”⁶⁵ people whom he described as, “com[ing] out of the same traditions and career tracks as us [sic], whether minority or not.”⁶⁶ Relying on the old standards will simply replicate what exists and thus prevent higher education from achieving, as he described it, “the intellectual diversity [it] need[s],”⁶⁷ that is to say, presenting a greater array of views on how the law should be taught, developed, interpreted, and applied. Throughout his article, Light warned of other missteps to avoid when seeking a more representative faculty. His concerns included relying less on resumes filled with numerous publications or the likelihood of someone being a prolific author.⁶⁸ Too often it also meant graduating from a top university.⁶⁹ For Light, an efficient and effective way to change current practices is for colleges and universities to expand their recruiting policies to encompass nontraditional locations, such

60. *Id.*

61. *Id.* at 3.

62. Paul Light, “‘Not Like Us’: Removing the Barriers to Recruiting Minority Faculty,” 13 J. POL’Y ANALYSIS & MGT. 164 (1994).

63. *Id.* at 167.

64. MICHELS, *supra* note 2, at 266 n.330.

65. Light, *supra* note 62, at 165.

66. *Id.* at 167.

67. *Id.*

68. *Id.* at 166–68, 175, 177.

69. *Id.* at 166–67, 175.

as “less prestigious” schools⁷⁰ and nonacademic institutions, including think tanks and social organizations.⁷¹

Near the midpoint of his essay, Light cited comments two colleagues offered in response to his concern about improving faculty diversity.⁷² Both of his co-workers emphasized that reformers should expand their interpretation of minority. The first colleague asked, “Is our goal . . . to have faculty that reflects the diversity of society?”⁷³ If so, these democratizing efforts must include “creat[ing] new [professorial] opportunities that didn’t exist before.”⁷⁴ The other professor advised, “Those institutions that have been most successful in their attempts to transform themselves—this doesn’t have to do just with race—are those institutions that confront these deeply unsettled issues.”⁷⁵ In practice, this means adopting new recruiting, hiring, and promotion standards.

Knowing his ideas were a significant break from the prevailing view of diversity, Light cautioned advocates to be ready to defend themselves against the inevitable complaint that reinterpreting merit means lowering standards.⁷⁶ He proposed that the only response necessary to those supporting the *status quo* is to remind them that what counts as *qualified* has always been fuzzy.⁷⁷

V. An American Bar Foundation and Law School Admission Council Study

The ABF-LSAC jointly sponsored a research project leading to the 2011 publication of *After Tenure: Post-Tenure Law Professors in the United States*.⁷⁸ The researchers behind the study, Elizabeth Mertz, Frances Tung, Katherine Barnes, Wamucii Njogu, Molly Heiler, and Joanne Martin, said their goal was to “provide . . . information about the experiences of post-tenure law professors, . . . the missions of law schools, and diversity within the legal academy.”⁷⁹ They judged these questions important because law professors help shape the nation’s politics and society. They argued,

In the United States, law professors who have achieved senior status play an important role: They direct the initial training and screening of lawyers, who in turn play a

70. *Id.* at 173 (citing ROBIN KELLEY, ORGANIZATION OF AMERICAN HISTORIANS 7 (1993)).

71. *Id.* at 164, 167.

72. *Id.* at 169.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 176 (paraphrasing a colleague).

77. *Id.* at 165, 167–68, 170, 179.

78. Elizabeth Mertz et al., *After Tenure: Post-Tenure Law Professors in the United States*, Law School Admission Council (2012).

79. *Id.* at 1.

large role in this society's political and legal systems. Legal academics can also directly affect the conceptualization of national and local legal issues through their scholarship or through their own personal involvement as advocates, judges, or government officials . . . law professors also have a potential influence on the governing of our society—if not through their own individual efforts, then by shaping the educational institutions that train attorneys.⁸⁰

Mertz et al.'s results derived from a nationally distributed questionnaire asking tenured law faculty about their professional lives. Individual items on the questionnaire solicited information about gender, race, age, and parental education. Given the close association among educational attainment, income, and occupation, researchers often use years of formal learning completed as a social class proxy. Grbic, Garrison, and Jolly, for example, used parental education in their study of socioeconomic diversity among medical students in the United States.⁸¹ Mertz et al. used the same criterion to gauge the social class origins of the professors in their research. Their survey listed the following options for each participant's mother and father: 1) Some high school or less, 2) High school diploma or equivalent, 3) Some college/associate degree/vocational school, 4) Bachelor's or four-year degree, and 5) Some graduate school/graduate or professional degree.⁸² After combining Some graduate school/graduate or professional degree with Bachelor's or four-year degree or more under the second heading Bachelor's or four-year degree or more, the researchers concluded that the "survey results indicated that many tenured law professors come from educated and privileged backgrounds."⁸³

VI. Inbreeding at the Elites

In "Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors," Borthwick and Schau updated a 1980 ABA committee report about the backgrounds of law faculty at the United States' top-rated programs.⁸⁴ At one point they summarized the ABA results as showing that, perhaps not surprising to anyone familiar with Michels', Light's, and Schmidt's observations about the oligarchical nature of institutions, professors working in these programs were "almost exclusively elite school graduates,"⁸⁵ denoting

80. *Id.*

81. Douglas Grbic et al., *Diversity of U.S. Medical School Students by Parental Education*, 9 ANALYSIS IN BRIEF 1 (2010).

