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# RODRIGO'S RIPOSTE: THE MISMATCH THEORY OF LAW SCHOOL ADMISSIONS

Richard Delgado<sup>†</sup>

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## INTRODUCTION:

### IN WHICH I INTERRUPT RODRIGO DURING A DISMAL TASK AND LEARN OF A CONTROVERSY AT HIS LAW SCHOOL

"Hee, hee," I muttered to myself as I stepped out of the elevator. My brash, talented protégé had been in the habit of materializing unannounced in my doorway, as though by magic, brimming with excitement over some new idea or theory.<sup>1</sup> Now it was my turn to drop in on him unexpectedly.

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1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (introducing Rodrigo) [hereinafter Delgado, *Rodrigo's Chronicle*]. The son of an African-American

Courtesy of a board meeting that had adjourned early, I found myself in his city with a little time on my hands. A quick phone call to his secretary, whom I swore to secrecy, had assured me he would be in.

Feeling more than a little conspiratorial, I knocked on his door, trying to suppress the grin I knew would be unbecoming someone my age.

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serviceman and Italian mother, Rodrigo was born in the United States, but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from high school at the base school then attended an Italian university and law school on government scholarships, graduating fourth in his class. When the reader meets him, he has returned to the United States to investigate graduate law (LL.M.) programs. At the suggestion of his half sister, famed U.S. civil rights lawyer Geneva Crenshaw, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 7 (1987), he seeks out “the professor” for career advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (Delgado, *Rodrigo’s Chronicle, supra*); law and economics (Richard Delgado, *Rodrigo’s Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)); love (Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter Delgado, *Third Chronicle*]); legal rules (Richard Delgado, *Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993)); the critique of normativity (Richard Delgado, *Rodrigo’s Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)); relations between men and women (Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993)); enlightenment political theory (Richard Delgado, *Rodrigo’s Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)); black crime (Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994)); narrative jurisprudence (Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (the final chronicle in the first cycle and the final chapter of RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995))); the rule of law (Richard Delgado, *Rodrigo’s Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)); affirmative action (Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter Delgado, *Merit and Affirmative Action*]); clinical theory (Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996)); legal formalism (Richard Delgado, *Rodrigo’s Thirteenth Chronicle: Legal Formalism and Law’s Discontents*, 95 MICH. L. REV. 1105 (1997)); the problem of desperately poor border settlements (Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997)); interracial indifference (Richard Delgado, *Rodrigo’s Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000) [hereinafter Delgado, *Remonstrance*]); Latino civil rights (Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805 (2005) [hereinafter Delgado, *Revisionism*]); and many other topics over the next few years. During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The professor meets Rodrigo’s friend and soulmate “Giannina,” and her mother, Teresa; he also learns that Rodrigo’s father’s family immigrated to America via the Caribbean. His father, Lorenzo, looks black and identifies as such, but speaks perfect Spanish.

"Professor! What are you doing here?" My young friend flung the door wide open and pumped my hand warmly. I explained, then quickly asked if he was busy.

"Not at all," he said, pointing to the stacks of multi-colored folders littering every horizontal surface of his office. "I'm on the admissions committee this year, so that casebook of mine is on the back burner.<sup>2</sup> But this next group of files isn't due back until Monday, so I have plenty of time. Come on in."

Clearing a spot for me on his couch, Rodrigo asked, "Have you ever served on your school's admissions committee, Professor?"

"Not in years. Things were simpler back then."

"They must have been," Rodrigo said. "First, we got *Grutter v. Bollinger*,<sup>3</sup> telling us that race-conscious decisionmaking is permissible if done just right. Then, we learned just last month that Ward Connerly has targeted our state . . . ."

"Mine, too," I interjected. "And a poll shows that his anti-affirmative action referendum might actually pass."<sup>4</sup>

Rodrigo grimaced. "We're hoping our citizens know better. But in the meantime, Richard Sander weighed in with those two articles . . . ."<sup>5</sup>

"Is your administration actually taking them seriously?"

"No, but some of our board of visitors are. They are urging us to drop race-conscious admissions on the ground that they just hurt black students. Laz and I were talking about that earlier this morning."<sup>6</sup>

"What's his position? I know that when you started teaching, he was your best friend, even though he's the faculty advisor to the Federalist Society."

