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RACE AS A RED HERRING? THE LOGICAL IRRELEVANCE OF THE RACE VS. CLASS DEBATE

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A theory has only the alternative of being right or wrong. A model has a third possibility: it may be right, but irrelevant.

- Manfred Eigen¹

INTRODUCTION

A theory is a hypothesis of what will happen when a particular set of circumstances are in play. The theory can be right in predicting outcomes or it can be wrong. When a theory is well-tested and highly reliable, it can hope to become a scientific principle or even a scientific law. A model, on the other hand, is a structure or a narrative through which one strives to illustrate the theory being pursued.² As Manfred Eigen elucidates in the quote above, a theory can be proven right or wrong with data and/or by experimentation; however, the model or narrative created to explain that theory does not necessarily have to be wrong to be wholly irrelevant.

Professor Richard Sander's theory posits that by not focusing directly on class in their admissions processes, law schools are doing a disservice to their stated quests for diversity.³ He painstakingly creates a socioeconomic status (SES) data set that compares respondents in the After the JD study (AJD)⁴ to demographic slices of the 2000 census data with carefully integrated components of occupational indices. Although a reasonable person can/may/should disagree with the validity and reliabil-

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1. Manfred Eigen, *The Origin of Biological Information*, in *THE PHYSICIST'S CONCEPTION OF NATURE* 618 (Jagdish Mehra ed., 1973) (Manfred Eigen is biophysicist and won the 1967 Nobel Prize in Chemistry).

2. See generally *SCIENTIFIC THEORY OR MODEL*, <http://aether.lbl.gov/www/classes/p10/theory.html> (last visited May 17, 2011) (discussing theories and models for Professor Smoot's physics class). See also *George Smoot Wins Nobel Prize in Physics*, *BERKELEY LAB*, <http://www.lbl.gov/Publications/Nobel/> (last visited May 17, 2011) (providing a perspective and biography on Professor George Smoot, his Nobel Prize, and the Lawrence Berkeley National Laboratory).

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

4. For more information on the AJD—a longitudinal study undertaken by the American Bar Foundation on the careers and experiences of law graduates—can be found at, see *After the JD*, *AM. BAR FOUND.*, <http://www.americanbarfoundation.org/publications/afterthejd.html> (last visited May 17, 2011).

ity of the data logic that Sander has created, the data he presents adequately supports his narrowly constructed theory that the lower SES tiers are disproportionately underrepresented in law schools in comparison to higher SES tiers.⁵

Sander's theory may be right; however, the narrative model of pitting SES against race—even if the data is correct—is so irrelevant, that one can question the logic in introducing race into a theory that neither requires it nor requests it in order to withstand scrutiny. In other words, if one were to take all references to race out of Sander's narrative—the theory that law schools need to explicitly focus on SES in order to open “doors of opportunity,” improve “mobility in American society,” make sure “that national elites reflect talent from all corners of society,” and produce “graduating classes that look like America” can stand on its own merit⁶—why then, does Sander create a model that pursues *both* the exploration of socioeconomic diversity in law school as well as the comparison of racial and class diversity as rational objectives for law schools?⁷

I. THE PURSUIT OF DIVERSITY

We begin with Sander's dissection of why law schools are so focused on diversity:

It is hard to think of any issue in the legal academy that has generated as much discussion, reflection, or debate for the past forty years as the quest for student diversity. Nearly all law schools have some type of diversity program; the ABA weighs school efforts in fostering diversity heavily in its process of accrediting law schools.⁸

Sander argues that this intense focus on diversity “[i]n rhetorical terms . . . is about both class and race;” however, “as a practical matter . . . the discussion almost invariably focuses on race.”⁹ Because Sander does not argue that the focus on diversity is inherently a bad thing, the theory that he is beginning to build starts with this premise: in their quest for diversity, law schools have not paid as much attention to class as they have to race, and this has impacted their ability to “maximize student opportunities and improve [their] health, and [their] conscience.”¹⁰

The logic in his theory goes awry when—instead of simply demonstrating how law schools have ignored class and why they now need to integrate class into their diversity efforts—Sander proceeds to create a model where he tries to argue for the integration of class by creating a

5. Sander, *supra* note 3, at 637–40.

6. *Id.* at 631.