82. Mertz et al., *supra* note 78, at 7.

83. *Id.* at 6.

84. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J. L. REFORM 191 (1991).

85. *Id.* at 232.

universities commonly ranking among, say, the top twenty in the *U.S. News & World Report's* annual survey. Borthwick and Schau quote these amusing and revealing words from the ABA report:

Were we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system

. . . It seems clear that the inbreeding here is likely to contribute to a form of legal education that serves large firms and their corporate clients better than it does the lawyers who handle the personal legal problems of average people.⁸⁶

Namely, these programs are notably short on intellectual diversity. After conducting their own inquiry of the same group of scholars, Borthwick and Schau concluded that little had changed since the ABA report was released. They summarized their findings this way:

[T]he passageway to a career as a law professor remains quite narrow. With few exceptions, that passageway leads through one of the nation's top-ranked schools. Though this proposition may seem self-evident [sic] to members of the legal professoriate, it may surprise many who wish to become law teachers, as well as law school applicants generally. One wonders what impact this "inbreeding" has not only on legal education but on the development of the law itself.⁸⁷

Borthwick's and Schau's writings on the incestuous nature of law school personnel standards are another instance of the oligarchical nature of bureaucracies. In this case, it involves the leading organizations that are responsible for deciding how the law is taught, studied, and practiced.

VII. Confess'n the Blues

Jeffrey Harrison was someone who saw beyond the cultural and social boundaries of his time. In 1992, nineteen years before Mertz et al. conducted their research, he published "Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring."⁸⁸ Harrison was a professor of law at the University of Florida College of Law when his paper appeared in a symposium issue of

86. *Id.*

87. *Id.* at 237, 238; see also Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools*, 68 J. LEGAL EDUC. 614 (2019).

88. Jeffrey L. Harrison, *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring*, 42 J. LEGAL EDUC. 119 (1992).

the *Journal of Legal Education*. The theme of the law review edition was diversity.⁸⁹ Harrison's informal writing style illustrates how sometimes a work such as his can expose an issue or issues in a way data rarely can. Once these writings gain a wider audience, they can prompt reformers and their allies to rectify the problem that concerned the author or authors. Unfortunately, Harrison's folksy piece never found the reception it deserved, given the issue bothering him. Perhaps there is good reason for this oversight. First, he directed a sharp pen at those colleagues he held responsible for the problem he thought deserving of a remedy. Second, he was contradicting the nation's bootstraps folklore, the idea that the United States is a land where those born of the poorest of circumstances can be anything they choose if only they will work hard enough.

Harrison began his piece by recounting a conversation he had had with a colleague about faculty hiring. He wrote,

I telephoned an old friend the other day at another law school.

"What's up?" I asked.

"Faculty retreat," he replied.

"Sorry to hear it. Any topic, or just a weekend of touchy-feely?"

"Serious business," he said. "The theme is 'Recruiting for Diversity.' One session on race, one on gender."

"What about class—you know, poor and working-class candidates?"

"Are you kidding?" he responded. "Too important."⁹⁰

Believing class origins should be weighed as a diversity criterion, Harrison said when he interviewed someone applying for a position in his program, he looked for signs the person likely grew up working class.⁹¹ (Apparently he did not feel comfortable asking for this information directly.) Harrison said he regarded a candidate's class background as a worthwhile concern because faculty of humble origins can bring novel perspectives to the study and teaching of law.⁹² During his formal and informal interactions with every applicant, he looked for social class markers. He listed a few examples, such as

89. Mertz et al., *supra* note 78 (did not cite *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring* in their study).

90. Harrison, *supra* note 88, at 119.

91. *Id.* at 120.

92. *Id.*

whether the person had a crooked or discolored tooth,⁹³ had been an assistant manager at a fast-food restaurant,⁹⁴ wondered out loud whether a relative is entitled to food stamps⁹⁵ and if a nephew might be paroled soon.⁹⁶ If he detected any signs the person had likely overcome long odds to earn a law degree, he considered this evidence the applicant had the qualities necessary to become a successful academic.⁹⁷

Harrison saw his thinking as synonymous with that of his colleagues, only upside down.⁹⁸ He interpreted a candidate having grown up disadvantaged as evincing merit, while the others were relying on traditional indicators, such as a high GPA from a top law school or a clerkship.⁹⁹ Drawing on his then fourteen years of teaching law, he argued that his colleagues favored the standard determinants of what it means to be qualified as nothing more than an excuse for hiring the people Mertz et al. depicted as coming from “educated and privileged backgrounds.”¹⁰⁰ Harrison characterized the other faculty’s reasoning as little more than an “instance of self-referential wishful thinking,”¹⁰¹ or just another case of like hiring like.¹⁰² Harrison believed his approach mirrored that of his colleagues in the sense he and the others were playing the odds, only he was betting on a different set of odds. In his mind, he was willing to wager that his approach would yield a hire who could bring some long-underrepresented thinking to the profession. Harrison, like Bowen, Kurzweil, and Tobin, preferred to put a thumb, or a thumb and a half, on the scale in favor of what he called “blue-collar diversity.”¹⁰³

Harrison was not done. He went on to suggest why law schools, and so many people in the United States for that matter, are leery about questioning the effects of social class inequalities on various aspects of life. This reticence discourages most law school professors from weighing socioeconomic origins in faculty hiring. Harrison said this same hesitancy helps explain why working-class people generally fail to see “themselves as victims of any sort.”¹⁰⁴ They tend not to envision how “the opportunity deck” has been stacked against

93. *Id.* at 121.