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2. On Rodrigo's new casebook, see Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights* (forthcoming 2007); Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 25 (2006).

3. 539 U.S. 306 (2003).

4. On Ward Connerly's campaign to enact California Proposition 209 (banning the use of affirmative action in-state programs, including higher education) and look-alikes in other states, see Matthew Hansen, *NU may be Target on Minority Aid Ballot Initiative*, OMAHA WORLD-HERALD, Feb. 4, 2007, at A1.

5. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) [hereinafter Sander, *Systemic Analysis*]; Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2005) [hereinafter Sander, *Paradox*]. See also Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

6. See Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1713, introducing "Laz," Rodrigo's young colleague at his law school. A principled conservative, Laz befriended Rodrigo when he joined the faculty. Laz is also gay.

“We still are best friends,” Rodrigo replied, “even though he’s conservative and I’m not. As you know, his Polish family immigrated to the U.S. without much money. Laz went to a community college,<sup>7</sup> then the state university and Harvard Law School. He has a great understanding of class and is more sympathetic toward people of color than you might think.”

“As a devotee of law and economics,<sup>8</sup> what does he think of the Sander articles?”

“He likes Sander’s approach, but thinks he draws the wrong conclusion from his data. I could summarize his argument, if you are interested.”

“I’d love it,” I said. “But how about if I buy you dinner? My flight back isn’t until tomorrow morning, so I’m on my own tonight.”

“Let me call Giannina.<sup>9</sup> She has a meeting of her reading group, but might want to join us later.”

When I nodded enthusiastically, Rodrigo picked up his phone, then, after a brief exchange in Italian that I couldn’t quite catch, looked up. “She says she’d love to join us for desert and suggested a little bistro that she likes. It’s a short walk from here and near where her group is meeting.”

“Sounds good to me.”

Ten minutes later, we were seated in a comfortable booth in the homey Italian restaurant, examining the mouth-watering Neapolitan recipes on the handwritten menu. After a pause I asked, “What looks good to you?”

“I’m thinking of having the trippa-stuffed cabbage,” Rodrigo said. “I learned to enjoy it when I lived in Italy, even though most Americans can’t stand the idea.”

“I’m thinking of having the pasta primavera with seafood,” I said. “My doctor told me to cut down on red meat.”

After the waiter took our orders, Rodrigo looked up expectantly. Taking my cue, I asked: “So, tell me about your conversation with Laz. I assume you two have some ideas about minority admissions?”

“We do,” said Rodrigo with alacrity, whether at the thought of telling me his latest theory or because of the savory-looking food that the waiter

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7. See *id.* at 1746.

8. See, e.g., Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998) (discussing marketplace theory of abolishing racism).

9. See Delgado, *Third Chronicle*, *supra* note 1, at 402 (introducing “Giannina,” Rodrigo’s sweetheart (now wife), a published playwright and poet, and now a law student in Rodrigo’s city).

was carrying on a tray past us on the way to a neighboring table.

"That looks good," I said, eyeing the sizzling pizza, sprinkled with olives and some type of chopped sausage.

"Maybe next time," Rodrigo said. "Anyway, Laz and I think Sander is wrong, although for slightly different reasons. Have you seen his two articles?"

"I read the Stanford piece when it first came out and a few of the responses.<sup>10</sup> But I haven't read his recent one about black lawyers in elite firms. Maybe you'd better summarize them before we start."

#### I. IN WHICH RODRIGO SUMMARIZES SANDER'S DOUBLE MISMATCH THEORY

"As you know," Rodrigo began, "Sander, who teaches law at UCLA and is married to a black woman, posited in his first article that affirmative action harms black law students.<sup>11</sup> It gives black applicants a big boost, so that one who might otherwise have gotten into Wayne State gets into the University of Michigan. One who might have gone to Loyola of Los Angeles goes to Berkeley or UCLA."<sup>12</sup>

"That's more or less the point," I interjected. "What's so bad about that?"

