REFLECTIONS ON RICHARD SANDER'S *CLASS IN AMERICAN LEGAL EDUCATION*

RICHARD D. KAHLENBERG[†]

Low-income students of all races have been the invisible men and women of American legal education. But in the nonfiction realm, Richard Sander may be their Ralph Ellison.

Sander's *Class in American Legal Education* lays bare dramatic economic inequality within selective U.S. law schools, institutions that pride themselves on being progressive, inclusive, forward-looking, and right-thinking. Sander's exposure of stark class inequality in our institutions of legal education parallels the 2004 scholarship of Anthony Carnevale and Stephen J. Rose, who revealed enormous socioeconomic disparities in access to undergraduate learning at selective institutions.[1] Fortunately, the Carnevale and Rose research spurred a great deal of soul searching and some action to address inequality at the undergraduate level.[2] One can only hope that Sander's exposé will launch a similar discussion and set of actions within the legal academy.

This Article provides some context about—and analysis of—the significance of Sander's findings on: (1) the degree of socioeconomic inequality in American legal education; (2) the extent to which racial affirmative action produces socioeconomic diversity; (3) the lack of institutional commitment to addressing socioeconomic inequality in law schools; (4) the potential racial dividend of socioeconomic preferences; and (5) whether low-income students admitted through class-based affirmative action can succeed in legal education and beyond. Finally, the Article concludes with a discussion of how Sander's research fits into the larger legal environment surrounding affirmative action.

I. DEGREE OF SOCIOECONOMIC INEQUALITY

As Sander notes, while law schools routinely publish data on the racial diversity of their student bodies, they rarely publish socioeconomic data about their students.[3] This omission (which is very telling in itself)

[†]   Senior Fellow, The Century Foundation. A.B. Harvard College, 1985. J.D. Harvard Law School, 1989.
    1.   Anthony Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN AMERICAN HIGHER EDUCATION 101, 106–07 (Richard D. Kahlenberg ed., 2004).
    2.   Richard D. Kahlenberg, *Introduction*, *in* REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 1, 1–3 (Richard D. Kahlenberg ed., 2010).
    3.   Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 631 (2011).

did not, however, deter Sander, who drew upon a large data base (the After the JD Study) and constructed an impressive index of socioeconomic status (SES) to give systematic meaning to the data.[4] The analysis is itself groundbreaking because it provides for the first time a very clear picture of the socioeconomic makeup of America's law schools.

Moreover, the substantive findings are breathtaking. The degree of socioeconomic stratification found by Sander at the most elite twenty law schools is as bad as (indeed, slightly worse than) the stratification found by Carnevale and Rose at the nation's most selective 146 colleges and universities (which educate less than 10% of the nation's postsecondary freshman class).[5] Sander found that only 2% of students at the top twenty law schools come from the bottom socioeconomic quarter of the population while more than three quarters come from the richest socioeconomic quartile.[6] This comports with Carnevale and Rose's finding that at the most selective 146 colleges and universities, only 3% came from the poorest socioeconomic quartile and 74% from the richest. In other words, one is 25 times as likely to run into a wealthy student as a low-income student at the nation's selective campuses, and the tilt is slightly greater at the top twenty law schools.[7] Astoundingly, Sander writes "roughly half the students at these schools come from the top tenth of the SES distribution, while only about one-tenth of the students come from the bottom half."[8]

II. THE SOCIOECONOMIC DIVIDEND OF RACIAL AFFIRMATIVE ACTION

Sander's second important finding is that racial affirmative action in legal education has done little to promote socioeconomic diversity.[9] That is to say, selective law schools tend to achieve racial diversity by providing preference in admissions to fairly affluent African American and Latino students. Sander finds that at top twenty law schools, 89% of African Americans, and 63% of Latinos come from the top socioeconomic half of the population (along with 92% of Asian Americans and 93% of whites).[10] As Sander notes, "upper-middle-class minorities capture most of the benefits of law school preferences[,]" because the "strongest applicants come from predominantly advantaged backgrounds."[11] This conclusion parallels the findings in selective undergraduate institutions. In a study of twenty-eight selective colleges and universities, for exam-

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4.   *See* Sander, *supra* note 3, at 639 tbl.1.
5.   Carnevale & Rose, *supra* note 2, at 104.
6.   *See* Sander, *supra* note 3, at 639 tbl.1.
7.   Carnevale & Rose, *supra* note 2, at 106 tbl.3.1.
8.   *See* Sander, *supra* note 3, at 637 (emphasis omitted).
9.   *See id.* at 644.
10.   *See id.* at 651 tbl.8.
11.   *Id.* at 656.