7. *See generally id.*

8. *Id.* at 631 (citation omitted).

9. *Id.*

10. *Id.* at 669.

false competition between class and race in order to prioritize one over the other.¹¹ After meandering through limited data models and the thorny politics and jurisprudence on race, he concludes that an SES focus on diversity should replace a race focus on diversity.¹² Thus, the theory that a greater focus on SES diversity is necessary is right. The model of race-based diversity being complicated and thorny in comparison to class-based diversity is also right. That said, the model is irrelevant to the theory because increasing SES-based diversity in law schools is not dependent on unraveling race-based diversity. The logical problem with Sander's argument is that he never directly argues two critical points: (1) racial diversity should not be a priority for law schools; and (2) law schools are somehow limited to only one focal point in diversity, thereby necessitating an either/or conflict between a race focus and an SES focus. So, why does Sander introduce the logical irrelevance of race in order to prove a theory on class?

II. INTERSECTIONALITY AVOIDS THE "RED HERRING"

A "red herring"—a distraction or diversion from one point by another point¹³—changes the direction of a dialogue so that the real conversation ceases, at least temporarily. While trying to prove his theory on the underrepresentation of the lower SES tiers in law school, Sander consistently creates a conflict between race and class based efforts (the red herring) to articulate his argument, even though he does not need to. In doing so, he ignores the very large body of intersectionality research that has taught us to understand connections between social inequities instead of creating a competition between them.¹⁴ Upon reading Sander's thesis, one has to wonder if he is ignoring intersectionality and using race as a red herring to strengthen his argument on class-based diversity or whether he is using class as a red herring to attack law school efforts towards racial diversity without appearing to do so.

For decades now, scholars have researched and presented on the need to understand race and class (along with gender and other key identity characteristics) as interconnected, not oppositional, in explaining inequity.¹⁵ Intersectionality has been accepted and embraced as a meth-

11. See generally *id.*

12. See *id.* at 668. Professor Sander disagrees with this characterization of his article.

13. See *Red Herring*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=red+herring> (last visited May 17, 2011) (giving an etymological discussion on the background of the phrase "red herring").

14. For a summary of this research, see Rachel Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. (forthcoming 2011), available at <http://www.stanford.edu/group/lawlibrary/cgi-bin/library/wordpress/wp-content/uploads/2010/11/best-et-al-multipledisadvantages.pdf>.

15. For purposes of the focus and space requirements of this publication, I do not cover the additional intersectionality impact of gender. For some of the seminal and critical work on the intersectionality of race, class and gender, see generally RACE, CLASS AND GENDER: AN ANTHOLOGY (Margaret L. Andersen & Patricia Hill Collins eds., 7th ed. 2010); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 227 (2d

odology for studying the relationships among multiple dimensions and modalities of social relationships and subject formations.¹⁶ This methodology holds that the classical conceptualizations of inequalities within society, such as classism, racism, sexism, homophobia, and religion-based bigotry intersect with each other to create complex forms of discrimination; we need to study these modalities together in order to understand each one. Opposing one against the other disables our ability to fully understand any single inequality.¹⁷ Intersectionality asks us to expand our intellectual vision and understand greater complexity, not because it is easy to do so, but because it is necessary to guarantee academic rigor and understand practical implications.

A simplified Venn diagram of the intersection of race and class inequities would show race inequity as one contained set and class inequity as another contained set that intersect to create a shared set of both race and class inequities. Both of these sets of inequities need to be attacked and neutralized in order to create law schools and a legal profession that can actualize the meritocracy we now merely idealize—and the intersection is a place where our work can have dramatic results.

According to Sander, “[s]tark as black and Hispanic underrepresentation is, it pales in comparison to the absence of students from the bottom half of the SES distribution.”¹⁸ Sander seems to recognize that race plays a role separate from that of class; however, he argues for the focus to be on class because the racial difference is not as bad as the difference between SES tiers. He also does not address directly how working on SES inequity alone begins to mitigate the inequities faced by minorities in lower SES tiers who confront the double-bind of race and class. Sander presents additional data that demonstrates that, even within the same SES tier, African Americans are less likely to be represented in law school as their white counterparts.¹⁹ Surprisingly, even as Sander illustrates racial inequality within SES tiers, he argues that class inequality should be the focus, at the exclusion of racial inequality without ever explaining why we need to force a choice between two compatible alternatives.

