

COMMENTARY ON PROFESSOR RICHARD SANDER'S *CLASS*
IN *AMERICAN LEGAL EDUCATION*

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INTRODUCTION

Professor Sander's article discussing class in American Legal education is an open invitation for thoughtful individuals to discuss real student diversity—involving much more than simply support of racial diversity. Racial diversity in a law school is indeed a desirable goal. In an American society with an increasing class divide, the continual quest for racial diversity is misguided if pursued without an equally aggressive attempt to have the law school classroom reflect the social and economic diversity that exists in America. Even in rhetorical terms, the historical debate about diversity in the legal academy has been understood as exclusively promoting racial diversity at the expense of any real articulation of the need for class-based diversity.

As a practical matter, the diversity that the legal academy should address in the future should include a deliberate and focused discussion regarding class or socioeconomic status (SES) issues because the primary continuing effect of historical racial discrimination is economic disadvantage. In white urban neighborhoods, only one percent of the community is “extremely impoverished.”¹ The poverty rate of the Latino neighborhoods is similar to that of African American neighborhoods; twenty-two percent are in low poverty.² Twenty-five percent of the African American communities suffer “extreme levels of poverty.”³ Significantly, these impoverished communities are also marginalized in that they suffer from inadequate education, unemployment, and high incarceration rates.⁴

Although racial discrimination against blacks is the predominant factor leading to economic disadvantage⁵ in the black community, I do

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1. Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 U. KAN. L. REV. 903, 924 (2009).

2. *Id.*

3. *See id.*

4. Geneva Brown, *The Wind Cries Mary—The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, 24 ST. JOHN'S J. LEGAL COMMENT 625, 643 (2010).

5. *See id.* (discussing the disproportionate impact the Personal Responsibility and Work Opportunity Reconciliation Act, which denies drug offenders eligibility for public assistance for life, has on African Americans, particularly African American women and children).

not think racial disadvantage and class disadvantage are the same. I agree with the position that a significant degree of both race and class based discrimination systematically exist in America and in its law schools.⁶ Professor Kleven argues that the United States is an inherently classist and racist society—and that classism and racism are interconnected with common characteristics.⁷ It is clearly a very plausible argument that racism and classism are interconnected. If one accepts Kleven's assertion to be true—that racism and classism are interconnected—then it is unacceptable for institutions (with the responsibility to collect statistics and facts beneficial to the legal academy) to collect a wide-range of information associated with race without collecting a quantity of systematic information concerning SES that might impact a person's opportunity to become a law student, a lawyer, or a law professor.⁸ Thus, because classism and racism are interconnected, Sander's article, at a minimum, is a necessary and proper call to the Law School Admissions Council, the National Association for Law Placement, the American Association of Law Schools, and the American Bar Foundation to collect relevant systematic data regarding the impact of class or socioeconomic status on the legal profession.⁹

Reasonable minds can disagree as to the nature and quantity of either race-based discrimination or class-based disadvantage. Nevertheless, if I had the ability to prohibit the practice of racial discrimination in America, and end it today, without addressing SES issues, most African Americans would remain at a competitive disadvantage in American society because of SES issues.¹⁰ Regardless of race, if racial discrimination ceased to exist, African Americans would only become competitive in society by inclusion in broad-based social and economic justice policies designed to help all similarly situated individuals.¹¹ Obviously, in our social order blacks have experienced racial discrimination incalculably more than any other racial group.¹² By focusing on class rather than race—in creating diversity in law school classrooms—the legal academy undermines the argument that race-based affirmative action plans in law school admission plans produce reverse racial discrimination against whites.¹³ A class-based admission process to promote diversity is a rea-

6. Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in The United States?*, 8 CONN. PUB. INT. L.J. 207, 207 (2009).

7. *Id.*

8. See Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632 n.3 (2011).

9. *Id.*

10. See Peterson & Krivo, *supra* note 1, at 924.

11. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

12. *Id.* at 527 (Scalia, J., concurring).

13. *Id.* at 528 (“Racial preferences appear to ‘even the score’ (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately

sonable means of avoiding the problems associated with an admission system utilizing racial preference since it would directly contribute to the objective of increasing opportunities for economically underprivileged applicants without discriminating on the basis of race.¹⁴ In *Regents of University of California v. Baake*,¹⁵ Justice Powell argued that an admissions program could be hindered if it concentrated only on ethnic diversity; thus, it should include a class based-system to enhance diversity.¹⁶ Under a class-based admission program, minorities would still receive admission preferences because a relatively high number of minority groups are impoverished.¹⁷

