

## Symposium

# Are Law Schools Racist?: A “Talk” with Richard Delgado

By DAN SUBOTNIK\*

More subtle and searching than other critiques of critical race theory . . . Dan Subotnik’s book poses challenges that all progressives, myself included, will have to consider.

Richard Delgado\*\*

### Introduction†

WALKING BRISKLY INTO HIS FAVORITE Starbucks coffeehouse one morning, Riccardo ordered a tall cappuccino and an almond biscotto from the statuesque Italian clerk. A young law professor and the son of a black American man and an Italian woman, Riccardo studiously avoided looking at the Cameron Diaz–lookalike because they had previously dated and the wound of loss was still raw. Luckily, as he turned around looking for a distraction, he spied his old classmate, Bianco, the son of Austrian immigrants and also a law professor, sitting in the corner absorbed in his reading. Riccardo grabbed his

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\*\* DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER AND LAW TALK IN AMERICA* (2005) (quoting Delgado’s passage on the inside flap of the book).

† Editor’s note: This Article was written before Richard Delgado wrote “The Sincerest Form of Flattery?” and Rhonda V. Magee wrote “Toward an Integral Critical Approach to Thinking, Talking, Writing, and Teaching About Race” in response.

breakfast, quickly traversed the room, and plopped down opposite his pal.

“What’s up?” he said to his startled friend. A crease crossed Bianco’s brow. Though still rattled from seeing his old girlfriend, Riccardo read Bianco’s face. “What’s the matter?”

Bianco showed him the article he was reading, “Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions.” “Have you ever read any of these dialogues?”

“Your question suggests that you have.”

“I have,” Bianco admitted. “I started one year ago but I had no patience for the *extranea*. I just finished this one.”

“And . . . ?”

“If the ‘professor’<sup>2</sup> absolutely must announce that he likes the vegetables in his pasta primavera lightly cooked,<sup>3</sup> or brag that he likes Italian creamy custard, but, on advice of his doctor, he controls himself,<sup>4</sup> he should do so during cocktail hour. Not in a law review article, which has more important uses. Who does he think he is, Julia Child? Oprah?”

“You’re so linear, Bianco. Isn’t everyone entitled to a little riff? What’s eating you?” Riccardo continued, biting into his biscotto. “We go back a long ways together. Come on, out with it.”

“I have another idea about the function of the Italian custard. But all right. I recently read a book, *Toxic Diversity*,<sup>5</sup> which charges that, ignoring scholarly standards, a number of minority and feminist scholars are saying horrendous things about white males—and mostly with impunity.”<sup>6</sup>

“Oh, they’re probably just flexing newly acquired muscles a little, Bianco. It shouldn’t be too hard to understand the frustration of being part of the legal academy but still falling short of numerical parity. Why must you take everything so seriously?”

“I understand perfectly well the joy of signifying—for everyone. But, as the author explains, minorities and women are not playing

1. Richard Delgado, *Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637 (2007). This Article is itself a kind of riposte over the years.

2. *Id.*

3. *See id.* at 643.

4. *See id.* at 647.

5. SUBOTNIK, *supra* note 1.

6. *See* Alan Dershowitz, *Harvard Witch Hunt Burns the Incorrect at the Stake*, L.A. TIMES, Apr. 22, 1992, at A11 (“[B]lack are entirely free to attack white men . . . in the most offensive terms; . . . radical African Americans can accuse all whites of being racists, without fear of discipline or rebuke.”).

some harmless little game, but are rather undermining civil society and in some cases helping to terrorize people. Harvard Law professor Randall Kennedy, a black man himself, has warned that groups that have been oppressed can readily become oppressors.”<sup>7</sup>

“Oh, come on. Give me an example, Bianco.”

“Take the Duke rape case, which involved a black complainant and three white lacrosse players. You recall that, don’t you? Long before the evidence was in, eighty-eight faculty members, including forty-six women and a good number of members of the African and African American Studies Program, signed a statement denouncing racism and sexism, thus roiling the campus, stirring up the local black community, pressuring the prosecutor to stick with the case much too long, and upending the lives of three young white students and the lacrosse team coach, in the process.”<sup>8</sup>

“What should faculty members concerned about the alleged rape have done instead?”

“It would have been enough to say that the charges were serious and to ask the prosecutor for a full and fair investigation, while calling for calm on campus. Tell me, Riccardo, would your law faculty have done anything more than the highly esteemed Duke Law faculty or dean did, which is to say, virtually nothing, to make sure that similarly situated white students at your school were not being railroaded by the prosecutor, who was subsequently disbarred for his actions?”

“What a horrible thought. I don’t know.”

“Here’s another mental exercise for you. Suppose the accused had been black athletes. Would your colleagues not have leapt to their defense? Or are stereotypes about antisocial behavior by black people meant to be resisted at all costs and those about preppy white athletes to be adopted wholesale?”

“What can be done about academic gamesmanship? We can’t control what out-of-control professors write.”

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7. Randall Kennedy, *My Race Problem—and Ours*, ATLANTIC MONTHLY, May 1997, at 65. According to Kennedy: “[U]nless inhibited, every person and group will tend toward beliefs and practices that are self-aggrandizing. This is [not only] true of those who inherit a dominant status . . . . [O]ne of the most striking features of human dynamics is the alacrity with which those who have been oppressed will oppress whomever they can once the opportunity presents itself.” *Id.*

8. See STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 144–45 (2007). For an assessment of the ideological background of the case, see Dan Subotnik, “*Hands Off*”: Sex, Feminism, Affirmative Consent and the Law of Foreplay, 16 S. CAL. REV. L. & SOC. JUST. 249 (2007).

"Sure we can. First, newspaper editors and especially law review articles editors, who are students after all, can be trained not to fall for the law school analogue of Sokal's Hoax."<sup>9</sup>

"That will take time. What else?"

"Most important, when crazies weigh in on race and gender, other academics must hold them to the same standards as white males. And white men may have to step up and do the job."

"White men are not speaking out enough?" asked Riccardo. "What an idea!"

"The point is, as black Harvard sociologist Orlando Patterson says, no normally insecure white person dares speak openly on the subject of race for fear of being branded a racist; thus the talk, such as exists, cannot be trusted."<sup>10</sup>

"Of what use are dialogue and free speech if truth-telling inclinations are stifled?"

"Precisely. Progress is impossible without frank talk across group lines. That's why in his book, *Racial Healing*, Yale Law's Harlon Dalton, who is black, urges whites and blacks to 'take risks' and 'confront one another'<sup>11</sup> in an 'unadulterated struggle.'<sup>12</sup>

"But doesn't that have to be done with some delicacy? Not, to be frank, with your characteristic ham-handedness," Riccardo retorted.

