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RACE AND SOCIOECONOMIC DIVERSITY IN AMERICAN LEGAL EDUCATION: A RESPONSE TO RICHARD SANDER

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INTRODUCTION

The debate surrounding diversity in legal education continues. The centerpiece of this debate for over forty years has been racial diversity and the admission policies that help to foster that diversity. In the realm of K–12 education, as the likelihood of true racial integration has receded there has been a greater focus on efforts to increase socioeconomic status (SES) diversity in public schools.¹ Colleges and universities have also begun to implement undergraduate programs that encourage greater class diversity.² The need for and methods of encouraging SES diversity in law schools is now emerging as a significant part of the diversity dialogue. In this essay, I will argue that SES diversity is an important goal for law schools to aspire to, and class-based efforts to increase law school diversity should be used in conjunction with ongoing race-conscious admissions policies. The most significant obstacles to SES diversity efforts are: (1) the constant comparisons to racial diversity, which create a suspicion that class-based efforts are part of the movement to end affirmative action; (2) the need for greater empirical research on SES diversity in law schools to discover the types of admission policies and retention efforts that will have the most impact; and (3) the failure of the American public school system to adequately educate poor children, leading to an insufficient pool of poor students who are eligible for admission to law school.

I. THE RELATIONSHIP BETWEEN RACE AND CLASS

In the lead article for this symposium, *Class in American Legal Education*, Professor Richard Sander argues that “[l]aw school admission policies use very large and relatively mechanical racial preferences, but appear to generally ignore SES considerations.”³ He hopes that his article

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1. Nancy Connelly, *After PICS: Making the Case for Socioeconomic Integration*, 14 TX. J. C.L. & C.R. 95, 103–04 (2008); Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES (July 15, 2007), <http://www.nytimes.com/2007/07/15/education/15integrate.html>.

2. Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCES: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 135 (Richard D. Kahlenberg ed., 2004).

3. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 633 (2011) [hereinafter Sander, *Class in American Legal Education*].

and this symposium will help begin a serious discussion in the legal academy about encouraging socioeconomic diversity.

One of the main goals of Professor Sander's article is to "compare racial and 'class' diversity as objectives that law schools should pursue."⁴ One fundamental question about Sander's approach is why do these two types of diversity need to be compared? Is Sander arguing that SES diversity should replace racial preferences or that SES diversity will promote racial diversity? If SES and racial diversity are not interdependent in some way, then it seems a bit of a red herring to compare them in a study whose ultimate goal is to demonstrate that "a serious discussion in the legal academy about how to address socioeconomic diversity is long overdue."⁵

What is the justification for SES diversity? In an earlier article that chronicled UCLA's experiment with class-based affirmative action, Sander suggested several possible rationales for SES diversity:

- (1) Greater socioeconomic diversity in law schools can produce a richer education for all students, by making the range of experiences brought to law school closer to the "real" world.
- (2) Bringing more low-SES people into law school, and hence into the legal profession, confers more legitimacy on the profession and makes it better able to respond to the needs of the public.
- (3) Increased access to low-SES applicants actually improves the quality of the student body, because test scores and other admissions criteria understate the ability of low-SES applicants.
- (4) Helping low-SES people to enter higher education increase social mobility and thus helps, however modestly, to reduce poverty and increase equality.⁶

All of these rationales support the promotion of class-based diversity independent of any discussion of racial diversity. Sander suggests that a fifth possible justification for class diversity is to provide a race-neutral alternative to race-based affirmative action.⁷ If the replacement of race-based affirmative action is the true goal of the promotion of SES diversity, then its merits should be considered on that basis.

The justification for race-based affirmative action has developed over time. Initially, racial preferences in admission were primarily justified as a way to redress historic racial discrimination by increasing access to legal education for racial minorities.⁸ The Supreme Court's deci-

4. *Id.* at 632.

5. *Id.* at 633.

6. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 475 (1997) [hereinafter Sander, *Experimenting with Class-Based Affirmative Action*].

7. *Id.* at 475-76.