"This stair-step situation hurts blacks by placing them in artificially good schools. Unprepared for the fast-paced, intellectually demanding atmosphere, they end up getting lower grades and learning less than they would have had they attended a school more suited to their abilities."<sup>13</sup>

10. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005) [hereinafter Ayres & Brooks, *Reduce Number*]; David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Daniel E. Ho, Scholarship Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005) [hereinafter Ho, *Not Cause*]; David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

11. See, e.g., Sander, *Systemic Analysis*, *supra* note 5, at 371-72, 440; Sander, *Paradox*, *supra* note 5, at 1776, 1817-20.

12. Sander, *Systemic Analysis*, *supra* note 5, at 371-72, 425-42; Sander, *Paradox*, *supra* note 5, at 1776, 1817-20.

13. Sander, *Paradox*, *supra* note 5, at 1776, 1817-20; Sander, *Systemic Analysis*, *supra* note 5, at 371-72, at 425-42; Sander, *A Reply to Critics*, *supra* note 5, at 1964-65. See also Ayres & Brooks, *Reduce Number*, *supra* note 10, at 1808-09 (agreeing that blacks' low grades—"the median black law school [GPA] is at the 6.7th percentile of white law students" and only 7.5% of blacks have GPAs higher than the white median—and bar passage rates are serious problems).

“Never mind that other studies of minorities at top schools show that a high percentage of them graduate and go on to careers of great distinction,”<sup>14</sup> I interjected.

“Sander says that is not because they get a good legal education while they’re there. They don’t; much of it passes right by them. Instead, they get good jobs because of a further level of affirmative action—in the law firms that hire them<sup>15</sup>—as well as because of their schools’ well-developed alumni networks.<sup>16</sup> Their actual time there is a torment. The black who might have been an A or B student at a lower-ranked school hardly ever speaks in class and struggles to get passing grades. Their confidence shattered, many flunk the bar exam and have to retake it. Some never pass at all.”<sup>17</sup>

“And I gather this is where Sander’s second article comes in?”

“Right. The first one concludes that affirmative action ends up reducing the net number of black lawyers, since many who go to strong schools courtesy of affirmative action drop out or flunk the bar.<sup>18</sup> If they had gone to law schools where the instruction is more suited to their needs . . . .”

“More concrete,” I interjected, “emphasizing rote memorization and black letter law.”

“Exactly,” Rodrigo seconded. “If they had gone to schools that taught that way, they would learn more, get higher grades, and pass the bar. And that’s true all the way down the line.”<sup>19</sup>

“A breathtaking thesis,” I said. “But what about that second article?”

“That one analyzes the careers of black lawyers in top law firms.”<sup>20</sup>

14. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Richard O. Lempert, David L. Chambers & Terry K. Adams, “*From the Trenches and Towers*”: *Law School Affirmative Action: An Empirical Study Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 *LAW & SOC. INQUIRY* 395 (2000).

15. See Sander, *Paradox*, *supra* note 5.

16. *Id.* at 1776-77; Sander, *Systemic Analysis*, *supra* note 5, at 454-68 (considering the boost a job applicant receives from the prestige of his or her law school).

17. Sander, *Paradox*, *supra* note 5, at 1775, 1817-20 (blaming low bar passage rate on affirmative action in law school admissions); Sander, *Systemic Analysis*, *supra* note 5, at 371-72, 442-46. See also Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 *YALE L.J.* 2005 (2005) (noting that black law students are almost two-and-one-half times as likely as their white counterparts to drop or flunk out, four times as likely to fail the bar exam on their first try, and six times as likely never to pass it at all).

18. See Sander, *Systemic Analysis*, *supra* note 5, at 372, 442-54, 468-78.

19. *Id.* at 410-18, 441-42, 447-48 (discussing this “cascade effect”).

20. See Sander, *Paradox*, *supra* note 5.

Those firms, Sander says, are so eager to integrate their ranks that they end up hiring blacks with lower grades than usual.<sup>21</sup> An African American with a C average from Cornell, for example, gets a job at Arnold and Porter. The other associates have A averages and were on the law review. The African American struggles, does poorly on early assignments, and ends up doing routine, unchallenging work."<sup>22</sup>

"And a few years later, when the partnership decision comes up, a senior partner takes him in hand and explains that he is not going to make it,"<sup>23</sup> I said.

"Exactly. So the African American lawyer leaves in disgrace. Affirmative action in law school admissions ends up producing a smaller number of black graduates than if we let things take their course."

