Daily Journal

# Policy decisions are better when informed by data

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April 29, 2016

Most people agree that it is good to inform policy decisions with empirical data. Then again, the California State Bar is not most people.

Without data, the public cannot tell if a policy is succeeding or if it is failing - or more importantly, if it is making things worse. Since 2008, UCLA Law School Professor Richard Sander has been locked in a court battle trying to obtain data from the bar on test-takers' performance and racial composition - and the bar is doing everything in its power to stop him. Sander's aim has been to test his theory about affirmative action effectiveness called "mismatch."

According to Sander, the use of racial preferences in higher-education admissions may have reduced the overall number of minority practicing attorneys by 7.9 percent. This is a very important detail, because if true, it means that the current set of affirmative action policies is actually making things worse for minorities and reducing the number in higher-skill professions.

Mismatch theorists assert that "there is now a serious gap in academic credentials between minority and non-minority law students at all levels," as Gail Heriot of the U.S. Commission on Civil Rights put it. The notion at play is that because elite schools lower their credentials to admit minority applicants, lower-tired schools "[u]p and down the pecking order" do the same. This dynamic creates a class where "the average black student has an academic index that is more than two standard deviations below that of his average white classmate." Those students then tend to underperform on the bar exam, lowering the overall number of minority attorneys.

As the L.A. Times editorial board said in 2013, "[m]aybe [Sander]'s right and maybe he's wrong. But there's no justification for denying him the data he needs to test his theory." What Sander is saying is for sure not politically correct, but if factually correct his theory will necessitate sweeping changes in education policy - simply stated, if he is right, Americans would have been getting minority education policy wrong to the detriment of minorities. It is a researcher's duty to test theories and state useful facts, even ones that may distress.

Still, the bar is putting up every roadblock that it can muster.

To test the "mismatch" theory, and after repeated denials of direct requests to the bar itself, Sander in 2008 sought a writ of mandamus to compel the bar to turn over information on test-takers' law school, grades, LSAT scores, race and ethnicity - obviously relevant data that could

easily be anonymized for privacy concerns by simply omitting the names, addresses, social security numbers and any other personal information.

The trial court denied Sander's right of access, but in 2013, the California Supreme Court held in Sander v. State Bar that there was a common law right of access in the information if it can be disclosed in a manner that protects against individual identification and if there is no counter-veiling interest outweighing disclosure, and remanded the case.

Then, in 2015 - as a result of lobbying efforts by the bar - the California State Legislature passed Senate Bill 387, ostensibly prohibiting making the disclosures requested by Sander under Business and Professions Code Section 6060.25. Basically, the bar attempted to end-run the Supreme Court decision in order to avoid disclosing the data.

But the judicial branch got the last laugh.

Recently, in light of new law, the bar moved for judgment on the pleadings in Sander. San Francisco Superior Court Judge Mary E. Wiss found - as a matter of plain text and legislative history - that SB 387 did not actually accomplish what the bar wanted.

Instead, as Judge Wiss found, because the "last antecedent" phrase in SB 387's recitation of the types of unobtainable data - "that may identify any individual applicant" - applied to all of the preceding terms in the list, the data Sander seeks is still obtainable by the public as long as it is not individually identifiable. Additionally, the legislative history apparently reflects an intent to codify the Sander standard, not to overrule it as the bar lobby advocated.

Despite court defeat after court defeat-wisely upholding Sander's right to the data - the bar plans to defend itself at trial. The agency will argue that "countervailing interests" - whatever they may be - tip the scales against disclosure.

This case has been ongoing for nearly a decade. The bar just keeps fighting Sander to prevent him from proving or disproving his theory. And of course it's been spending money to do so that could otherwise go to legal aid, attorney training or even to develop programs to encourage more members of historically disadvantaged groups to become attorneys.

Regardless of what one thinks of affirmative action - or any other government policy - empirical data serves to inform decisions and to hone its application. The bar's recalcitrance really makes no sense. Vague and easily remedied concerns over privacy aside, either Sander is wrong - and the bar should have let him prove that eight years ago - or he is right, and the bar has been withholding important data because it didn't like the implications for law school admissions even if the status quo hurts those whom affirmative action is supposed to help.

There is too much at stake. Let the man have his data.

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