Further, Sander asserts that “the shift to class preferences [in California due to Prop 209] has not proved inconsistent with racial diversity.”²⁰ Even Ward Connerly, the driving force behind Prop 209 and an

ed. 2000); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

16. See Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS 1771, 1772 (2005).

17. See Susanne V. Knudsen, *Intersectionality—A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks*, in CAUGHT IN THE WEB OR LOST IN THE TEXTBOOK 61 (Eric Bruillard et al. eds., 2006).

18. Sander, *supra* note 3, at 647.

19. *Id.* at 649–53.

20. *Id.* at 663.

avid opponent of race-focused diversity efforts, conceded in 2010 that “the percentage of black and Latino students has declined at UC Berkeley, UCLA and UC Santa Barbara.”²¹ The race versus class model is not only an ineffective way to achieve either class-based or racial diversity, but the model is irrelevant in helping us better understand the dynamics of either inequity.

Ideally, in order for Sander’s model to be relevant, he would either need to remove all references to race or present evidence as to why a competition between the inequities is necessary for us to move forward (i.e., limited resources, conflicting strategies, etc.).

Sander discusses the twin ills of racial and class inequity, but he forces an irrelevant and unnecessarily exclusive choice instead of advocating for a protocol that addresses both ills without compromising either. It is therefore critical, when assessing his model, not to lose sight of the larger perspective simply because a red herring throws off our sense of direction.

III. THE PERNICIOUS EFFECT OF RACE

Race matters—not more or less than class—but it matters. The racial inequality component of the Venn diagram is critical and relevant to understand if we are to strive for the equality of opportunity goals that Sander cites as his ultimate goal.²² The universe of racial inequality is as damaging to our collective goal of equal opportunity as the universe of class inequality. Further, the understanding of both inequalities are especially critical to removing barriers to success for those who survive in the intersection of the two worlds; the individuals who experience twice the obstacles and have access to half the support.²³

The universe of class inequality is often structural; there are barriers that prevent access to opportunities based on the educational success of your parents or the family income into which you were born. The universe of racial inequality is often visual; stereotypes are triggered when your visible racial identity triggers stereotypes and characteristics for people associated with your racial identity instead of with you as an individual. Our national history of racial inequities has, without doubt, morphed racial inequities into class inequities for many. The understand-

21. Bay City News, *Affirmative Action Foe Says UC Schools With Increases in Minority Admissions Have Lower Standards, Are “Not as Selective”*, SFAPPEAL (Feb. 16, 2010, 8:56 PM), <http://sfappeal.com/alley/2010/02/affirmative-action-foe-says-uc-schools-with-increases-in-minority-admissions-not-as-selective.php>.

22. See Sander, *supra* note 3, at 1, 668–69.

23. See Bernice McNair Barnett & Ann R. Tickamyer, *Theories and Research on the Intersections of Race, Gender, and Class Inequalities: From Lenski’s Status Inconsistency to Collins’ Matrix of Domination and Beyond, 1954–2004* (Aug. 2007), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/8/5/0/8/pages185083/p185083-1.php (paper presented at the annual meeting of the American Sociological Association, New York City).

ing of the Venn diagram as three distinct, yet interrelated components, allows us to avoid the red herrings thrown in our path. Race matters—not more or less than class—but it matters.

As Brian Lowery at Stanford Graduate School of Business reveals through his research on racial stereotypes:

Negative stereotypes about various racial groups bombard us every day in the mass media and deposit their residue deep into our minds, often without our realizing it Even among the most well-intentioned and consciously egalitarian people . . . non-conscious associations about ethnic groups still have a pernicious effect on behavior and attitudes.²⁴

Lowery further finds that focusing on race itself—through positive messages—can begin to counter the impact of negative stereotypes.²⁵ SES differentials, on the other hand, do not trigger visual reactions to the same extent as racial differences. We need background data in many instances in order to trigger SES-based stereotypes, but our racial biases are always running as long as our eyes are open.