ple, Derek Bok and William Bowen found that 86% of African Americans were from middle or high socioeconomic status families.[12]

Sander's finding is significant because in the discussions of race-based affirmative action, including among justices of the U.S. Supreme Court, advocates routinely seek to bolster their case by citing the relatively lower socioeconomic status of minority students. In *Gratz v. Bollinger*,[13] for example, Justice Ginsburg, joined by Justices Souter and Breyer, noted that African Americans had a poverty rate of 22.1%, and Hispanics had a poverty rate of 21.2%, compared with a white poverty rate of 7.5%.[14] Black and Latino students, they noted, "are all too often educated in poverty-stricken and underperforming institutions."[15] Likewise, in a political cartoon, Rob Rogers of the *Pittsburgh Post-Gazette*, depicted an African American girl, who states: "I survived life on welfare and food stamps . . . . In a poor, crime-ridden neighborhood with crumbling schools filled with guns and drugs . . . . In a world that rewards rich white men. So now, affirmative action will help me get into college."[16] Her white male colleague retorts, "That's so unfair." As Sander points out, however, this appealing story, in which affirmative action benefits low-income minority students, is the rare exception in practice.

III. THE FAILURE OF INSTITUTIONS TO PROVIDE SOCIOECONOMIC AFFIRMATIVE ACTION

Sander's third important finding is that law schools, which often purport to provide a leg up in admissions to economically disadvantaged students, do not in fact systematically do so.[17] Sander's analysis of a 1995 survey of nineteen law schools suggests that while schools provide very large preferences to black and Latino students, there is no preference provided to students whose parents have lower levels of education.[18]

These findings comport with studies of selective undergraduate institutions. Carnevale and Rose found that racial preferences triple the representation of black and Hispanic students at the nation's most selective 146 institutions, but that low socioeconomic students receive no preference.[19] Likewise, William Bowen, Martin Kurzweil, and Eugene

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12.   William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequence of Considering Race in College and University Admissions 341 tbl.B.2 (1998) The authors did not include comparable data on Latino students.

13.   539 U.S. 244 (2003).

14.   *Id.* at 299 n.2 (Ginsburg, J., dissenting) (citing U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, POVERTY IN THE UNITED STATES: 2000, at 291 tbl.A (2001)).

15.   *Id.* at 299.

16.   Rob Rogers, *Affirmative Action*, ROBROGERS.COM, http://www.robrogers.com/gallery/old_favorites/html/03/affirmative_action.html (last visited May 31, 2011).

17.   *See* Sander, *supra* note 3, at 656.

18.   *Id.* at 655–57.

19.   Carnevale & Rose, *supra* note 2, at 141–42, 148–49.

Tobin found that racial preferences increase the chances of admission for under-represented minorities at nineteen institutions studied by 27.7 percentage points,[20] but that low-income students receive "essentially no break in the admissions process; they fare neither better nor worse than other applicants."[21] So too, Thomas Espenshade and Alexandria Walton Radford found, that at highly selective private colleges and universities, African American students receive a boost the equivalent of 310 SAT points, but low-income students receive just a 130-point boost, which itself is racially tilted toward under-represented minorities.[22]

Likewise, Sander finds that law school grants and scholarships are not geared toward financial need.[23] Wealthy whites receive twice as much grant and scholarship money as low-income whites (12% of costs covered versus 5%).[24] And wealthy blacks receive four times as much grant and scholarship aid as low-income whites (20% versus 5%).[25]

IV. THE RACIAL DIVIDEND OF SOCIOECONOMIC AFFIRMATIVE ACTION

Sander's fourth significant finding is that socioeconomic or class-based affirmative action can produce a substantial amount of racial diversity.[26] He discusses the experiment at the UCLA Law School, which was banned from using race by voter initiative, and turned to socioeconomic status instead.[27] The race-blind program produced a class that was more than one-third nonwhite.[28]

The experiment was subsequently watered down, but even so, the racial dividend of socioeconomic affirmative action remained significant. As Table 1 suggests, in the fall of 2002, to take one example, blacks and Hispanics benefited considerably from the socioeconomic affirmative action program. African American students were 16 times as likely to be admitted under the socioeconomic program as they were under other programs, and Latino students were 6.8 times as likely to be admitted.

There are a couple of important points to make about the UCLA Law School experiment.

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20.   WILLIAM BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 105 tbl.5.1 (2005).

21.   *Id.* at 166 (emphasis omitted).

22.   THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92 tbl.3.5 (2009).

23.   Sander, *supra* note 3, at 659.

24.   *Id.* at 661 tbl.12.