94. *Id.*

95. *Id.* at 123.

96. *Id.*

97. *Id.* at 122.

98. *Id.*

99. *Id.*

100. Mertz et al., *supra* note 78, at 7.

101. Harrison, *supra* note 88, at 122 (citing Derrick Bell, *Application of the “Tipping Point” Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986)).

102. SCHMIDT, *supra* note 8, at 64; MICHELS, *supra* note 2, at 245.

103. Harrison, *supra* note 88, at 122.

104. *Id.* at 124.

them.¹⁰⁵ Instead, the American dream misleads them to believe they are fully responsible for their station in life. They are never urged to examine critically how structural classism, although he did not call it that, influences their mobility chances, versus those who inherit considerable sums of Bourdieu's three elements of wealth. He reasoned that people born working class think if they exert enough effort, they will make it to the top or, if nothing else, get there by winning big money in the state lottery.¹⁰⁶ Unlike other disadvantaged groups, working-class people have not established "consciousness-raising groups."¹⁰⁷ Failing to question the consequences of inherited advantages, versus inherited disadvantages, working-class people assume, according to Harrison, that without enough labor, they will not get a high-status job, or maybe become a law professor (if they even know about this possibility to begin with).¹⁰⁸ Meanwhile, today's law faculty "wallow in the benefits of [these] . . . misconception[s] and most know that it is in their interest to leave well enough alone."¹⁰⁹ This willingness to "leave well enough alone" is another example of Bachrach and Baratz's second face of power: preventing an item from being considered.¹¹⁰

VIII. Recommendations

Opening the Closed Question: Nobody has offered a nuanced plan for achieving Harrison's "blue-collar diversity" among law professors.¹¹¹ Nor has anyone

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Stephen J. McNamee and Robert K. Miller Jr.'s *The Meritocracy Myth* provides a well-documented and highly readable account of the nebulous quality of merit and how its evolving definition has worked to disadvantage people based on physical disability, religion, personal appearance, geographical region, age, and social class background.

110. Bachrach & Baratz, *supra* note 14, at 949.

111. Michael Higdon describes how law school hiring heavily favors graduates of America's top-rated law programs. He reasons that if all schools began hiring graduates of less prestigious colleges or universities, this change would significantly increase socioeconomic diversity among the nation's law faculty. He might be right, in a small way, but then again maybe not. Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias* 87 ST. JOHN'S L. REV. 171, 195 (2013).

If history is any guide, his plan risks becoming another example of Michels' "new conductor, but the music is just the same" (*supra* note 2, at 266, note 330). There is no guarantee that if implemented his hiring strategy would not primarily benefit upper-middle- and upper-class applicants. Like hiring like, only the "like" in this case would be those prospective hires who graduated from a less prominent law program. The present discussion proposes instead to find, first, a way of assessing each applicant's socioeconomic background and, second, the administrative steps necessary to achieve as well as maintain Higdon's and Harrison's ideal of a more socioeconomically diverse law professoriate.

outlined policies intended to change the culture of current-day legal education to make law schools more representative and welcoming places for working-class academics (hereinafter WCA).¹¹² The following paragraphs suggest ways to accomplish these results.

Coaxing: The principles Thaler and Sunstein presented in *Nudge: Improving Decisions About Health, Wealth, and Happiness* should inspire the movement to democratize law schools.¹¹³ The two authors propose changing people's thinking and actions using free-market incentives. They prefer persuasion to force of law to achieve a desired end.¹¹⁴ Thaler and Sunstein explain their thesis this way: "In many cases markets provide self-control services, and government is not needed at all."¹¹⁵ They believe that information and peer pressure are better ways of achieving the "good . . . cause."¹¹⁶ Among other motivating factors, Thaler and Sunstein say, leaders can employ research findings and publicity "to move people in better directions."¹¹⁷ For example, U.S. government officials have used public service announcements to convince smokers that it is in their self-interest to abandon the habit, as this change in behavior will lower their chances of contracting cancer, emphysema, heart disease, and other health problems. Peer pressure, public opinion, and facts can force law schools to open, in Shaw's words, "a closed question."¹¹⁸ In this case, it means expanding the definition of *qualified* to include class background concerns, as has been happening with other demographic considerations, such as race, ethnicity, and gender.

Gathering Evidence: Not so long ago, law schools did not collect and report information about the number of female and minority students and faculty in their programs, facts previously considered irrelevant for hiring and admissions purposes. Today, law programs assemble and publicize data on these and other classifications, such as undergraduate GPA, LSAT percentiles, and countries, states, and undergraduate schools.¹¹⁹ Having numbers readily available allows

112. For present purposes, working-class academics include those whose parent, parents, or caretaker(s) were unemployed or were raising children, held blue- or pink-collar jobs, and never attended an academic college during the applicant's youth. Those applicants failing to meet all these criteria will not be granted a thumb and a half. These standards are suggestive. No matter how the ABA eventually operationalizes and later refines the term (as times change), the focus should always be on identifying those individuals who grew up with significantly fewer financial, social, and cultural assets.

113. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

114. *Id.* at 47.

115. *Id.* at 48.

116. *Id.* at 71.

117. *Id.* at 59–60.