"I am glad you are being forthright with me but, in short, no. Patterson insists that 'no special sensitivity is needed in these confrontations.'<sup>13</sup>

"Hold on here; we are getting ahead of ourselves. I am sorry but the Duke case by itself cannot support the charge that minority critics are hurting American society."

9. See Roger Kimball, *A Painful Sting Within the Academic Hive*, WALL ST. J., May 29, 1996, at A18. The hoax, perpetrated by Professor Alan Sokal at NYU, consisted of inducing a left-wing academic journal to publish a nonsense article that, with liberal use of postmodern jargon, purported to deconstruct a principle of physics.

10. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 2 (1997) ("[N]o European-American person, except one insensitive to the charge of racism, dares say what he or she really means.").

11. HARLON DALTON, *RACIAL HEALING* 4 (1995) ("We will never achieve racial healing if we do not confront one another, take risks[,] . . . [and] say all the things we are not supposed to say in mixed company.").

12. *Id.* at 97 ("If engagement is the first step in healing, then the second is pure unadulterated struggle . . .").

13. PATTERSON, *supra* note 11, at 115 ("Afro-American and Euro-American persons should treat each other exactly alike: as responsible moral agents. We do not need any special sets of sensitivities.").

“Okay, take the substantial differentials in black-white test scores that cut across income categories.<sup>14</sup> In disvaluing their significance, as the professor has done,<sup>15</sup> race activists make it that much harder for black people to achieve equality in American society.<sup>16</sup> And by holding whites responsible for all society’s ills, minority activists are responsible for making Rush Limbaugh et al. possible.”<sup>17</sup>

“Are you finally showing your true color, Bianco—after all these years? What gives?”

“The seed was probably planted fifteen years ago, at a faculty meeting devoted to hiring, when a female colleague blurted out, ‘The last thing we need around here is another white male.’ Of more direct influence is the race and gender theory I am reading. In an effort to show that American culture is not neutral but serves the interests of white males, minority and feminist writers call for increased race and gender consciousness.<sup>18</sup> I guess I finally got the message. Ain’t I a white man?”

“Pray tell, what have you learned as a newly self-conscious white man?”

“Most important, race and gender unhinge even the best human minds. The problem is rooted initially in our self-love and has been manifested most clearly in the ease with which our forebears convinced themselves that black people were incapable of living independently and were far better off as slaves.<sup>19</sup> And similarly, after failing to

14. Christopher Jencks & Meredith Phillips, *Introduction to THE BLACK-WHITE TEST SCORE GAP 2* (Christopher Jencks & Meredith Phillips eds., 1998).

15. Delgado, *supra* note 2, at 642 (challenging the value of standardized exams like the Law School Admission Test, or “LSAT”).

16. Jencks, *supra* note 15, at 3–4 (“[I]f racial equality is America’s goal, reducing the black-white test score gap would probably do more to promote this goal than any other strategy that commands broad political support. Reducing the test score gap is probably both necessary and sufficient for substantially reducing racial inequality in educational attainment and earnings. Changes in education and earnings would in turn help reduce racial differences in crime, health, and family structure . . .”).

17. The angry white male would seem to make up most of the talk show audience.

18. See John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *LAW & INEQ.* 355, 399 (2007). Out of modesty—or perhaps immodesty—Powell uses lowercase first letters in his name.

19. See Philip Mazzocco, Kirwan Inst. for the Study of Race & Ethnicity, *The Dangers of NOT Speaking About Race 2 n.1* (2006), available at <http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/TheDangersofNotTalkingAboutRaceMay2006.pdf> (“[W]e are driven to *perceive* our own racial group as the best (in-group love), and to *perceive* other racial groups as inferior (out-group hatred).” (citing Bernadette Park & Charles M. Judd, *Rethinking the Link Between Categorization and Prejudice Within the Social Cognition Perspective*, 9 *PERSONALITY & SOC. PSYCHOL. REV.* 108 (2005))).

educate women, in readiness to prohibit them from owning property and voting.”

“What does self-love have to do with anything?”

“It is undoubtedly bad form in every society to announce, ‘I am the smartest guy in the room.’ But if an individual wants to feel that he really counts for something, and especially if he wants to get ahead, the point somehow has to be made. The way to do this is to hide behind the group. Hence: ‘My group is smarter than yours—or his.’”

“Wait a minute, Professor Bianco. You have shown only that white-male thinking is corrupt.”

“Nice try; we need more critical thinking like that on race—and gender. Consider those grandiose and silly proclamations of minorities over the years on race and gender. MacArthur ‘genius’ award winner and black Columbia Law professor Patricia Williams teaches that minorities and women think more deeply than white males; to wit, they can see through white men’s ‘definitional polarities’ to the fullness of ‘life’s complication.’”<sup>20</sup>

“They—we—do? How does that happen?”

“The intellectual race- and gender-based advantage starts early, according to the recently elected co-president of the Society of American Law Teachers. On a cognitive development scale of one to four, she claims, citing the work of William Perry, minorities and women *begin* at step three.”<sup>21</sup>

“How could she have gained understanding of black people’s elevated consciousness?”

“Take a good guess. She is a black woman herself. A number of other minority authors smugly claim multiple consciousness.”<sup>22</sup> Still

20. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8 (1991). A Columbia University psychology professor adds that people of color have special “clarity of vision.” DERALD WING SUE, *OVERCOMING OUR RACISM* 261–62 (2003). He continues: “We can understand Whites better than they can understand us . . . and must never allow White folks to make us doubt our perceptual wisdom.” *Id.* “[Whites] may believe that their opinions and judgments are as fully formed and cogent as victims of racism. In this circumstance something approximating a lack of standing to speak exists because the insight gained by personal experience cannot be duplicated—certainly not without careful study of the oppression under scrutiny.” Michael Eric Dyson, *Seeing the Simpson Verdicts in Black and White*, *NEWSDAY*, Feb. 9, 1997, at G5.

21. Deborah Post, *Rain and Shine and Growth*, in LOUISE HARMON & DEBORAH W. POST, *CULTIVATING INTELLIGENCE* 22–55 (1996).

22. W. E. B. Du Bois undoubtedly provided the inspiration for this notion when he claimed that black people needed “double consciousness” in order to survive in America. W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 19 (Fine Creative Media, Inc. 2003) (1903); *see also, e.g.*, LANI GUINIER, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 87 (1997) (invoking the spirit of Du Bois).

others sanctimoniously claim a higher morality on race issues.<sup>23</sup> A group whose consciousness and moral standards are higher than another's gains not only an inflated ego but also a claim to moral and intellectual priority."