I suppose one could argue that the search—which has occurred over the past several decades—for race-based student diversity at elite law schools speaks collectively about both race and class only in a very restricted set of circumstances. Traditionally, race and class have only been addressed as a consequence of the theory that traditional race-based affirmative action law school admission policies open doors of opportunity predominantly to those African Americans from upper or middle class families.¹⁸ Almost all of the nonwhite law students, similar to their white cohorts, are from rather elite families.¹⁹

The great debate about diversity in legal education over the last several decades has been about promoting racial diversity as a symbolic gesture of social justice without any similar promotion of class-based diversity as an effective tool for advancing social justice. A race-neutral class-based SES admission policy is a necessary and proper tool to effectively generate graduating classes at elite law schools that reflect the interesting intermix of SES and racial diversity in American society. Sander's article makes a very valuable contribution to diversity scholarship by inviting scholars to systematically explore the issue of whether the law school community should begin to address SES law school admission policies with the same energy it has utilized to justify race-based admission criteria.²⁰

Sander's article does an excellent job of demonstrating how the lack of SES diversity in American law schools requires those promoting true intellectual diversity at law schools to seek both racial and economic diversity with equal vigor. Sander provides information that reveals that a very large percentage of American law students are from rather privi-

disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks.”).

14. John P. Cronan, *The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions*, 34 SUFFOLK U. L. REV. 305, 321 (2001).

15. 438 U.S. 265 (1978).

16. *Id.* at 311–15.

17. Cronan, *supra* note 14, at 320.

18. See Sander, *supra* note 8, at 632.

19. *Id.*

20. *Id.* at 632–33.

leged families.²¹ For example, at elite law schools, only ten percent of the students are from families at the bottom half of the SES stratum.²² If blacks and Hispanics are effectively represented in law schools (when judged against the total number of college graduates) while low and moderate SES college graduates are not adequately represented, it is imperative that a strategic plan be implemented in the law school community addressing the development and improvement of SES diversity.²³

I. DATA AND THE MEASUREMENT OF CLASS

Sander has provided a good example of how legal scholars can incorporate demographics statistics from social science to measure the class or SES divide among people living in America, while exploring the merits of class-based diversity in legal education.²⁴ From a historical perspective, it is clearly appropriate to implement social science data to support class-based diversity in legal education on account of the important role social science data has played in promoting equality in education. Take, for example, *Brown v. Board of Education*,²⁵ where social science data was a pivotal factor in demonstrating stark racial inequalities, which helped facilitate a decision promoting equality in our system of education.²⁶

Theoretically, Sander's position that the impact of class or socioeconomic status in contemporary Western society is multifaceted and complex²⁷ should be viewed with suspicion and perhaps even rejected because no matter who the poor people in society are (i.e., black, Hispanic, white), they are typically ignored by their neighbors and marginalized by society.²⁸ Unlike the disadvantaged poor, however, the rich have influence over, and contact with, many powerful friends.²⁹ In general, as a result of this power and influence, the privileged receive the best available education and are overrepresented in the most promising and prestigious professions. Sander's use of SES statistics and racial demographics demonstrates what the human experience already knows; that those with the most money and their offspring are more likely to earn a higher income from investments, acquire both a better education and a higher level of education, and hold the more desirable occupations.

I believe that Sander's use of a numerical SES Index is a useful alternative heuristic tool to support a discussion regarding class-based diversity in legal education, but I reject any suggestion that the numerical

21. *See id.*

22. *Id.* at 643.

23. *See id.* at 633.

24. *See generally* Sander, *supra* note 8.

25. 347 U.S. 483 (1954).

26. *Id.* at 495 n.11.

27. *See* Sander, *supra* note 8, at 633.

28. *Proverbs* 14:20 (New International Version).

29. *Id.*

SES Index is necessary to move this alternative diversity discussion from “beyond vague generalities.”³⁰ Instead of using the numerical SES Index to support the SES diversity option in legal education, I think the disparate impact analysis adopted in *Griggs v. Duke Power Co.*³¹ forty years ago—with its potential for a significantly more limited use of numbers—is equally as effective and perhaps less burdensome to demonstrate that a class-based or SES diversity admission policy is beneficial for legal education and represents good public policy.

II. SES PROFILES FROM THE AJD

According to Sander, the After the JD study (AJD) is the top available resource available regarding the SES of modern-day law students.³² AJD produced a nationally representative illustration of some four thousand law graduates who were licensed as attorneys in 1999 or 2000.³³ As a result of the self-evident universal truth that privileged elites have many friends while the economically disadvantaged are virtually without any powerful friends,³⁴ the findings of the AJD should not be surprising. The AJD SES disparity study reveals that approximately fifty percent of the students at elite law schools have parents in the upper tenth of the SES divide in America, whereas merely one-tenth of the students have parents from the bottom fifty percent of the SES divide.³⁵ Or, to state it another way, a young person living in the United States and fortunate enough to have parents whose SES positioned them in the top ten percent of the SES divide were twenty-four times more probable to attend an elite law school when compared to a young person whose parents’ SES situated them in the bottom fifty percent of the national SES divide.³⁶ The fact that the economic divide makes one student twenty-four times more likely to go to an elite school than another demonstrates that no one who is serious about diversity in the legal education can afford to ignore the compelling justification for an SES preference admission policy.