118. SHAW, *supra* note 27, at 1.

119. *HLS Profile and Facts, J.D. Class of 2023*, Harvard Law School <https://hls.harvard.edu/dept/jdadmissions/apply-to-harvard-law-school/hls-profile-and-facts/>.

diversity advocates to hold schools responsible for their personnel decisions. This accounting has bolstered efforts to enroll more women and racial and ethnic minorities in the study and instruction of law, making the discipline more representative of the public it serves.

Because the ABA and law programs do not solicit and publicize data about the socioeconomic origins of faculty,¹²⁰ this oversight allows all but those in the know to assume, if they think about it at all, that “If nobody counts it, it must not count.” Without counting there is no accountability.

A Yardstick: Educational attainment has been rising in the United States during the twentieth century and, as Mertz et al.’s survey results show, years of formal learning tend to run in families.¹²¹ That is, the higher the educational attainment of the parents, the more likely it is their children will graduate from college and, in disproportionate numbers, finish a graduate or professional degree.

The questionnaire in Appendix A was used in three published studies to solicit information about the respondent’s parents’ occupation and educational attainment.¹²² The reply rates were high, ranging from sixty-two to sixty-eight percent. The versatile survey requires only a minute or two to complete. Depending on circumstances, the sixteen categories can be used either as is or condensed to match classifications listed in other studies, such as Mertz et al.’s.

Each of the three published studies controlled for the average age among the respondents. It was assumed that the participants were born to women between the ages of twenty-five to thirty-four years, the census category allowing for most of the participants’ mothers from those times to have completed an undergraduate degree or more.

120. The ABA Profile of the Legal Profession (2019) includes statistics concerning women and racial and ethnic minorities, but nothing about socioeconomic origins, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.
121. Mertz et al., *supra* note 78, at 7; see also ANTHONY P. CARNEVALE & JEFF STROHL, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 42 (2013); Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES 91–115 (Greg J. Duncan & Richard J. Murnane eds., 2011); Emily Forrest Cataldi et al., *First-Generation Students: College Access, Persistence, and Postbachelor’s Outcomes*, U.S. Dep’t of Educ. (Feb. 2018), <https://nces.ed.gov/pubs2018/2018421.pdf>.
122. Kenneth Oldfield, *Social Class-Based Affirmative Action in High Places: Democratizing Dean Selection at America’s Elite Law Schools*, 34 J. LEG. PROF. 307, 316–20 (2010); Kenneth Oldfield, *Achieving Social Class Diversity Throughout the Workforce: A Case Study of TIAA-CREF*, in CONSIDERING CLASS: ESSAYS ON THE DISCOURSE OF THE AMERICAN DREAM 149–66, 160 (Kevin Cahill & Lene Johannessen eds., 2007); Kenneth Oldfield, *Socioeconomic Origins of Deans at America’s Elite Medical Schools: Should These Leading Programs Weigh Deans’ Social Class Background Information as a Diversity Criterion?*, 85 ACAD. MED. 1850, 1852 (2010).

One of the three projects was published in 2008; it tested socioeconomic diversity among deans at the fifty highest-rated law programs in the United States. The mean age of these administrators was approximately fifty-six years. Therefore, in 2008 the average birth year for these deans was roughly 1952. For comparative purposes, and because formal schooling levels among people in the United States has steadily risen over the years, the education findings for the deans' parents were measured against national figures for 1950, the census year nearest to 1952. The analysis revealed, perhaps not surprisingly, most of these administrators were from “educated and privileged backgrounds,” as Mertz et al. said about the tenured law professors who participated in their study.

In their research, Mertz et al. did not differentiate between those respondents with “Some graduate school,” the category they used, and respondents who earned a graduate or professional degree when comparing their results with U.S. Census figures. An article published in 2018 analyzed the social class origins of medical students and demonstrated the rewards of noting respondents whose parents completed an advanced degree versus those respondents who entered a graduate program but did not finish, thereby being categorized as “BS/BA.”¹²³ After controlling for age, the analysis matched the reference population, U.S. Census figures for Illinois residents, against years of formal schooling completed by the mothers and fathers of cohorts attending one of that state’s medical schools during the years 2006 to 2015, inclusive.¹²⁴ The results revealed that the 658 fathers of these students were 1.3 times more likely to have earned a BS/BA, 3.3 times more likely to hold an MA, and 10.1 times more likely to have obtained a “Doctorate/Professional” degree.¹²⁵ Conversely, the 683 mothers of the students were 2.1 times more likely to have received a BS/BA, 4.1 times more likely to have completed an MA, and 3.9 times more likely to have a “Doctorate/Professional” degree.¹²⁶ These data are consistent with Mertz et al.’s conclusions that educational attainment runs in families; growing up with access to social, financial, and cultural capital greatly increases the odds a young person will earn an undergraduate or an advanced degree.

Broadening the Meaning of Merit: To gauge diversity levels among faculty at the nation’s law schools, the ABA should adopt an accreditation standard supporting a request for data on the socioeconomic origins of professors currently on staff at every law school. The parental education questions in Appendix A should be incorporated in the ABA’s standard demographic questionnaire to collect these figures.

123. Kenneth Oldfield, *Diversity Among American Medical Students by Parental Education: Improving Participation Rates for a Historically Underrepresented Community*, 1 TRENDS IN DIVERSITY 19–20 (2018), <https://digitalcommons.kent.edu/cgi/viewcontent.cgi?article=1014&context=td>.

124. *Id.* at 15.