"So I am likely a more sophisticated and more moral scholar than you, and you owe me respect. I never thought of that."

"You might indeed be, but remember, you are only half black, and since you, quote, 'never thought of that,' you undercut Williams' argument. The amazing thing is that Williams did not feel the need to support her claim to elevated consciousness with any evidence—and that her academic publisher apparently did not require it. In its self-righteousness, the scholarship I refer evokes the barbershop rather than the academy. Just for the fun of it, imagine Williams' likely response to a white scholar who, after doing a race-based study of grades, had made a similar claim for whites."

"What a thought."

"The important message here," added Bianco, "is not just that rhetorical standards are different for different groups, but that since race is so often an intellectual trap, we should give no presumption of competence to any group, including minorities, as Richard Delgado has proposed.<sup>24</sup> We should, again, speak the same way to one another across racial lines as we do within them, and no person or group should be condemned without a full and fair investigation."

"A comprehensive investigation is needed before we condemn white men? I've never heard that one before."

"Glad I could teach you something. Adolph Eichmann, John Gotti, Richard Dahmer, and Timothy McVeigh were fairly tried. What's so terrible about a defense of white men generally? That it is a 'mitzvah' to defend the powerless does not suggest its contrapositive, that it is a sin to defend the powerful."

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23. Dyson, *supra* note 21 ("[W]hites who have benefited, whether explicitly or unconsciously, from racial inequality [should] now be courageous in rejecting a belief in the moral equivalency of black and white views about race."). Regarding the O.J. Simpson verdict, Dyson wrote: "[W]hite skepticism about black juries' ability to convict black criminals doesn't have the same moral gravity as the claims of blacks victimized by racial injustice." *Id.*

24. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 9 (2001) (arguing that minority status "brings with it a presumed competence to speak about race and racism"); see also Mari Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 (1990) ("[I would] give special credence to the perspective of the subordinated.").

“What does all this have to do with me? I have never reflexively condemned whites as a group.”

“Bully for you, Riccardo. The point is that the time has come for you to step up and help defend white people against attack.”

“You’d better explain.”

“As I mentioned earlier, I have just read a dialogue of his. What I found out was that the supposed gentle shepherd was actually eating his flock. You have to listen not only to what he says but to what he doesn’t. Should I stop here?”

“No, continue.”

“Are you sure? This is going to get rough.”

“Cut the patronizing, Bianco.”

“It will take some time. Do you have it? Once into my wind-up, I don’t want to balk.”

“In fact, I am supposed to teach now. But the students will just have to wait. Go on, Bianco.”

## I. Bianco Explains the Game that the Professor Plays

“You must know about UCLA law professor Richard Sander and his mismatch theory—that African Americans, and presumably everyone else, would be better off in law schools where they were competitive with the rest of the class rather than attending schools as beneficiaries of affirmative action and ending up, *on average*, with far worse grades.<sup>25</sup>”

“How,” asked Riccardo, “would that help black students?”

“Black students, in his view, would then not get discouraged and would be more likely to stay in school, get better grades, graduate, and pass the bar exam.<sup>26</sup> Sander recommends that affirmative action be cut back significantly, if not eliminated, because it leads not to more, but to fewer law graduates.”

“Hasn’t Sander’s conclusion been seriously challenged?”

“Yes.<sup>27</sup> And I cannot add anything to that matter. What we need to think about now are the causes of that which has not been chal-

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25. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 453–54 (2004) [hereinafter Sander, *A Systemic Analysis of Affirmative Action*].

26. *Id.*

27. See Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sanders’ Study*, 57 STAN. L. REV. 1855 (2005); Michelle Landis Dauber, *The Big Muddy*, 57 STAN. L.



lenged—the existence of the huge race-based grade disparities.<sup>28</sup> The professor suggests that ‘[r]acism at the law schools and in the legal curriculum and sheer economic hardship are equally plausible hypotheses’ as affirmative action for poor African American law school grades.<sup>29</sup> You’ve been in the teaching business for a few years now, Riccardo. Doesn’t being tarred with racism make you ill?”

“Not me; I consider myself black. Remember, racism equals race plus power. And my group is, by common understanding, powerless. But seriously, again, maybe you should go a little easy on him, Bianco. He is no kid anymore.”

“Same standards, remember?”

“Okay. But maybe the key word is ‘plausible.’ That is to say, the professor is merely hypothesizing a connection between racism at law schools and grades.”

“In theory, you are right. But since the professor holds that racism is as plausible an explanation for low grades as affirmative action,<sup>30</sup> should the racism claim not, at least, be tested? Lots of explanations for low grades having little to do with racism are ‘plausible.’ African American students may be underperforming because, as has been suggested, they know that affirmative action is available as a safety net for them.<sup>31</sup> Let’s be clear that the professor is not hypothesizing the existence of racism. He has been complaining about it incessantly over the years. At issue here is only the connection of racism at law school with poor grades.”

“What’s wrong with the racism hypothesis?”

“Let’s define racism. Here is one definition: ‘A belief in the superiority of a particular race; prejudice based on this.’”<sup>32</sup>

“Are you saying that our law schools are free of racism?”

“That is not the issue, which is whether racism leads to lower grades. Think about what our law schools have been doing in recent years. Is it racism when the Association of American Law Schools

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REV. 1899 (2005); Daniel E. Ho, Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005); David B. Wilkins, *A Systemic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

28. See Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 26, at 373.

29. See Delgado, *supra* note 2, at 644.

30. *Id.* at 641.

31. SHELBY STEELE, WHITE GUILT 61 (2006) (“Preferential affirmative action . . . tells minorities quite explicitly that they will not have to compete on the same standards as whites precisely so they can be included in American Institutions *without* in fact achieving the same level of excellence as whites.”).

32. OXFORD AMERICAN DICTIONARY AND THESAURUS 1233 (2003) (1996).

(“AALS”) requires that schools ‘seek to have a faculty, staff and student body which are diverse with respect to race, color, or sex?’<sup>33</sup> Is it racism when law schools admit applicants of color and reject whites such as Barbara Grutter<sup>34</sup> with far higher predictors, and then spend a fortune defending the decision in court? Is it racism when the ABA Section on Legal Education attempts to tie accreditation to bar passage<sup>35</sup> and a number of law schools protest because the action would disproportionately affect minority applicants?<sup>36</sup> I’m asking you.”

“No, I guess not.”