"And that same practice in law firm hiring," I continued, "results in a smaller number of black partners than if the firms only hired graduates who were likely to succeed. Now I see how the two articles fit together."

We fell silent as the waiter set down our plates of steaming food. "This trippa looks great," Rodrigo said, spearing a forkful of cabbage slathered in some sort of green sauce. "How's your pasta?"

"Delicious," I replied. "The seafood is fresh and the vegetables lightly cooked, just the way I like them."

We ate in silence for a few minutes. Then Rodrigo looked up: "I suppose you want to know what Laz and I thought about Sander's double whammy?"

## II. LAZ'S RETORT: SANDER FAILS TO CONSIDER ALL THE ALTERNATIVES

"Very much so," I replied. "The dean hinted that if I stick around I might be on our admissions committee next year, especially if that referendum passes."<sup>24</sup>

"Just make sure you have lots of professional liability insurance," Rodrigo said. "Some of those conservative legal foundations would like to sue at the drop of a hat."<sup>25</sup>

"Suing is my line of work," I said dryly. "I'm sure you remember that

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21. *Id.* at 1783-95.

22. *Id.* at 1817.

23. *Id.* at 1805-08.

24. *See supra* text accompanying note 4.

25. On conservative legal organizations, *see, e.g.*, JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 27, 40, 46, 47-52, 60, 78-79, 100, 128-31, 133-35, 145 (1996); MANUEL G. GONZALES & RICHARD DELGADO, THE POLITICS OF FEAR: HOW REPUBLICANS USE MONEY, RACE, AND THE MEDIA TO WIN (2006).



I was a civil rights lawyer before I went into teaching.”

“I do,” Rodrigo said. “And I’m sure you’ll give a good account of yourself. But back to Laz. He thinks Sander is probably right that minorities admitted to law school with GPAs and LSAT scores lower than those of their classmates tend to earn lower grades.”

“They cluster at the bottom of their law school classes, I think Sander showed.”<sup>26</sup>

“At the top schools, at least,” Rodrigo nodded. “But Laz pointed out that the mismatch theory is by no means the only possible explanation for this distribution. Racism at the law schools and in the legal curriculum and sheer economic hardship are equally plausible hypotheses.<sup>27</sup> Laz also pointed out that Sander ignores many students of color who compile fine records at law schools and afterwards, including some who are not at all from privileged homes.”<sup>28</sup>

“The proverbial son or daughter of the black neurosurgeon,” I replied dryly.

“Exactly. So, Laz points out that racism, both in the law school curriculum. . . .”

“With Anglocentric courses and Socratic teaching that reinforces quick responses and a lot of bluffing,” I continued.

“Exactly. And more of the same on the bar exam, all may be just as likely causes of minorities’ poorer performance.”

“All that plus economic hardship, you said.”

“Exactly. Oh, and on a more basic level, several of Sander’s critics have disputed his correlations. Ho, for example, performs a matched-pair analysis of Sander’s own data, and shows that minorities with the same entering credentials—say an undergraduate GPA of 3.4 and an LSAT of 180—do not do better at second- or third-tier schools. They all perform worse than their white counterparts, but this is true even at low-ranked schools where admissions are not very selective and affirmative action is not much of a factor.<sup>29</sup> Ian Ayres and Richard Brooks showed something

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26. Sander, *Systemic Analysis*, *supra* note 5, at 425-36.

27. *Id.* at 439-40, 479 (mentioning, but dismissing, income as a source of black attrition); 440 (same, with race); Sander, *Paradox*, *supra* note 5, at 1758 (considering, but rejecting, lack of mentoring as a cause of blacks’ failure in elite firms).

28. *Cf.* BOWEN & BOK, *supra* note 14; Chambers et al., *supra* note 10, at 1887-81. *See* Sander, *Systemic Analysis*, *supra* note 5, at 437 (conceding that at the very top schools, few blacks drop out and most graduate); *see also* Ayres & Brooks, *Reduce Number*, *supra* note 10, at 1824 (noting that blacks in top schools are “carried along” to greater success than they might have enjoyed elsewhere).