Furthermore, we assign static racial identities to individuals in a way that disadvantages those individuals even when there are opportunities to make conscious choices that do away with such assignments. Nonetheless, there remain significant obstacles. For example, hypodescent is the automatic assignment of an individual to a group or class that is considered subordinate or inferior. It is the one-drop rule dating back to a 1662 Virginia law on mixed-race individuals, upheld in a 1985 ruling in Louisiana regarding a woman with a black great-great-great-grandmother who was denied the right to classify herself as “white” on her passport.²⁶ Since its conception, the notion of hypodescent has been critically scrutinized and evaluated, and “[o]ne of the remarkable things about . . . hypodescent is what it tells us about the hierarchical nature of race relations in the United States Hypodescent against blacks remains a relatively powerful force within American society.”²⁷ According to Ho et al., American culture still reinforces a racial hierarchy with whites having the highest status, followed by Asians, and

24. Marguerite Rigoglioso, *Racial Stereotypes Can Be Unconscious but Reversible*, STANFORD KNOWLEDGEBASE (Jan. 15, 2008), <http://www.stanford.edu/group/knowledgebase/cgi-bin/2008/01/15/racial-stereotypes-can-be-unconscious-but-reversible/> (discussing the research conducted by Brian Lowery, Associate Professor of Organizational Behavior, Stanford Graduate School of Business).

25. *See id.*

26. *See* Arnold K. Ho et al., *Evidence for Hypodescent and Racial Hierarchy in the Categorization and Perception of Biracial Individuals*, 100 J. PERSONALITY & SOC. PSYCHOL. 492, 493 (2011).

27. Steve Bradt, *‘One-Drop Rule’ Appears to Persist for Biracial Individuals*, HARV. FAC. ARTS & SCI. (Dec. 9, 2010), <http://www.fas.harvard.edu/home/content/%E2%80%98one-drop-rule%E2%80%9999-appears-persist-biracial-individuals> (discussing the research conducted by Arnold K. Ho and Jim Sidanius at Harvard University).

both groups being trailed by Hispanics and African Americans.²⁸ If you are black, you do not get to change, transform or transcend in any way. SES tiers are much more porous and allow for movement. Movement from a lower SES tier to a higher SES tier is viewed as heroic, while the attempt to redefine oneself racially is viewed as inauthentic, perhaps even insane.²⁹

Combine the above data with data from research by Kurt Hugenberg and Galen Bodenhausen that shows that whites who look at identical facial expressions on white and black faces perceive greater levels of hostility in black faces,³⁰ and the picture becomes clear that no matter what the data is on class inequality, we cannot relegate racial inequality to a “has been” social issue. If we are not dealing with both race and socioeconomics individually and collectively, we are not increasing opportunity in law schools and in the legal profession.

According to Sander, the “two [race and class] are often conflated in discussions of diversity.”³¹ Once Sander’s model of race versus class is examined in the context of the logical irrelevance of such an argument (given the volume of data showing that racial inequity is an issue separate and apart from class inequality), it is difficult to explain why Sander chooses to frame his perspective as “conflation” of race and class instead of “intersection” between race and class.

Nevertheless, Sander proceeds to make the point that “the contribution *racial* diversity makes to *socioeconomic* diversity in legal education is quite modest.”³² Again, the answer may be correct, but if it is not answering the right question, it is irrelevant. So what if racial diversity makes only modest contributions to socioeconomic diversity? Where is the evidence that if we focus on one inequality, we have to desert other inequalities? If working on racial inequity does not solve socioeconomic inequity, should we abandon the efforts to try and achieve racial equity? In other words, does Sander’s model ask the question in a way where we get the right answer, but we end up answering a completely irrelevant question?

Sander posits, as part of his model, an exposition of “Comparing the Advantages of ‘Class’ Versus ‘Racial’ Preferences.”³³ He advances the proposition that “there is much to commend going further, and using mild SES preferences as at least a partial substitute for current racial

28. Ho et al., *supra* note 26, at 492.

29. See Steven Gray, *Michael Jackson and the Black Experience*, TIME (Jun. 27, 2009), <http://www.time.com/time/arts/article/0,8599,1907472,00.html> (discussing Michael Jackson and his perceived attempts to transcend race).

30. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and Perception of a Facial Threat*, 14 PSYCHOL. SCI. 640, 642–43 (2003).