25.   Id.

26.   *Id.* at 665.

27.   *Id.* at 659.

28.   *Id.* at 662.

First, the sophisticated definition of socioeconomic status employed by UCLA Law School surely increased the racial dividend. Some research has suggested that affirmative action based on parental income is unlikely to produce much racial diversity because poor whites generally outscore poor blacks on standardized tests.[29] This is true in some measure because low-income black students on average face extra obstacles not faced by low-income whites: they are more likely to have low wealth (controlling for income) and are more likely to live in concentrated poverty and attend schools with higher poverty levels. UCLA Law School, quite properly, accounted for those extra obstacles that disproportionately affect African Americans.

Table 1: Economic and Racial Diversity at UCLA Law School

UCLA School of Law					
Fall 2002 SES Admission Summary					
	SES			All Others		
	Apps	Admits	Enrolled	Apps	Admits	Enrolled
Native American	1	0	0	46	7	2
African American	30	19	8	331	13	5
Chicano/Latino	51	26	13	478	36	11
Asian	63	20	17	1221	158	37
White	86	30	17	2521	400	129
Other/Unknown	57	16	9	1724	234	57
Total	288	111	64	6321	848	241

Source: Andrea Sossin-Bergman, director of admissions, UCLA Law School, November 2002

In doing so, UCLA Law was able to capture the legacy of discrimination and ongoing discrimination in the housing market through economic criteria. Housing discrimination, for example, may help explain why black families with incomes in excess of $60,000 live in neighborhoods with higher poverty rates than white families earning less than $30,000. And our nation's legacy of discrimination and housing discrimination surely help explain why even among white and black people of similar income, black people have fewer financial assets. While the median income of black people is about 62% of the median income of

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29.   *See* Thomas Kane, *Racial Bias Testing*, *in* THE BLACK-WHITE TEST SCORE GAP 448–51 (Christopher Jencks & Meredith Phillips eds., 1998).

white people, the median net worth of black people is just 12% of the median net worth of white people.[30]

Second, it is important to note that UCLA Law School's successful use of socioeconomic affirmative action is not isolated: the University of California undergraduate system as a whole has grown more diverse in some measure through the use of class-based affirmative action in the wake of the passage of Prop. 209 in 1996 banning the use of race. The proportion of new freshman who are under-represented minorities initially declined from 18% in 1997 to 15% in 1998 (the first year of race-blind admissions), but has since increased to 24% in 2008. The elite undergraduate institutions—UC Berkeley and UCLA—have fared less well, but after the share of African American and Latino new freshman declined from 23% in 1997 to 14% in 1998, it has since rebounded some to 20%.[31]

Finally, national research comports with the finding that socioeconomic affirmative action can produce substantial racial diversity. Carnevale and Rose, for example, found that at the most selective 146 undergraduate institutions, if grades and test scores were the sole determinants of admissions, the combined representation of African American and Latino students would be 4%. Using race triples that figure to 12%.[32] But using socioeconomic affirmative action would do almost as well— producing a class that was 10% black and Hispanic.[33] Because Carnevale and Rose did not use wealth as a factor in their simulation, the inclusion of that factor would likely raise the racial dividend of socioeconomic affirmative action even further.

Increasingly, research suggests, the primary barrier to equal educational opportunity is class rather than race. In 2010, for example, Carnevale and coauthor Jeff Strohl found that most of the predictors of low SAT scores are socioeconomic in nature.[34] Being socioeconomically disadvantaged (as opposed to highly advantaged) cost a student 399 SAT points on the math and verbal assessments, while being black (as opposed to white) cost a student fifty-six points on average.[35]

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30.   *See, e.g.*, EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT 19 tbl.4-1 (202).

31.   Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994–2008*, *in* EQUAL OPPORTUNITY IN HIGHER EDUCATION 83, 84–89 (Eric Grodsky & Michal Kurlaender eds., 2010).

32.   Carnevale & Rose, *supra* note 2, at 135.

33.   Richard D. Kahlenberg, *Introduction*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN AMERICAN HIGHER EDUCATION 1, 14 (Richard D. Kahlenberg ed., 2004).

34.   *See* Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access is Increasing Inequality, and What To Do About It*, *in* REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 71, 173 (Richard D. Kahlenberg ed., 2010).

35.   *See id.* at 170, 173.