III. SOME HISTORICAL CONTEXT

From an historical perspective of legal education, the incredible advantage given to elite members of society to receive a legal education at an elite law school has not changed in the last forty years.³⁷ The available data confirms that there has not been any increase in SES diversity for the last four decades.³⁸ The available data and historical trends make a

30. Sander, *supra* note 8, at 634.

31. 401 U.S. 424 (1971).

32. Sander, *supra* note 8, at 634 (citing RONIT DINOVTZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (Janet E. Smith et al. eds., 2004)).

33. Sander, *supra* note 8, at 634.

34. *Proverbs* 14:20 (New International Version).

35. Sander, *supra* note 8, at 637.

36. *Id.*

37. *Id.* at 644.

38. *Id.* at 645 tbl.4.

compelling justification to adopt SES diversity-based admission programs in elite schools and throughout legal education.

IV. COMPARING RACIAL AND SES DIVERSITY

Sander's heuristic numerical Tables 5, 6, and 7 lend very credible support to his conclusion that efforts directed at increasing racial diversity—attempting to remedy the effects of racial discrimination—have been very successful when compared to the wayward efforts to assist disadvantaged socioeconomic groups (regardless of race).³⁹ If it is true that college graduates of every race go to law school in almost equal proportions, then the information in Table 6 demonstrates the relatively unremarkable conclusion that—in the context of acquiring a legal education in America today—class or SES matters more than race in determining a person's chances of attending law school.⁴⁰ Additionally, the data in Table 7 inspired Sander to make the following conclusion:⁴¹ “Indeed, it is fair to say that low-SES representation at elite law schools is comparable to racial representation fifty years ago, before the civil rights revolution.”⁴² I support Sander's heuristic rationale (articulated nearly fifteen years ago) for expanding the opportunities to attain a legal education based on SES, rather than focusing exclusively on race: (1) increased SES diversity in law schools will create a better education for all students, by giving each student an expanded opportunity to simulate “real” world experiences; (2) enrolling a greater percentage of low-end SES students at a law school, who subsequently become lawyers, creates diversity in the legal profession while simultaneously increasing the legitimacy of the legal profession in the eyes of an increasingly diverse public; (3) low-end SES candidates in fact enhance the value of the student body experience in law school because standardized test scores and traditional admissions criteria devalue the potential and competence of low-end SES candidates; (4) assisting low-end SES candidates to enter law school and successfully become lawyers expands social mobility by decreasing poverty and boosting economic equality by closing the SES gap; (5) socioeconomic preferences are a “race-blind” replacement for traditional affirmative action that will expand diversity in legal education.⁴³

The truth of the matter is that there is virtually no overlap between SES and racial diversity because non-white students attending law school are usually from somewhat elite status (in particular, at the best law schools).⁴⁴ Because of the somewhat elite status of racial minorities in

39. *Id.* at 646–49.

40. *Id.* at 648 tbl.6.

41. *Id.* at 649 tbl.7.

42. *Id.* at 649.

43. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 475–76 (1997).

44. Sander, *supra* note 8, at 655–56.

law school, *racial* diversity as a general rule does not advance *socioeconomic* diversity in legal education.⁴⁵

VI. LAW SCHOOL ADMISSIONS PRACTICES

The *Grutter v. Bollinger*⁴⁶ decision endorsed a separate and elitist-focused admission system in legal education. In this case, the Court upheld an admission practice where students with the highest LSAT scores and undergraduate grades—within each racially elite cohort—had the greatest opportunity to be admitted to law school.⁴⁷ Sander's data reveals that the *Grutter* decisions give law schools permission to practice a race-based, but elitist, system of admitting students.⁴⁸ A law school admission system that favors the elite of all races at the expense of those in society who are economically disadvantaged is truly tainted.⁴⁹

VII. THE ATTAINABILITY OF “CLASS DIVERSITY”

Sander identifies the UCLA School of Law class-based diversity initiative as an example of a successful race-neutral law school admission program because it expanded both SES diversity and racial diversity in the law school student population.⁵⁰ Nonetheless, Sander's conclusion—that the UCLA Law School's class-based preference system was only successful because most other law schools were not implementing a SES based preference in their admission process—should be rejected because of a lack of data to support this conclusion. I am confident that a similar study in the future will reveal that virtually every law school acting in good faith can advance SES diversity in legal education by deleting any consideration of race.