8. See generally Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 203 (2006) (noting that affirmative action programs grew out of civil unrest in the 1960s and blacks' demands to increased access to higher education); David B. Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57

sion in *Regents of the University of California v. Bakke*⁹ introduced the idea that affirmative action was constitutionally justified by a university's view that racial diversity improved the classroom setting and enhanced the learning atmosphere.¹⁰ In 2003, the Supreme Court reaffirmed the diversity rationale in *Grutter v. Bollinger*.¹¹ In *Grutter*, Justice O'Connor found that there was a compelling state interest for the University of Michigan's law school to utilize race-conscious admissions policies when the law school determined that "diversity is essential to its educational mission."¹²

If the primary rationale for SES diversity is to replace race-conscious admissions and serve as a race-neutral method of promoting racial diversity, then those who promote this view should demonstrate that class-based diversity is capable of accomplishing that goal. In Sander's article about the UCLA School of Law's use of class-based preferences, he concluded that these preferences "had only mixed success in preserving racial diversity at law school" and that "[t]he enrollment of blacks and American Indians fell by more than 70 percent."¹³

The comparison of SES diversity and race-based diversity may also ultimately hurt the effort to implement more class-conscious admissions policies. Sander concludes, "[l]aw school admission policies use very large and relatively mechanical racial preferences, but appear to generally ignore SES considerations."¹⁴ These types of statements give the impression that the discussion and promotion of SES diversity is just another mechanism to undermine and delegitimize race-based affirmative action. Many potential proponents for class-based affirmative action include those who are attempting to preserve race-conscious admissions, so putting the two in tension is both unnecessary and counterproductive.¹⁵

If class-based preferences are to be implemented on their own merit, without regard to the promotion of racial diversity, then there should be significant additional study on whether the benefits of SES diversity can be verified in the law school setting. Professor Sander has made a significant contribution to the discussion of socioeconomic diversity by

STAN. L. REV. 1915, 1920–22 (2005) (recounting the systematic exclusion of racial minorities in the legal profession and affirmative action as a way of increasing access to legal education).

9. 438 U.S. 265 (1978).

10. Moran, *supra* note 8, at 205.

11. 539 U.S. 306 (2003).

12. *Id.* at 328.

13. Sander, *Experimenting with Class-Based Affirmative Action*, *supra* note 6, at 473.

14. Sander, *Class in American Legal Education*, *supra* note 3, at 633.

15. See generally Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L. & POL'Y REP. 1, 4 (2005) (arguing that instead of attacking race conscious admissions a "more constructive endeavor would be to consider what policies will further efforts to more fully diversify law schools and attempt to ensure educational opportunity").

providing more data on this question, but undoubtedly, more study of the SES of law school students must be done. It appears that very few law schools attempt to collect statistics on the SES of their students. While every law school and the ABA collects statistics on the racial background of students, we know very little about those students' SES.¹⁶ Because we know a significant amount about the history and impact of race-conscious admissions, there is the instinct to try and compare other forms of diversity to race.

I strongly believe that increased SES diversity would enhance classroom settings and improve the legitimacy of the legal profession, but these theories have to be backed by strong empirical data. In the area of racial diversity, long term studies such as William Bowen and Derek Bok's book, *The Shape of the River*, help establish the tangible benefits that flow from racial diversity.¹⁷ In addition, Richard Kahlenberg has done groundbreaking work on the need for socioeconomic integration in K-12 schools and the notion that good education is best guaranteed by having "solidly middle-class" schools.¹⁸ These types of comprehensive studies are sorely needed in the area of SES diversity and graduate education.

The "After the JD" (AJD) study gives us some information on SES from a small group of law students,¹⁹ but if the goal is to create class-based preference programs, every law school should begin to gather comprehensive SES data on their students. This data should attempt to go beyond basic information such as parental levels of education, occupation, and income to capture information about generational family wealth.

II. OUTSIDE THE WORLD OF ELITE LAW SCHOOLS

While Professor Sander uses national data on law schools such as the AJD study,²⁰ many of his conclusions and the overall study of law schools admissions data place too much emphasis on elite law schools. One of the key findings of Professor Sander's study is that at the most prestigious law schools, "only five percent of all students come from

16. The ABA website includes statistics about race. The statistics on race include the total minority J.D. degrees awarded from 1983-2009. There are also enrollment numbers for minority students, which are provided for each minority racial and ethnic group. ABA Section of Legal Education & Admission to the Bar, *Legal Education Statistics from ABA-Approved Law Schools*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited May 17, 2011).

17. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (2000).

18. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 1* (2001).

19. Sander, *Class in American Legal Education*, *supra* note 3, at 634-35.

20. The AJD study is a study of four thousand law school graduates who became licensed in 1999 or 2000. *Id.* at 634.

families whose SES is in the bottom half of the national distribution.”²¹ Sander notes that “[a]cross the spectrum of law schools, there is a lopsided concentration of law students towards the high end of the socio-economic spectrum, which becomes more lopsided with the eliteness of the law school.”²² He admits that at less elite law schools the socioeconomic disparities are “substantially smaller.”²³

Many studies on the impact of affirmative action in higher education, specifically in graduate schools, have focused on elite institutions.²⁴ It is understandable that scholars are interested in detailing the admissions policies of the most selective universities. However, in giving a picture of law school admissions, especially as to the SES of law school students, it is important not to overemphasize elite or highly selective law schools.

The United States now has 200 accredited law schools.²⁵ Professor Sander provides data from the AJD study on the level of SES eliteness of law students relative to the law school’s eliteness.²⁶ Overall, students in the bottom half of the SES spectrum account for only 16% of the law school students.²⁷ At law schools ranked 101st and lower, 21% of the students are in the bottom half of the SES spectrum.²⁸ There does appear to be a rise in the number of low-SES students at less elite law schools. Even with the data given, however, it is difficult to assess the entire law school landscape. There are significant differences between law schools ranked in the third tier and law schools ranked in the fourth tier.²⁹ The fourth tier, unlike the third tier, includes a number of schools that have special missions, such as historically black law schools including Thurgood Marshall School of Law, North Carolina Central, and Southern University. Although Professor Sander did not compile separate SES

21. *Id.* at 632.

22. *Id.* at 637.

23. *Id.*

24. *See, e.g.*, BOWEN & BOK, *supra* note 17 (a study of 45,000 students who attended “academically selective institutions” and the impact of race conscious admissions policies).

25. ABA Section of Legal Education & Admission to the Bar, *ABA-Approved Law Schools*, AM. BAR ASS’N http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited May 17, 2011).

26. Sander, *Class in American Legal Education*, *supra* note 3, at 637. As Professor Sander acknowledges in his article, there are significant limitations to the use of the AJD data, and to defining SES based on the information given in the AJD survey. *Id.* at 634. AJD only sampled approximately 4,500 law students who became licensed attorneys in 1999–2000. The survey respondents were asked four questions related to SES, specifically the education level and occupation of their mother and father. Only Professor Sander used this survey information to develop a numerical SES index for each AJD respondent. *Id.* at app. I.

27. *Id.* at 639 tbl.1.

28. *Id.*

29. I examined several different 2010 law school rankings. *See Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 17, 2011); *Top 2011 Law School Rankings*, TOP-LAW-SCHOOLS.COM, <http://www.top-law-schools.com/rankings.html> (last visited May 17, 2011).

data for fourth tier schools, I believe that data would show there are even more low SES students at these schools due to their missions.

This need for more data is especially prescient due to the shifting nature of legal education. With 200 law schools in the United States, access to legal education has increased substantially. In fact, in the years since the AJD study was done, an additional 16 law schools have been provisionally or fully accredited by the ABA.³⁰ Legal education is no longer characterized by the most elite law schools, but instead law schools are increasingly offering more part-time programs and online education that attracts students with broad backgrounds.³¹

III. CONCLUSION

Beyond admissions policies that adopt class-based preferences, SES diversity in legal education will only be expanded by creating programs that increase the number of low-SES students that are eligible to attend a law school. Sander points out that “students from the top [SES] quartile were nearly five times as likely to finish a four-year college as students from the bottom quartile.”³² This means that the disproportionately low numbers of low-SES students graduating from college will continue to have an impact on all efforts to bring additional class diversity to law school. These college graduation statistics are a reflection of the larger problem of providing quality K-12 education to children who are at the bottom of the socioeconomic ladder.

30. See ABA Section of Legal Education & Admission to the Bar, *ABA-Approved Law Schools by Year*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited May 17, 2011).

31. *Part-time Law*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/part-time-law-rankings> (last visited May 17, 2011) (ranking law schools with part-time programs).

32. Sander, *Class in American Legal Education*, *supra* note 3, at 640.