31. Sander, *supra* note 3, at 649.

32. *Id.* at 654.

33. *Id.* at 664.

preferences.”³⁴ As he expounds: “SES preferences are based on individual circumstances, not group membership. This is more appealing on grounds of fairness. It is hard to justify giving large preferences to blacks and Hispanics from privileged backgrounds while ignoring the needs of low-SES applicants of all races.”³⁵ Again, he presents evidence for a theory, but his model is untenable because he never proves why we have to choose between advancing racial equity over SES equity. In other words, by throwing the red herring of race into the discussion, Sander keeps us arguing the merits of fighting racial inequity instead of asking him to defend his model of pitting race against class. Or maybe, the real red herring is class so that we believe we are discussing class inequity while we are being set up to defend having to fight for racial inequities. The presence of a red herring in Sander’s model is inarguable; whether that red herring is race to bolster the case for class or the red herring is class to catalyze disagreement on race is up for debate.

To further illustrate the weakness of the logical irrelevance of Sander’s model, let us examine his closing thoughts in his article. Sander states, “In the age of Obama, there is abundant evidence that upper-middle class minorities have made dramatic gains over the past fifty years, and experience genuine access to mainstream American institutions.”³⁶ Obama’s identity as a racial but upper-middle class minority—according to Sander’s logic—emphasizes the opportunities available to minorities thereby negating the need to continue to work toward racial equity. Based on this logic, any work fighting for equity for people with physical disabilities was unwarranted after the ascendancy of Franklin D. Roosevelt to the presidency in 1933. More poignantly, given the SES tier into which Bill Clinton was born, we should be done with class-based diversity efforts as well. A trailblazer’s journey does not erase inequalities and inequities faced by many who happen to share characteristics with that trailblazer.

CONCLUSION

There are many logical fallacies with Sander’s overall argument, but his insistence on arguing against racial equity by arguing for class equity is an outmoded syllogism that undermines his stated commitment to greater diversity in law schools. His additional efforts to take a trailblazer like Barack Obama and apply his success to African Americans overall without explaining (or even considering) why Bill Clinton’s success does not apply to all poor whites further demonstrate the fallacy of his model.

34. *Id.*

35. *Id.*

36. *Id.* at 668.

Sander's fundamental theory—that unless the lower SES tiers are adequately (perhaps even equitably) represented in law schools, we cannot purport to be diverse—has merit. That said, the merit in his theory is lost as he forces us to muddle through an illogical and irrelevant model of “pick one—race or class.” Sander's data may be right, but it does not matter, because he merely gets good answers to really bad questions.

The intersectionality theory invites us to try and understand that identities are not monolithic or simple. In order to understand SES, you have to understand race, gender, and perhaps even sexual orientation. If not, you risk proving up a right theory but making your model irrelevant. Moreover, when you pit one social identity against another, you break down the very conversations that we want to see occur on a regular basis.

Diversity across many individual and group characteristics is critical in our law schools, not just because of the enhanced educational benefits that are derived from multiple perspectives,³⁷ but because our law schools create the next generations of lawyers. As a nation of laws, lawyers have always played a central role in how we organize and govern ourselves as a society.³⁸ Without lawyers who look like and represent all of the various components of the society that we seek to influence, our role, much like Sander's model, will be deemed irrelevant.

37. See SUSAN AMBROSE ET AL., THE BENEFITS OF DIVERSITY FOR EDUCATION AT CARNEGIE MELON 1–4 (2004), available at <http://www.cmu.edu/teaching/trynew/BenefitsOfDiversity.pdf>.

38. Twenty-five of the fifty-six signatories to The Declaration of Independence were lawyers or jurists. Steve Mount, *Signers of the Declaration of Independence*, U.S. CONST. ONLINE, <http://www.usconstitution.net/declarsigndata.html> (last modified Feb. 28, 2011). Twenty-five of the forty-four unique U.S. Presidents have been lawyers. See *The Presidents*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/> (last visited May 18, 2011). Over 50% of U.S. Senators have law degrees. JENNIFER E. MANNING, CONG. RESEARCH SERV., MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE 2 (2010), available at http://assets.opencrs.com/rpts/R40086_20101119.pdf.