V. CAN STUDENTS ADMITTED WITH SES PREFERENCES GRADUATE AND SUCCEED?

Sander's fifth significant finding is that at UCLA Law School—a highly selective institution—students given socioeconomic preference in admission were part of a class that went on, in 2000, "to achieve the highest state bar passage rate in the school's history before or since."[36]

The finding is very important because if socioeconomic preferences ended up admitting under-prepared students who could not persist to graduation or passage of the bar, the program would be doing its so-called beneficiaries little good. As Sander has noted in widely cited research, bar passage rates for beneficiaries of traditional race-based affirmative action has been disturbingly low.[37] Sander notes that the weight of the preference provided to socioeconomically disadvantaged applicants at UCLA Law was about half the weight provided previously to Latinos, and a quarter of the weight provided previously to African Americans.[38]

Again, Sander's research is buttressed by scholarship involving selective undergraduate institutions. Carnevale and Rose found that socioeconomic preferences could boost the proportion of students from the bottom socioeconomic half of the population from 10% to 38%,[39] and yet graduation rates would actually rise, from 86% today to almost 90%.[40] The authors estimated that the preference employed under their model is roughly half the size currently used for race.[41]

VI. THE IMPORTANCE OF SANDER'S RESEARCH IN A POST-*GRUTTER V. BOLLINGER* WORLD

Richard Sander's article comes at an important time in the life of racial affirmative action programs. While *Grutter v. Bollinger*,[42] the U.S. Supreme Court's 5–4 decision affirming the use of race at the University of Michigan Law School[43] appeared to give new life to such programs (at least for twenty-five years), the makeup of the U.S. Supreme Court has changed, and some observers expect that *Grutter* may be reversed—or severely curtailed—in the event that the Supreme Court takes on a challenge to affirmative action at the University of Texas.

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36.   Sander, *supra* note 3, at 663.
37.   *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 443 (2004).
38.   Sander, *supra* note 3, at 662.
39.   Carnevale & Rose, *supra* note 2, at 149.
40.   *See id.* at 107, 149.
41.   *Id.* at 149.
42.   539 U.S. 306 (2003).
43.   *Id.* at 343.

Fisher v. University of Texas at Austin[44] squarely raises one of the issues Sander addresses: can race-neutral alternatives to affirmative action (such as class-based affirmative action) produce a critical mass of minority students and thereby render the continued use of race unconstitutional?[45] In the suit, white plaintiffs challenged the use of race in admissions, arguing that Texas's Top 10 Percent plan—which automatically admits those in the top 10% of their high school class—creates sufficient racial diversity by itself.[46] Plaintiffs noted that using race-blind criteria produced a class that was 4.5% African American and 16.9% Hispanic in 2004, so the subsequent reintroduction of race on top of the Ten Percent plan is unconstitutional.[47] (In *Grutter*, a law-school class that ranged between 13.5% and 20.1% minority was considered to have achieved a "critical mass" of such students.)[48]

A three-judge panel of the Fifth Circuit Court of Appeals recently rejected the claim,[49] but it may ultimately receive a more favorable hearing in the U.S. Supreme Court. With Justice Alito having replaced Justice O'Connor on the Court since the 2003 *Grutter* decision, Justice Kennedy—a dissenter in *Grutter*—is the new swing justice. Opponents of affirmative action are further heartened by Justice Kennedy's 2007 concurring opinion striking down the use of race in school integration programs in Louisville and Seattle. In the lead decision, *Parents Involved in Community Schools v. Seattle School District No. 1*,[50] Justice Kennedy declared that the individual classification of students by race should be used only as "a last resort."[51] In his *Grutter* dissent, Justice Kennedy said the Court should "force educational institutions to seriously explore race-neutral alternatives."[52] While Justice Kennedy may not wish to overturn *Grutter* explicitly, he may be open to substantially altering the nature of *Grutter* by vigorously enforcing the decision's requirement to look to alternatives before using race. The practical implication would be for universities to earnestly employ the type of class-based affirmative action program that Sander describes, as well as top-percent plans, reserving race for extreme cases.

CONCLUSION

In the end, it may be that the demise of race-based affirmative action will finally prompt higher education—including law schools—to address the great reality of class inequality. Sander notes, stunningly, that

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44.   645 F. Supp. 2d 587 (W.D. Tex. 2008).
45.   See id. at 590.
46.   *Id.* at 603.
47.   *Id.* at 593.
48.   539 U.S. at 390 (Kennedy, J., dissenting).
49.   Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011).
50.   551 U.S. 701 (2007).
51.   *Id.* at 790 (Kennedy, J., concurring).
52.   539 U.S. at 375 (Kennedy, J., dissenting).

"low-SES representation at elite law schools is comparable to racial representation fifty years ago, before the civil rights revolution."[53] Ironically, a conservative victory in the U.S. Supreme Court undercutting race-based affirmative action programs may be the prerequisite to making class visible at long last.

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