125. *Id.* at 19.

126. *Id.* at 20.

When hiring, individual law schools should distribute the questionnaire in Appendix A to those submitting materials for every advertised job opening. The survey should be circulated right after the closing date for accepting applications. Persons failing to complete and return the form would not be granted a thumb and a half in the hiring process.

Proctoring: Initially, the analysis should monitor faculty diversity according to parental education relative to U.S. Census figures after controlling for age and using the parent with the highest level of education as the household standard. The results should be collapsed into five categories instead of Mertz et al.'s four. That is, 1) High school or less, 2) Some college, 3) BA/MS, 4) MA/MS, 5) Doctorate/professional. Given the wide range of possible replies, the groupings could be modified periodically depending on lessons learned through use and changes in how the government lists education levels. As shown earlier, adding the master's and doctorate/professional classifications will provide a more discerning measure of diversity in individual programs and in the field in general. For the ABA and each program these survey options can be consolidated or expanded depending on which categories best fit the needs and politics of the time.

Bonus Points: Occupation information should be used to identify individuals whose parents never attended college, or maybe did not complete high school, and who held low-paying, low-status jobs.¹²⁷ These applicants deserve extra credit, two thumbs instead of a thumb and a half, for having shown, according to Carnevale and Rose, “the right stuff” in overcoming barriers.”¹²⁸ An instance of this approach is a candidate whose parents were migrant farm workers or janitors and went only as far as eighth grade. Personnel committees can evaluate candidates, again quoting Carnevale and Rose, “not only by where [they] stand . . . , but also by how far one had to go to get there.”¹²⁹ This method demonstrates the advantage of using sixteen options to identify parental education levels.

Publicity: All law programs should list the ABA survey results on their websites according to the five recommended categories along with the other demographics they normally offer. These educational data should be updated periodically, potentially every three years, and posted to the school's website immediately after each reassessment.

According to *The ABA Standards and Rules of Procedure for Approval of Law Schools 2020-2021*, “All information that a law school reports, publicizes, or distributes shall be complete, accurate and not misleading to a reasonable law school student or applicant. A law school shall use due diligence in obtaining and verifying such information.”¹³⁰

127. See *supra* note 112.

128. Carnevale & Rose, *supra* note 24, at 28.

129. *Id.*

130. *Admissions and Student Services: Standard 509. Required Disclosures*, American Bar Association, at

The same document states that law schools must disclose the “numbers of full-time and part-time faculty.”¹³¹ The ABA should also solicit and assemble the parental education data gathered from each law school and list the combined results on its website shortly after each three-year census of faculty members together with any other metrics it ordinarily provides about the professors currently on staff. This accounting would enable reformers to hold all law schools and the field overall responsible for their democratizing outcomes. In other words, the ready availability of these numbers would make it possible to monitor socioeconomic diversity by program and by the discipline at large, including testing for discernible trends. Expanding the ABA’s demographic survey as proposed here would show that the discipline formally acknowledges that Thaler and Sunstein’s notion of nudging is difficult or impossible without quantitative evidence.¹³²

Accolades: In 2011, the *National Jurist* published an article titled “Most diverse law schools.”

Focusing primarily on the racial and ethnic identities of students, the discussion mentions in passing that the faculty at the University of New Mexico are diverse according to these two categories. As Kevin Washburn, dean of this law school, explained, “Having a diverse faculty is attractive to students Students see professors that are like themselves.”¹³³ Elsewhere the article states, “Schools are also increasing efforts to hire more women and minority educators.”¹³⁴ The examples cited to support this claim are racial and ethnic hires. The article does not mention increasing socioeconomic diversity among students or faculty.

In 2016, *preLAW* published a story saying its staff had evaluated law programs for diversity. The piece reported, “Each school was assigned a grade, with schools that received a B+, A-, A or A+ being honored in the magazine. The magazine will also rank schools that received an A+ or A.”¹³⁵ The article provided an alphabetical listing of sixty law school programs that earned good grades for faculty and student diversity by race and ethnicity.¹³⁶ The winners

35, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter5.pdf.

131. *Id.* at 36.

132. THALER & SUNSTEIN, *supra* note 113.

133. *Most Diverse Law Schools*, NATIONAL JURIST 2 (Mar. 15, 2011), <http://www.nationaljurist.com/content/breaking-news/most-diverse-law-schools> (internal quotation marks omitted).

134. *Id.*

135. Prelaw releases most diverse law school list, *prelaw releases Most Diverse Law School List*, NATIONAL JURIST 1 (Dec. 1, 2016), <https://www.nationaljurist.com/prelaw/prelaw-releases-most-diverse-law-school-list>.

136. *Id.*

included American University, Charlotte School of Law, and Northeastern University.¹³⁷ The socioeconomic background of neither the faculty nor the students was considered when grading each program. Obviously, it would be impossible to determine the class origins of professors because law schools do not collect these data.

Henceforth *preLAW* and other publications such as *U.S. News & World Report* should grant favorable attention to law programs that achieve high marks for socioeconomic diversity among their professors. Those schools registering appreciable improvement in faculty diversity also deserve recognition.

Programs receiving high grades should tout this achievement on their websites and through local media. These tributes would be an incentive to achieve greater socioeconomic integration among faculty at all the nation's law schools. Such recognition would also bring greater attention to this long-overlooked diversity standard. Winners would be spurred to keep doing what they are doing and motivate other law schools to improve their faculty diversity.