Indeed, “[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”⁵¹ Under the strict scrutiny standard, each law school with a racial preference admission plan should at least be required to provide compelling evidence that a UCLA type SES plan would not advance intellectual diversity in legal education.⁵² Unlike Sander, I think the UCLA SES plan can be implemented successfully at other law schools even if every law school in the country has implemented an SES admission preference plan to close the class divide. Diversity in American education is a positive thing for law students and the law school community. Because “[SES] discrimination is the pre-

45. *Id.*

46. 539 U.S. 306 (2003).

47. *Id.* at 315–16, 343–44.

48. Sander, *supra* note 8, at 667–68.

49. See generally L. Darnell Weeden, *After Grutter v. Bollinger Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 *BYU J. PUB. L.* 161 (2004).

50. Sander, *supra* note 8, at 661–62.

51. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

52. See Weeden, *supra* note 49, at 198–99.

dominant impediment to achieving meaningful educational diversity” in the legal academy, it is proper to regard the UCLA SES preference plan as providing effective race-neutral tools to close America’s SES legal education divide.⁵³ The legal academy “must work harder by thinking outside the race box to expand diversity” to those students with a disadvantaged SES history while deleting race as a factor in its admission criteria.⁵⁴

My commitment to the concept of economic justice in our society leads me to believe that the successful SES diversity plan at UCLA further supports my conclusion articulated in an earlier commentary addressing race-neutral affirmative action programs. I posited, and continue to support the assertion, that “the Michigan Law School [in *Grutter*] did not make a compelling case that there were no effective race-neutral alternatives to achieve diversity.”⁵⁵

Similarly, I argued, “Race-based affirmative action programs should be rejected in law schools as a violation of the Equal Protection Clause.”⁵⁶ Likewise, “a law school can meet its goals of a qualified and diverse student body by considering class, lack of cultural exposure, interesting life experiences, present and historical economic status, and skills;” no discussion of race is necessary.⁵⁷

VIII. COMPARING THE ADVANTAGES OF “CLASS” VERSUS “RACIAL” PREFERENCES

As I said fifteen years ago:

Because racial determinations [supporting diversity] are likely to be subjected to either misuse or misunderstanding by both the proponents and opponents of race-based affirmative action, race-based affirmative action programs intended to bring diversity to a law school should be abandoned in favor of [SES] as a basis for affirmative action.⁵⁸

Unlike race, an SES-preference admission program “would be subject to the rational basis level of judicial review rather than the much tougher strict scrutiny standard of judicial review.”⁵⁹ Under the rational basis theory, a state sponsored SES diversity program is entitled to a presumption of constitutional validity under the rationale of *United States v.*

53. See, e.g., L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT 297, 297 (2005).

54. *Id.* at 332.

55. *Id.*

56. L. Darnell Weeden, Yo, Hopwood, *Saying No to Race-Based Affirmative Action is the Right Thing to do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 536 (1996–1997).

57. *Id.*

58. *Id.* at 535.

59. *Id.*

*Carolene Products Co.*⁶⁰ Even if there are currently no federal cases in the pipeline challenging the admissions practices at law schools for violation of the *Grutter* guidelines,⁶¹ undergraduate race-conscious admission guidelines implemented at the University of Texas under the *Grutter* rationale were unsuccessfully challenged as a violation of the Equal Protection Clause in *Fisher v. University of Texas at Austin*.⁶² While evaluating the elements of the University of Texas' race-conscious admissions policy, it is clear that the structure was modeled after the *Grutter* program, which the Supreme Court decided did not qualify as a quota.⁶³ According to the Fifth Circuit, "*Grutter* is best read as a path toward the moment when all race-conscious measures become unnecessary."⁶⁴ In order to make race-conscious measures unnecessary, *Grutter* requires law schools that utilize race-conscious admissions to honestly consider the race-neutral SES option utilized by the UCLA law school.⁶⁵ While it is conceded that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,"⁶⁶ it must at a minimum require compelling evidence that the UCLA SES preference plan will not enhance intellectual diversity at the law school.

CONCLUSION

Professor Sander's thoughtful heuristic presentation of the role of class in American legal education suggests that SES in the age of Obama has arguably replaced race as the new battle cry in the Twenty-first Century for social justice. Thus, at a minimum, SES matters in one's ability to attend law school. The issue facing the legal community now is whether SES matters more than race in deciding who goes to law school. Nevertheless, my reading of Sander's article leads me to the conclusion that reasonable minds in legal education could disagree as to whether SES matters more than race in deciding who attends law school in America.

60. *Id.* (citing 304 U.S. 144 (1938)).

61. Sander, *supra* note 8, at 668.

62. 631 F.3d 213 (5th Cir. 2011).

63. *Id.* at 235.

64. *Id.* at 238.

65. *Id.*

66. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003)).