“Is it racism when schools such as mine offer academic support programs that primarily benefit those with lower grades? Or when we have a year-long orientation program that is reserved exclusively for students of color?<sup>37</sup> Or when we hire an African American teacher and the Vice Dean acknowledges that he is not sure that a similarly situated white person would have been hired? And finally, if it is racism, should law schools end affirmative action in the name of equality?”

“What do you want, Bianco, a medal?”

“Not especially. But since you ask, let me put it plainly: although I have been teaching law for more than a quarter of a century, I am not a racist, so I want to stop being condemned as one. Is that asking too much? Or does just interrogating the claim of racism fatally undermine my claim?”

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33. See Association of American Law Schools, Bylaws § 6-3(c) (1971) (amended 2008), available at [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php); ABA Standards for Approval of Law Schools, Standard 212(b) (2008), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%202.pdf>.

34. Barbara Grutter was the plaintiff in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which assessed the constitutionality of affirmative action at the University of Michigan Law School. *Id.* at 343 (holding that the United States Constitution “does not prohibit the [l]aw [s]chool’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body”).

35. See ABA Standards for Approval of Law Schools, *supra* note 34, at app. 3 (Commentary on Interpretation 301-6) (providing that in order for a school to receive accreditation, the bar passage must be sufficient).

36. See Jodi Sokolowski, *ABA Pushes Law Schools for More Exam Tie-in*, BUS. FIRST BUFFALO, July 27, 2007, available at <http://buffalo.bizjournals.com/buffalo/stories/2007/07/30/story13.html>.

37. My school, the Touro Law Center, calls it the Legal Education Assistance Program, or “LEAP.” See Touro Law, Legal Education Access Program, [http://www.tourolaw.edu/student\\_services/student\\_services\\_office/academic\\_resources/legal\\_education\\_access\\_program\\_leap.asp](http://www.tourolaw.edu/student_services/student_services_office/academic_resources/legal_education_access_program_leap.asp) (last visited Jan. 4, 2009).

"I hear you. But surely we can't rely on a dictionary definition in evaluating an academic article about racism. What about institutional racism? Unconscious racism?"

"What about them? They are all ways of identifying the same sense of superiority. And the professor does not show us precisely where the sense of superiority lies. It seems fair to expect that in an *academic* article claiming pervasive racism, the racism will be demonstrated."

"So the professor just assumes the racism?"

"He's not that manipulative. The professor throws up the charge that law schools provide 'Anglocentric courses and Socratic teaching that . . . reinforce quick responses and a lot of bluffing . . . [a]nd more of the same on the bar exam.'"<sup>38</sup>

"I have heard these complaints for years."

"Just because a number of people voice a complaint does not mean that it has substance. A law professor should know that, Riccardo."

"Thanks for the lesson. What do you think of the professor's attack on Professor Sander?"

"I am not sure that Sander is right about whether in the last analysis affirmative action hurts minorities more than it helps them; his empirical methods have elicited a storm of criticism.<sup>39</sup> His conclusion, however, is not my point here, which is, that if racism becomes the default explanation for race-based disparities as in grades, we lose the moral force to act against 'real racism' and, no less problematic, we cannot solve the grade problem."

"What about Anglocentrism then?"

"I don't know what the professor wants—race is already addressed head-on in constitutional law, criminal procedure, race and racism, civil rights, and rights of the poor. A contracts casebook I am familiar with deals extensively with race.<sup>40</sup> Should we teach Mali contract and tort law because a sizable fraction of African American students have family origins there? What I do know is that usually second- and third-year law students are free to choose electives. It might advance the careers of our critical race theory experts, like the professor, but not those of our black students if they took advanced critical race

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38. Delgado, *supra* note 2, at 644.

39. See sources cited *supra* note 28.

40. AMY KASTELY ET AL., *CONTRACTING LAW* (2006). Unlike authors of other casebooks on contracts, Kastely believes that race should be addressed as part of the curriculum.

theory instead of telecommunications law or antitrust. Is it racist to want black students to be competitive with white students upon graduation?"

"That's pretty strong stuff."

"Not strong enough. Is the professor saying that black students cannot muster interest in 'white' subjects like antitrust? If so, it sounds like yet another example of what black author John McWhorter calls 'therapeutic alienation.'"<sup>41</sup>

"But do you deny the possibility that students of color might be more inspired if law schools offered more courses that were directed specifically to them?"

"In principle, Riccardo, perhaps. But one law school, UCLA School of Law, now offers a concentration in critical race theory.<sup>42</sup> It would be easy to compare the law school performance of concentrators with others to see how the former were doing. But no one has apparently done so. No one, including you, seems to want to know."

"You are not addressing the Socratic teaching question," Riccardo harrumphed.

"Harrumphing will get you nowhere with me, Riccardo. Think about how the professor himself communicates—through Socratic dialogue. Are you or your black students incapable of understanding him?"

"I suppose not," Riccardo conceded.

"Now," continued Bianco, "let me make something else clear. As you well know, I worry about the performance of minority students as much as anyone. Indeed, I think it is one of the banes of American culture. But I will not accept the idea that African Americans are handicapped at mastering that brand of repartee that we call Socratic dialogue in law school—and especially bluffing."

"Can you deny the emphasis on repartee and the salience of bluffing in our law schools?"

"No. But as for the former, African Americans would actually seem to be at an advantage. Who, after all, invented the 'dozens'?"<sup>43</sup>

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41. See *Basic Black* (PBS television broadcast Oct. 18, 2007) (hosted by Karen McLaren, with guest John McWhorter, who insists that alienation from "white" culture is not real).

42. UCLA Law, Academic Programs & Courses, <http://www.law.ucla.edu/home/index.asp?page=1083> (last visited Jan. 4, 2009).

43. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1997), [hereinafter WEBSTER'S] defines "the dozens" as "[a] ritualized game in which the players attempt to outdo each other in insults." *Id.* at 394.

Suffice to cite Harvard professor Henry Louis Gates' landmark book about the importance of word gamesmanship in black culture—and note specially the title—“The Signifying Monkey.”<sup>44</sup>

“And the bluffing?”

“Have you really learned nothing here, Riccardo? The problem with that argument—as should be quite apparent by now—is that skill at humbug is not limited to white people. Here again a book tells you all you need to know. Written by Stanford law professor Richard T. Ford, it goes by the title, *The Race Card: How Bluffing About Bias Makes Race Relations Worse*.<sup>45</sup> Professor Ford is talking about black academics, and, for what it's worth, he is black.”

“You can always find someone, as you have shown, to take a loopy position.”