Granting these awards would have other benefits. Programs with an underrepresentation of WCAs could consult with winners to learn what steps have proved most successful in assembling a diverse faculty. These conversations and correspondences could lead, in turn, to faculty publications and conference presentations on implementing effective reforms. Law journals have published articles about socioeconomic diversity among law faculty and administrators.¹³⁸ These periodicals could serve as outlets for lessons about what policies have proved best for promoting socioeconomic integration among law faculty. Including class background as a merit criterion could eventually lead to law professors' and their students' presenting papers and participating in discussions on this subject at professional gatherings.

Diversity Announcements: All law schools should expand the wording in their affirmative action announcements by suggesting that applicants seeking law school professorships who are first-generation college students and were raised in poverty or working-class environments are strongly encouraged to apply. This language is crucial because people born into these circumstances must recognize, perhaps for the first time, that personnel committees will now consider overcoming socioeconomic obstacles as evidence of merit. The revised notice should read, for example: "Applications from minorities, women, and candidates who are first-generation college students, and have poverty- or working-class origins, persons with disabilities, and military veterans are especially welcome." Expanding the affirmative action statement would signal to all newly hired WCAs that they no longer need downplay or conceal their backgrounds. They can take pride in their origins.

Informalities: Reformers should use less structured means to recruit and hire WCAs. An example is targeting organizations such as the Association of Working-Class Academics (AWCA) and people affiliated with the Working-

137. *Id.*

138. Harrison, *supra* note 88; Oldfield, *Social Class-Based Affirmative Action*, *supra* note 122.

Class Studies Association. Members of these groups would welcome the chance to list job announcements on their websites—in the case of AWCA, in its publication titled *Journal of Working-Class Studies*.¹³⁹

Hiring Academic Veterans: Beyond changing their job notices, the nation's elite law programs, perhaps those consistently listed among the top fifty law schools in the *U.S. News & World Report's* annual survey, should actively recruit WCAs tenured at less prestigious schools. Recruiting committees at the less competitive programs should fill any now open positions with WCAs.

Looking Outside: In *Not Like Us*, Light suggested that higher education actively solicit applications from potential candidates working at nonacademic institutions, including think tanks and social organizations.¹⁴⁰ Law schools should also focus their recruiting efforts on seeking applicants from certain parts of the United States. According to one source, graduates of less prestigious law programs are more inclined to reside and work in the Pacific Northwest and Atlantic Southeast.¹⁴¹ Recruiters should devote greater attention to both academic and nonacademic institutions located in these areas. With experience, these efforts could be further refined to specific sections of these regions, places more likely to yield academic job seekers deserving of at least a thumb and a half.

Graduates of places such as Berea College in Kentucky, a four-year institution that “offers a high-quality education to academically promising students with limited economic resources,” should be identified and encouraged to apply.¹⁴² This school does not charge tuition and instead offers full scholarships to all its students who, in turn, are required to work ten hours per week in campus and service jobs. Berea finances these scholarships through endowment earnings, donations, and other financial funds.¹⁴³

While lawyers would be the primary focus of these personnel efforts, schools should consider soliciting applications from Ph.D.s teaching in relevant fields, such as constitutional law or administrative law. These professors could provide law students with a more social science, policy-based interpretation of the field. Much of law derives from policies that develop slowly and then become entrenched, and this makes it difficult to change the law. If these WCA

139. See, e.g., *Working-Class Academics Section*, Working-Class Studies Association <https://wcstudiesassociation.wordpress.com/working-class-academics-section/>.

140. Light, *supra* note 62, at 164, 167.

141. *Choosing a Law School: Pre-Law College*, Alma College, <https://www.alma.edu/academics/pre-law/choosing-a-law-school/>.

142. *Quick Facts*, Berea College, <https://www.berea.edu/about/quick-facts/>. In 1855, Berea was the first college in the South to become coeducational and interracial. *Our Inclusive History: From 1855 to Today*, Berea College, <https://www.berea.edu/about/1855-to-today/>.

143. Tim Jordan, *Elite and Affordable*, Berea College, <https://www.berea.edu/news/elite-and-affordable/#:~:text=For%20example%2C%20Lucci%20points%20out,Berea%20is%20an%20%E2%80%9C.%20.%20>.

Ph.D. candidates perform well during their interviews, they should be granted a thumb and a half in hiring.

Diversity Within Diversity: Light recommended that universities ensure their personnel selection committees are diverse.¹⁴⁴ For present purposes the goal should be including as many WCAs on these panels as feasible when deciding faculty hires. This reform would serve two purposes. First, it would help colleagues raised with class privilege better appreciate how growing up with limited cultural, social, and financial assets curtails educational opportunities. Sometimes a personal observation by a WCA might be all it takes to convince the other committee members that despite having gone to a less prestigious law school, the candidate has shown “the right stuff,” as Carnevale and Rose¹⁴⁵ said, to be a sound hire. Hiring these applicants would help counteract the inbreeding problems noted earlier.

Second, these committee sessions would be an ideal setting for WCAs to recommend materials that recount how socioeconomic origins affect peoples’ relationship to higher education. For example, a WCA might explain to colleagues what it means to have never heard of a Ph.D. before entering college, wondering instead why a physician was teaching literature, or the effects of attending substandard elementary grade and high schools, or why it seemed odd that, unlike his or her family members, few if any of his or her professors wore dentures, something likely taken for granted by faculty raised by parents who could afford high-quality dental care and understood the value of proper oral hygiene and the rewards of shopping for a good dentist.