“Not convinced? Try black radio commentator Larry Elder's new book, whose subtitle is ‘How to Place the Race Card—and Lose.’”<sup>46</sup>

“There is finally the matter of financial pressures on African American law students, Bianco, which might force them to work instead of study.”

“As for distractions from schoolwork, the professor cites no study showing that, for example, African American law students have to work for money more than white students do. Shall we just assume it?”

“Okay, okay.” Riccardo threw his hands up, hoping to shut Bianco down.

“I am far from finished with the professor,” Bianco insisted, picking up the cue. “You promised to hear me out.”

“Don't remind me,” Riccardo said with resignation.

“You haven't conceded the racism issue to me yet.”

“These issues are more complicated than you've made them out to be, Bianco, as you should know. To put the matter plainly, why would our profession feel compelled to adopt affirmative action programs in the first place?” Riccardo stood up as if to leave.

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44. See generally HENRY LOUIS GATES, *THE SIGNIFYING MONKEY* (1988). Importantly, Gates is black. Webster's College Dictionary defines “signifying” as “[a] game or playful confrontation, as playing the dozens, in which witty insults are exchanged.” WEBSTER'S, *supra* note 44, at 1202.

45. See generally RICHARD T. FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008) (arguing that charges of white malevolence have too often been serious).

46. LARRY ELDER, *STUPID BLACK PEOPLE: HOW TO PLAY THE RACE CARD—AND LOSE* (2008).

“Do you want the answer or are you afraid of it, Riccardo? Sit down and take a breather while I go get you another cup of coffee.”

## II. Bianco Elaborates on the Professor’s Views Regarding Law School Grades

“The professor suggests that undergraduate grades and LSAT scores are poor predictors of law school performance, and that indeed, notwithstanding low scores in these domains and then in law school, many African Americans go on to careers of ‘great distinction.’”<sup>47</sup>

“Well,” Riccardo offered, regaining a little confidence, “do you disagree?”

“Hardly. But that does not evidence racism. The LSAT and grades are still the best measures we have of success in *law school*, which is why they are used in admissions. However imperfect the correlations, trained statisticians continue to find them helpful.<sup>48</sup> There is no reason to suppose that overriding these criteria with race will, on balance, produce higher-achieving students. Is the professor suggesting that notwithstanding higher scores, Barbara Grutter was unlikely to have a career of ‘great distinction’?”

“You say nothing about diversity.”

“You’re missing the point. If, in supporting affirmative action, the professor wants to argue, as others have, that society cannot have excellence in education without racial diversity, or that minority lawyers will more likely serve minority communities, that would be different. But he is not hanging his hat on that peg here.”

“On what does he hang it?” Riccardo queried awkwardly.

“Beyond questioning the utility of testing generally, the professor argues that African American students on the whole do worse than their entering credentials suggest on the LSAT. He wants readers to

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47. See, Delgado, *supra* note 2, at 642.

48. The LSAC claims that “[c]orrelations between LSAT scores combined with undergraduate grade point averages and first-year law school grades ranged from .25 to .64 (median is .47).” LAW SCHOOL ADMISSION COUNCIL, LSAT AND LSDAS INFORMATION BOOK 27 (2008), available at <http://www.lsac.org/pdfs/2008-2009/InformationBook08web.pdf>. LSAT scores and law school grades correlate well with first-time bar passage. See Keith Kaufman et al., *Passing the Bar: Psychological, Educational, and Demographic Predictors of Success*, 57 J. LEGAL EDUC. 205, 217–18 (2007) (arguing that LSAT scores and grades are a “stronger predictor” of bar success). In theory, perhaps, law school grades should be a better predictor of bar exam performance since the measurement is taken many times and more closely in time to the bar exam.

conclude from this, I think, that we simply cannot trust the predictive power of tests and college grades for law school performance.”

“But doesn’t that follow?”

“In suggesting that African Americans underperform their indicators, he is not strengthening, but weakening the case for ignoring test results and applying affirmative action. He is thus making a tactical mistake. That is, far from discriminating against African Americans, traditional measures of merit give them an ‘undeserved’ edge.”

“Bianco, are you against affirmative action? You’ve never said that before.”

“I am uneasy about it, Riccardo. I am concerned about the mismatch problem, the unfairness to white students lacking the advantages of educated parents, and the social tensions that ignoring these students’ needs exacerbates.”

“Can these concerns be allayed?”

“If the professor showed *any* concern about disadvantaged white applicants, I would not react the same way. Or if he just admitted, on the strength of the data, that students like Barbara Grutter would likely perform much better in school, but argued nevertheless that historical conditions for black people have made it impossible for black students as a group to catch up in the foreseeable future, and that at all costs American society has to do something about it, I—and, who knows? maybe eventually even Barbara Grutter—could swallow Delgado’s argument.<sup>49</sup> Just don’t lie to us about how the LSAT is useless.”

“What sticks in your craw, then, Bianco, is that the professor wants it both ways. Racism and educational circumstances make it *impossible* for black students to compete in school but, nevertheless, these students are fully competitive in the workplace and are, indeed, heroes for succeeding in the face of white racism. In this view, Grutter and others similarly situated should just graciously yield their places to black people.”

“Precisely. This last argument reprises precisely one that the then *enfant terrible* Richard Delgado made twenty-five years ago about white scholars who devote themselves to race. They should step aside and leave this important issue to minorities,<sup>50</sup> which they have largely

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49. Grutter was the plaintiff who unsuccessfully sued the University of Michigan for denying her admission to its law school. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

50. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Critical Race Literature*, 132 U. PA. L. REV. 561, 577 (1984) (arguing that the time had come for minorities to control racial discourse).

done. So Delgado would likely not approve my intrusion. On the other hand, I should note, he has spoken highly of *Toxic Diversity*.<sup>51</sup>

"I am glad that you are trying to be fair-minded. How does the professor explain how individual African Americans with poor test scores could succeed in the most prestigious law schools and become competitive thereafter?"<sup>52</sup>

"His primary claim, again, is that tests are not effective predictors of learning. But he admits that many African Americans will not show up well on standardized exams. He attributes this to "stereotype threat," the well-publicized, if inadequately documented, idea advanced by Stanford professor Claude Steele, that many African Americans freeze up on such tests because they perceive that they are being measured on intelligence where the stereotype of inferiority brands them as uncompetitive."<sup>53</sup>

"Sounds plausible to me, Bianco."

"Does it? Again, Riccardo, plausibility is not the test. A lot of things are plausible. You might want to be especially careful in this area. Stereotype threat would seem to prove too much. All good tests to some extent measure intelligence, defined as the ability to learn. A student suffering from stereotype threat would freeze on final exams, and indeed in class, almost as much as on standardized tests. He or she would then fall behind in the learning process and this would be reflected in lower grades."

"But isn't that theory consistent with the facts?"

"If stereotype threat—together with its learning consequences—operates so perniciously in school, it would likely continue operating in the high-pressure job environment and make the student uncompetitive there. Indeed, a follow-up article by Richard Sander on African Americans at major law firms shows that this may well be what is happening.<sup>54</sup> Do you believe in stereotype theory, Riccardo? Did you feel weighed down by white people in school?"

"I never thought about it."

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51. See *supra* text accompanying note 1 (describing my work as "[m]ore subtle and searching than other critiques of critical race theory").

52. Delgado, *supra* note 2, at 642.

53. Claude Steele, *Stereotype Threat and African-American Student Achievement*, in TERESA PERRY ET AL., *YOUNG, GIFTED AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS* 109 (1993); see also Claude Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African-Americans*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 15, at 401.

54. See generally Richard Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1775 (2005) (arguing that affirmative action often hurts African Americans).



“Forget, then, about what you felt or did not feel. Can’t you see the further problem? A true believer in stereotype threat would call not for affirmative action but for junking *Brown v. Board of Education* and going back to segregated schools because black students cannot bear up to the pressure of integration. Is *that* what you really want?”

“Oh my God.” Riccardo conceded.

“The professor has another argument in favor of affirmative action in legal education. It has to do with Dr. Martin Luther King, Jr.—‘the greatest social reformer this country has known,’ as the professor rightly puts it.<sup>55</sup> The professor reports that Dr. King ‘flunked’ the Graduate Record Exam when he was contemplating a career in sociology.”<sup>56</sup>

“What do you say about that?”

“I’ll come back to the Dr. King matter shortly. For now, consider the professor’s related idea that even if affirmative action candidates never pass the bar exam and never become lawyers, it *may* not be a problem. They may still end up working, I quote again . . . as ‘businessmen, social workers, or politicians’ and ‘doing more for society than many a corporate drone slogging away in a back room month after month doing document review for a big case.’”<sup>57</sup>

“That’s weird. I never thought I’d hear the professor tout the contributions of businessmen. But can you deny the tenuousness of the connection between success in school and success on the job, Bianco? You are a very bright guy, but I was your classmate and I know that your grades do not exactly reflect your scholarly performance to date. I think the professor is on to something.”

“Thanks for the reminder about the grades, Riccardo.”

“Sorry, but are they not relevant to the conversation?”

“Not really. In the real world there are never any guarantees; success is usually achieved by playing the percentages. Do you reject the idea that grades are the most important measure of success when that is precisely what employers seem to look to most? The professor is also not being helpful when he argues that, after being taught how to think like lawyers in the first year, law students would do better on LSATs and thus it is irrational to evaluate them for admission on the basis of pre-law school LSAT scores.<sup>58</sup> This is because there is no evi-

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55. See Delgado, *supra* note 2, at 648.

56. *Id.*

57. *Id.*

58. *Id.* at 650.

dence that minority students would do any better relative to whites on a repeat of the LSAT.”

“Maybe we should admit students by lottery.”

“That indeed has been suggested by Professors Lani Guinier and Susan Sturm.<sup>59</sup> But what about a lottery system for medical schools? The professor, of course, does not say. If medical schools should be exempt from affirmative action, why not law schools? Doesn’t the public need lawyers with first-class skills? Or do grades, again, have no relevance?”

“Interesting, I have never heard him actually say that grades don’t matter, which is obviously what he believes.”

“Of course not. It would not behoove someone who wants to remain in good standing with colleagues to publicly hold that grades are irrelevant. But if the professor really believes it, he should say so—and not just for the sake of his credibility. I know I would think that I had died and gone to heaven if he proved that grades don’t matter and law schools proceeded to abolish final exams.”

“I am reluctant to spoil your fantasy—and indeed my own—but maybe students who drop out or never pass the bar get enough out of law school to become successes in other fields.”

“That is precisely what the professor suggests. They can become, quote, ‘opinion-makers or organic intellectuals.’<sup>60</sup> As such, they could still look favorably on their law school education notwithstanding an attendant \$150,000 school debt, to say nothing of the lost income.”

“Yes.”

“Maybe so. But on a theory that we would more likely be stealing money, law schools such as mine have long rejected applicants, and expelled students, white and black, whose graduation seemed especially risky. That law school accreditation is tied to bar passage undoubtedly reflects this kind of thinking.”<sup>61</sup>

“Don’t we need to know what students themselves think about these matters?”

“Yes. These days even those who do graduate and pass the bar exam are wondering whether the \$150,000 investment in law school is worth it.<sup>62</sup> Law schools have even been sued by students claiming that

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59. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

60. Delgado, *supra* note 2, at 648.

61. See ABA Standards for Approval of Law Schools, *supra* note 36.

62. Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

they were misled into believing that they could succeed in law school.<sup>63</sup> It may be paternalistic, it may even be wrong, but it is hardly racist to want to protect students from themselves. Can they fairly evaluate their ability to succeed in the legal profession? Perhaps tellingly, of the many thousands of law graduates every year, the professor does not identify a single such 'organic intellectual.'"

"What does that term mean, anyway?"

"They haven't been sprayed. How should I know?"

"Let's go back to Dr. King. Can we afford to discourage a Dr. King from entering graduate school?"

"Of course, it was a great loss for sociology that Dr. King did not enter that field; how he would have shaken things up! But the professor doesn't tell us whether Dr. King even applied to graduate school."

"Still, maybe the Graduate Record Examination ("GRE") should be scrapped."

"I doubt it. Talented people put it together. And again, it is a question of percentages. Graduate schools give substantial financial packages to students. They have more reason to screen candidates than do law schools. If, in fact, ninety-five percent of those screened out by the GRE are the weakest candidates, the GRE is doing its job. Predictors rarely approach perfection. But there is a more fundamental point. Rejecting Dr. King from a graduate program might have been the best service sociology departments could have performed, not only for Dr. King, but also for our universities and all Americans. It allowed Dr. King to find the role in which he provided the greatest service to the nation. The King defense of affirmative action fails for yet another reason."

"What's that?"

"Had Dr. King gone to graduate school, is it likely that he would have gained both the credibility and self-confidence to become the greatest social reformer this country has ever known? In any event, was depriving Dr. King of a place in a sociology department racist?"

"It looks like there is still more," offered Riccardo, feeling the fire in Bianco's eye.