Finally, in addition to the sources mentioned above,¹⁴⁶ other possible writings to recommend to these more fortunate colleagues include Harrison’s¹⁴⁷ and Light’s¹⁴⁸ essays, and Cleveland’s *Helping First-Generation Lawyers Thrive*.¹⁴⁹ Reading the parts of Vance’s *Hillbilly Elegy* in which he recounts growing up poor in Appalachia followed by his three years at Yale Law School is a highly efficient and effective way to show what being a stranger in a strange land means: ranging from that campus’s intellectual, social and financial culture to job interviewing to dining etiquette.¹⁵⁰

Faculty Advising, Mentoring, and Scholarship: WCAs are well-qualified to help law students from working-class backgrounds make more informed decisions

144. Light, *supra* note 62, at 168–69, 172.

145. Carnevale & Rose, *supra* note 24, at 2.

146. *See generally supra* note 12.

147. *See generally* Harrison, *supra* note 88.

148. *See* Light, *supra* note 62.

149. Grover E. Cleveland, *Helping First-Generation Lawyers Thrive*, LAW PRACTICE TODAY (Apr. 13, 2018), <https://www.lawpracticetoday.org/article/helping-first-generation-lawyers/>.

150. J. D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016); *see also* RYAN & SACKERY, *STRANGERS IN PARADISE: ACADEMICS FROM THE WORKING CLASS* n.13 (1995).

about professional and personal choices. WCAs can foster mentorships that encourage these students to take advantage of informal learning opportunities, such as working on law reviews and applying for local, state, and federal clerkships, especially the latter.

Working-class students aspiring to be academics are less likely to recognize the importance that finishing programs, such as visiting assistant professorships, play in faculty hiring decisions. Experiential activities can give someone an advantage toward becoming a WCA. Perhaps the most important lesson mentoring sessions can teach working-class students is to remind them that the worst that can happen if they apply for a law school faculty position is to receive a rejection letter.

Wherever possible, WCAs should invite working-class students to participate in research projects that might produce publishable materials. The odds of having an article, monograph, or book published improves with experience. Most people usually become better at writing by doing more of it. These partnerships are arguably the most effective way of helping working-class students appreciate the role of writing in academic hiring, tenure, and promotion. Students from lower socioeconomic groups may have fewer chances to do the kind of post-law school scholarly writing that is increasingly expected from entry-level law school professors. Even if they do not aspire to be academics, no matter their chosen career path, they will be evaluated by their writing skills.

Mentoring should not be confined to students. Seasoned WCAs should volunteer to tutor newly hired WCAs in understanding the tenure and promotion criteria applicable in their programs. With ongoing oversight, the newcomers can concentrate on activities that meet these tenure and promotion standards.

Enrolling more WCAs would likely improve career advising, boost the number of publications about the relationship between the law and social classes, and encourage discussions with law students about giving back to their communities of origin.

Modeling: Having more faculty out of the “[c]lass [c]loset”¹⁵¹ on a law school staff would afford students from similar backgrounds the chance to see people like themselves become authority figures. This exposure would not only encourage law students to see academic careers as a possibility, it would motivate these students toward a greater pride in their own accomplishments, thereby stirring the long-overdue class consciousness Harrison envisaged. They will see why they are called classrooms.

IX. Conclusion

151. Felice Yeskel, *My First Closet was the Class Closet*, in *RESILIENCE: QUEER PROFESSORS FROM THE WORKING CLASS* 131-47 (Kenneth Oldfield & Richard Gregory Johnson, III eds., 2008).

Similar to most other social science groupings, no measure of socioeconomic status will ever be perfect. Operationalizing terms for research or policymaking requires value judgments that establish category boundaries. In *Constructing "Race" and "Ethnicity" in America: Category-Making in Public Policy and Administration*, Yanow¹⁵² showed how the definition of race has always been murky (becoming more so with the increasing number of interracial unions). Nevertheless, this ambiguity has not stopped people inside and outside the academy from operationalizing race and ethnicity for policy purposes. Molly Ivins offered a persuasive counterpoint to those detractors who will say social class cannot be deployed for faculty diversity purposes. Her justification for not letting the perfect be the enemy of the good was straightforward:

Look, all of law is a process of drawing lines on slippery slopes. The difference between misdemeanor theft and felony theft is one penny. The difference between misdemeanor and felony drug possession is one gram. For that matter, the difference between a pig and a hog is one pound. We're always drawing distinctions, and it is necessary to do so.¹⁵³

The law thrives on nuances. Consequently, there is no reason to go beyond Ivins' words to understand the practicality of adopting socioeconomic origins as a diversity goal, including what constitutes an acceptable level in deciding which programs are representative and which are not.

Making these recommended changes in faculty hiring would help all students appreciate the wisdom in Anatole France's wry observation that "the majestic equality of the laws . . . forbid[s] rich and poor alike to sleep under . . . bridges, to beg in the streets, and to steal . . . bread."¹⁵⁴ Ideally, these reforms will lead students to choose careers that focus on achieving greater equality in the distribution of Bourdieu's three forms of wealth.