"Yes. The professor's final argument for affirmative action is that it is, I quote, an 'antidote to white conceit.'<sup>64</sup> That is because without minorities in the classroom whites would think they were superior."

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63. *Maas v. Corp. of Gonzaga Univ.*, 618 P.2d 106 (Wash. Ct. App. 1980) (holding in favor of the university).

64. Delgado, *supra* note 2, at 654.

"Well? Afflicting the self-satisfied is supposed to be what law schools should be doing. No? As you and I have discussed, there are far too many such folks."

"Yes. But can't you see, Riccardo? Far from reducing racial smugness, affirmative action that produces minority law students at the bottom of the grade charts can only amplify it among fellow students. And if the cascading effect of affirmative action causes minority students to be uncompetitive at all law schools, as Sander suggests, such conclusions will be drawn universally."

"I give up, Bianco. How could I have been such a blockhead?"

"It's not easy to explain to a blockhead why he is one. But I will try. First, however, you should console yourself with the fact that you are not alone. There are scores of law teachers like you. The important thing is that you stop acting like a blockhead, stop humoring people like the professor, start thinking about race as you do any other academic subject, and then say what you think."

"Agreed. But go on."

"You've already missed half your class. I don't want to take responsibility for the rest. A black professional, as they say, has to be twice as good as a white one to succeed."

"Cut it out, Bianco. Nothing is more important than this. Go on."

### III. Bianco Explains How the Legal Academy Has Let Minorities and the Nation Down

"The thought is hardly my own but it is worth repeating. In a multicultural age, all too many women and minorities seem to be coming into academia not for the purpose of getting to the bottom of things, but for reasons of power politics."<sup>65</sup>

"Isn't it good that someone is speaking up for the disempowered?"

"As a general proposition, yes. The problem is that it is simply too easy, too rooted in human nature, to put the blame on the other person for one's own faults.<sup>66</sup> In so doing, activists take their eyes off the prize. To the extent that we are our own worst enemy, blaming others just prolongs the suffering."

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65. A declaration by a prominent feminist academic highlights the point: "My goal is not to deliver the truth but to inspire social change." JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

66. "The racial problem in this country is not people of color but whites." Derrick Bell, *Wanted: A White Leader Able to Free Whites of Racism*, 33 U.C. DAVIS L. REV. 527, 532 (2000). In this view, taking studies seriously does not solve anything.

“But why are these scholars not disciplined by the rest of the community when they go too far? Law professors delight in cutting down limbs that others are out on. In my more cynical moments I think that my colleagues are drawn to law teaching for precisely this pleasure.”

“Good question. By masterfully playing the race card, however, as *Toxic Diversity* shows, identity theorists have convinced most whites to play—and stay—dead. Shelby Steele describes a grand racial bargain according to which blacks will not call whites racist and, in exchange, whites will not call blacks stupid.”<sup>67</sup>

“But, as you have shown, the professor does call whites racist.

“Race activists, like the professor, don’t keep to the bargain.”

“But why can’t white scholars just disagree with blacks? I don’t always agree with you, but I don’t think you’re stupid. Why must disagreement by white scholars imply that they think blacks are stupid?”

“Because the line between ‘you are stupid’ and ‘your ideas are stupid’ is too subtle in the contemporary hair-trigger social environment created to a large extent by race activists.”

“That’s pathetic.”

“You said it. And it gets even worse. James Baldwin wrote about whites who, after hearing blacks spouting ‘stupidities’ and ‘absurd theses’—his words—overwhelm black speakers with applause.<sup>68</sup> These whites are contemptible, Baldwin concluded. I remember his exact response: “[T]here isn’t the slightest doubt: they are filthy racists.”<sup>69</sup>

“Okay, so white scholars cannot be counted on for honest race talk. What about minority scholars? Aren’t they savvy enough to see through the self-destructive stupidities of their own?”

“Yes, some have. But too often they are cowed, afraid of being labeled ‘race traitors.’”<sup>70</sup>

“So what happens?”

67. Shelby Steele, *The Race Not Run*, NEW REPUBLIC, Oct. 7, 1996, at 23, 26 (explaining why race talk is so limited in our society).

68. DAPHNE PATAI & NORETTA KOERTGE, PROFESSING FEMINISM 80 (1994) (quoting Baldwin, according to a report by noted author Mario Vargas).

69. *Id.*

70. STANLEY CROUCH, THE ALL-AMERICAN SKIN GAME 53–54 (1995) (noting that so many blacks are “afraid of being called self-hating or neoconservative that we function too often like espionage operatives who cannot be expected to tell the truth publicly for fear of being castigated unto unemployment or ostracized as traitors”). Crouch also states: “If we are to rise above the mud of racial limitation, we have to go far beyond the overstated racial paranoia and insecurity[;] we must be willing to let the dogs bark as our caravan moves by.” *Id.* at 54; see also generally RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL (2008) (describing the heavy psychic burden placed on black people who fail to march to mainstream drummers).

“After potential dissenters, white and black, back off, the rest is totally predictable. It is a psychobiological imperative. Even the simplest organism moves forward and, if not resisted, continues its advance in order to expand its power until it meets a countervailing force. Hence the opinions cited earlier about minority intellectual advantage. For what applies to one-cell organisms applies with no less force to human beings. Randall Kennedy has suggested that minority groups may already be abusing their power.”<sup>71</sup>

“What does this have to do with the charge of racism, economic hardship, and Anglocentric curricula and teaching methods?”

“When the argument is advanced that these conditions lead to poor law school grades, the race theorist cannot help but latch on. The race theorist will create or accept any argument that takes the onus off the students themselves, or their parents, and drops it on whites.”

“I think I get it now.”

“Not likely.”

“Why would you say that?”

“How do *you* explain the lower-grade phenomenon?”

“I don’t know. I wouldn’t even know where to start.”

“That’s the point. You’re so conditioned, brainwashed, by people like the professor that you can’t even imagine another explanation.”

“Maybe you are just too wedded to white supremacy.”

“That hurts, Riccardo.”

“And you haven’t hurt me? Besides, I am not the one advocating frank discussion.”

“Okay then. Consider the late Professor John Ogbu’s massive study of Shaker Heights High School outside of Cleveland. Ogbu, a Nigerian-born American anthropologist, found that 77% of the white kids in this racially balanced, upper middle-class school—which he calls ‘one of the best schools in the country’—graduated with honors, while only 2.5% of black kids did.”<sup>72</sup>

“That’s horrible.”

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71. See Kennedy, *supra* note 8, at 55, 65 (“[I]t is not premature to worry about the possibility that blacks or other historically subordinated groups will abuse power to the detriment of others.”).

72. JOHN OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* 6–7 (2003). Black kids make up 90% of the bottom 20%. *Id.* There is no suggestion here that the Shaker Heights school is representative of American high schools. That school’s experience is highlighted because, as one of our “best” schools, we could expect it to produce more than its share of law students.

“The important point for our purposes here, Riccardo, is that racism on the part of teachers, administrators, or fellow students plays no role in Ogbu’s diagnosis of the problem of black underachievement at Shaker High. His recommendations reflect this: black students need to work harder and stop worrying about what their peers think; they need to develop trust in the school system; and parents need to get more involved in their children’s educational development.”<sup>73</sup>

“Are you saying that Ogbu’s findings apply to law school?”

“It would be amazing if they did not. If black students from professional families are not doing what they are supposed to do in an excellent high school, the problems will surely carry over to college. The race-based LSAT gap reflects this.<sup>74</sup> What is clear to me, at least until someone persuades me otherwise, is that racism is no more a factor in our law schools than it is in Shaker Heights.”

“I think I understand what is driving the professor. It is simply too painful for all but the sturdiest activists to accept responsibility for the conditions that Sander and Ogbu highlight with their data, so people like the professor dredge up racism and pin it on law professors and law schools.”

“And what happens next?”

“Our schools feel guilty and look to new diversity programs, which has the effect of lowering standards. I read recently that the University of California Board of Admissions is proposing lowering the minimum entry GPA to 2.8, from 3.0, which has been in place for forty years.”<sup>75</sup>

“And then what, Riccardo?”

“When the grade gap remains, which it must if affirmative action does not address the underlying problem, race activists will claim that it only shows that the racism is even more entrenched and insidious than they thought, and then the racial climate at law schools heats up another few degrees. They are also forced to invent a new concept: ‘Invisible, Intractable, and Undetectable Racism.’”

“Not bad, keep it up. Why else does the professor go through all kinds of contortions to support affirmative action?”

“I’m not sure.”

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73. *Id.* at 277.

74. In the year 2000, the average LSAT score for black students was 142.6, compared to the average white student score of 153.6. *How Black Law School Enrollments Will Collapse Under Race-Blind Admissions*, J. BLACKS HIGHER EDUC., Autumn 2001, at 20–21.

75. Editorial, *Defining Diversity Down*, WALL ST. J., Jan. 9, 2008, at A14.

“Let’s start, if you will, with the fact that the professor is only a fictional character created by Richard Delgado.”

“Duh.”

“And Delgado has a personal stake in affirmative action.”

“A personal stake? What do you mean?”

“As a rule, parents want to leave something behind for their kids. Wouldn’t you agree?”

“Go on.”

“As an academic (not, say, a rich personal injury lawyer) and a person of color, he is too smart not to understand that affirmative action could provide a major legacy to his progeny; it would give them a leg up over the Barbara Grutters—or for that matter my progeny—in school and on the job for the indefinite future.”

“Are you saying that we should ignore Delgado’s argument because he is motivated by *self*-interest? That’s disgusting.”

“Is it any more disgusting than calling the law professoriate racist?”

“I guess not.”

“Since, as we have seen, the professor’s rhetorical standard is plausibility, not cogency, it does not seem unfair to simply raise the *cui bono*? issue<sup>76</sup> here. That of course does not dispose of the racism charge. Our whole justice system—and informal dispute resolution system—is premised on the idea that individuals who have suffered an injury are the best positioned to make a case for themselves. We do not simply throw plaintiffs out of court just for being self-interested. Self-interest is only one factor in the mix.”

“I get it now.”

“Let’s see. Why does Delgado use the narrative form that he refers to as the Chronicle? Why not the standard essay?”

“Because it is easier to read.”

“Just as I thought. Some of your childish faith in scholarship remains. Consider then that when academics write for law reviews, as opposed to, say, for *Newsweek*, they are writing primarily for the professoriate. But we know how to read essays, don’t we? We don’t need information in bite-sized pieces without supporting footnotes.”

“Certainly not.”

“Good. So try this theory on: The dialogue in question evokes the original dialogues. Delgado’s unspoken message to would-be critics:

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76. The Latin term literally means “to whose good?” In other words, “who benefits?” This is obviously useful in assessing the credibility of speakers.



Just as at the end of his dialogues Socrates always turns his once fierce interlocutors into mush, so taking on the master dialogist today, Delgado himself, is a no-win proposition.”

“Delgado as Socrates, you’re right, of course. But the original dialogues purported to quote or at least paraphrase real people.”

“Fair enough. The Chronicle, more significantly, allows Delgado to play head games with his readers. Can’t you see that only fools will waste time engaging with Delgado when he can at any time pull the rug out from them: ‘I didn’t say that; it was Rodrigo’ (or Laz, or the professor). It’s like shadow boxing where only the real person, the critic, can end up on the mat.”

“So, Delgado is seeking to preempt critical response to his work, the very kind of confrontation that Professor Harlon Dalton prescribes for racial healing.”<sup>77</sup>

“Bravo. Now, let’s see whether you get the A-plus. Why all the mouth-watering images of Italian culinaria?”

“It’s a sop to white people designed to show that their culture is not wholly corrupt.”

“Yes, and more important? Hint: What is Delgado trying to distract his readers from?”

“Both the weakness and the severity of his message to whites, i.e., that ‘their’ law schools sabotage black students at every turn. Drooling over the ‘mouth-watering Neapolitan recipes,’ including the ‘sizzling pizza sprinkled with olives’<sup>78</sup> and especially the creamy Italian custard,<sup>79</sup> who will feel up to a brawl with Delgado? It’s an absolutely brilliant strategy.”

“And so . . . ? You’re almost there.”

“So self-confident and civic-minded scholars must be alert to the damage Delgado is doing—to the fact that the creamy custard he conjures up serves only to mask the poison fruit within.”

“Bingo.”

“You’re the genius, Bianco; I surrender. Your work in shepherding me through this maze and exposing Delgado’s vicious group libel is model public service,” Riccardo added, having forgotten the pain of bumping into his ex-girlfriend. With a full heart and empty stomach, he readied himself for lunch by taking out the trippa-stuffed cabbage

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77. See Dalton, *supra* note 12 and accompanying text.

78. See Delgado, *supra* note 2, at 640.

79. *Id.* at 647.

slathered in green sauce, a favorite dish<sup>80</sup> that he had brought from home on an exquisite matching green Murano-glass plate.

“From your mouth, Riccardo, to my dean’s ear and to that of the dean at Yale Law School.”

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80. *Id.* at 640, 643.