Sackett said that given the significant role faculty play in governance, they should lead efforts to reshape the character of Yale Law School by calling attention to the consequences of socioeconomic inequalities on that campus.¹⁵⁵ The same argument should be the central tenet on every campus. Moreover, the reasoning Pruitt used to justify enrolling more working-class students applies as well to their professors. Hiring more WCAs is arguably the most powerful antidote to the "inbreeding" problem noted earlier.¹⁵⁶

152. DVORA YANOW, *CONSTRUCTING "RACE" AND "ETHNICITY" IN AMERICA: CATEGORY-MAKING IN PUBLIC POLICY AND ADMINISTRATION* (2002).

153. Molly Ivins, *Throwing hissy fits over sound court decisions*, CHICAGO TRIBUNE (July 3, 2003), <https://www.chicagotribune.com/news/ct-xpm-2003-07-03/0307030107-story.html>.

154. ANATOLE FRANCE, *THE RED LILY* 75 (1924).

155. Gjorgievska, *supra* note 50, at 3.

156. Borthwick & Schau, *supra* note 84.

All law schools receive direct and indirect forms of public support. This aid influences, in turn, how they conduct operations. Grants are conspicuous instances of government assistance. The financial advantages of tax exemptions, or tax expenditures as they are also called, are less so, but worth noting. Other indirect benefits are more obscure. These include, for example, income earned from investments and tax-deductible donations from graduates, citizens, and corporations.

Given the many ways government subsidizes law programs, advocates are entitled to know how school officials allocate this assistance—here meaning how much they are or are not employing a socioeconomically diverse faculty. Once available, these data can also be used in various ways to, as Harrison said, motivate working-class people to finally see “themselves as victims,”¹⁵⁷ and without fear of being accused of what some will undoubtedly and falsely call whining. This change will help them overcome, in Harrison’s words, the “illusion that the doors to high positions are somehow open to them if they just try hard enough”¹⁵⁸ Perhaps he will eventually get his wish and see university-sponsored “poor or blue-collar consciousness-raising groups”¹⁵⁹ become commonplace, not only within law schools but on campuses everywhere. Ideally, his idea will spread beyond the academy.

Much of life involves deciphering mazes. Harrison clearly understood that contrary to the American myth of endless opportunities for upward mobility, WCA applicants have undoubtedly proved their merit by overcoming many cultural, social, and financial disadvantages to gain their academic credentials. Light’s willingness to question the egalitarian implications of the (then) accepted way of interpreting *qualifications* is what he intended by his “Not Like Us” challenge to existing personnel standards, involving both formal and informal criteria. Harrison, Light, and others understand the need to perpetually rebalance opportunities. For alarmists who use “redistribution of wealth” as fear words, reformers need only remind them that the United States has been reallocating wealth upward for the past several decades under the guise of supply-side economics, a modern-day retelling of Say’s Law (supply creates its own demand).¹⁶⁰ Harrison, Light, and reformers of like mind want to redistribute wealth in the form of opportunities, in this case holding law schools accountable for making room for more WCAs and the diversity benefits these faculty will provide.

Redefining what allegedly counts as *merit* will not be easy if history is any guide. The battle to increase racial, ethnic, and gender representation throughout higher learning faces numerous obstacles, ranging from court challenges to executive orders to denying tax exemptions to voter referendums. These impediments have not stopped reformers from continuing to push for

157. Harrison, *supra* note 88, at 124.

158. *Id.*

159. *Id.*

160. See *supra* note 44.

change. Striving to recruit more WCA law professors will face similar if not more hurdles. Admissions committees weigh socioeconomic information as a diversity factor when deciding which students to accept. Law schools have yet to apply the same standard to hiring faculty. This telling nondecision gives added power to the academy's self-proclaimed commitment to fostering critical thinking through inclusiveness. Until the class background considerations that are good for students apply in faculty hiring, Harrison's introductory commentary about "Recruiting for Diversity" endures:

"What about class—you know, poor and working-class candidates?"

"Are you kidding? . . . Too important."

APPENDIX A

Name _____

The first two questions ask about your parents, 'stepparents,' guardians, 'or primary caregivers' occupations when you were growing up. Indicate the kind of work each person performed. In either or both instances, provide a SPECIFIC answer. If one of your caretakers was an ENTREPRENEUR, describe what that individual did. For instance, say your primary caretaker sold farm equipment. Don't just say ENTREPRENEUR. Or, if your primary caretaker was a MANAGER, describe WHAT KIND OF MANAGER. Say, for example, "managed a line of clothing stores." Likewise, if this caretaker was a SCHOOLTEACHER, say "taught English in a public high school." Fill in the spaces.

i. While you were growing up, what was your parent's, stepparent's, guardian's, or primary caregiver's main occupation - that is, what kind of work did this individual perform? (Be precise. Describe the specific line of work.)

ii. While you were growing up, what was your parent's, stepparent's, guardian's, or primary caregiver's main occupation - that is, what kind of work did this individual perform? (Be precise. Describe the specific line of work.)

iii. While you were growing up, what was your parent's, stepparent's, guardian's, or primary caregiver's education levels?

#1	#2	Education Level
		Grade School
		Junior High School
		Some High School
		Completed High School
		Vocational School (for example, barber school, beautician school, secretarial school, career college, and so forth).
		Some College
		Associate Degree
		Completed College
		Attended Graduate School
		Completed Graduate School (master's degree)
		Ph.D., or Equivalent (for example, Ed.D.)
		Attended Law School
		Completed Law School
		Attended Medical School
		Completed Medical School
		Other (specify) _____