29. *See* Ho, *Not Cause*, *supra* note 10, at 1997 (showing that bar passage rates for blacks are not affected by attending a top tier school).

similar.”<sup>30</sup>

The waiter, who had been standing patiently by our table-side, interjected to ask how we had found our meals. “Wonderful,” we both said. He filled our water glasses and left.

“So Sander ignores other plausible explanations for the poor performance of minorities in law school and law firms. But I think you said you had positive reasons for doubting whether mismatch is the reason?”

### III. IN WHICH RODRIGO PUTS FORWARD A FURTHER REASON FOR REJECTING SANDER'S HYPOTHESIS: THE CASE OF THE ELDERLY

“I do,” Rodrigo said. “Something is going on with minority students and lawyers. Their low grades are troubling, and the legal profession needs to address them. But according to Sander, there's no need to do that. All we have to do is discontinue the well-meaning but misguided social program that is causing all the trouble.”

“Stop interfering with nature,” I observed wryly. “Nothing is wrong with Sander's effort to find out why some minority students perform poorly. But placing the blame on affirmative action does not follow from his data.”

“You're too kind, professor,” Rodrigo said. “Laz said that Sander's reasoning reminded him of Marie Antoinette's famous remark.”<sup>31</sup>

I hesitated a second. “I'm not sure I see the connection.”

“That idea is that minorities should be thankful for what they have and that aspiring to more will simply get them in over their heads. Laz said that smacks of Social Darwinism<sup>32</sup> and that its logical extension would mean eliminating a lot of other programs, including ones that helped his family in their early years.”

“Such as?”

“Social security, for one. You could just as easily see that program as generating a mismatch between elderly people and our fast-paced, hard-charging, youth-oriented society. Those who can't hold a job, because

30. Ayres & Brooks, *Reduce Number*, *supra* note 10, at 1809 (finding a “reverse mismatch” effect, and that affirmative action increases, not decreases, the net number of black law students and that abolishing it would cause a drop in their number). Bar passage rates for blacks are also higher at the better schools. *Id.* at 1826.

31. “Let them eat cake.” See JOHN BARTLETT, *FAMILIAR QUOTATIONS* 319 (Justin Kaplan ed., 16th ed. 1992).

32. Attributed to Herbert Spencer, the theory holds that social structures should promote survival of the fittest. See 1 HERBERT SPENCER, *THE PRINCIPLES OF BIOLOGY* 129-30 (rev. ed. 1898). See also 11 CHARLES DARWIN, *THE ORIGIN OF SPECIES* (Charles E. Eliot ed., P.F. Collier & Son Corp. 1961) (1859).

they've slowed down or can't think as fast as they used to, have no business lingering on at public expense. Instead of babying or pretending we owe them support because of a lifetime of work, we should require them to stand on their own two feet. If we discontinued this form of affirmative action to the elderly, we would have fewer older people . . . ."

I snorted. As one who was rapidly approaching retirement age, I couldn't help feeling both amused and outraged at where Rodrigo was going.

Rodrigo smiled back. "Right. We'd have fewer older people, but those we did have would be much healthier."

"That's ridiculous," I said. "It reminds me of Jonathan Swift's suggestion that, in times of famine, we eat babies.<sup>33</sup> We could eat the elderly. Maybe troublemakers of color like you and me, too."

"Very funny," Rodrigo said. "But, according to Laz, you could apply the mismatch theory to many social programs, such as assistance to the disabled, English classes for immigrants, and prenatal care for indigent mothers. They all supply a commodity that their recipients could not afford on their own. This just hurts them in the long run because once the dole stops, they won't be able to stand on their own two feet. They may even die or sicken earlier because society helped them for a short time, so that we end up with fewer welfare babies, disabled people, and immigrants than if we just left them alone."

"America would never buy that argument," I said. "Not even in these conservative, hard-hearted times."

"But that's the logical implication of Sander's argument," Rodrigo replied. "We also wouldn't have national parks because they are a form of affirmative action for people who can't afford nice big lawns. Or veterans' benefits because they just help former servicemen and women get into college or the workforce when otherwise they wouldn't be able to. Or public universities, like yours and mine. You could see them as a form of affirmative action for the middle class, subsidized by taxpayers, most of whom will derive little direct benefit from them."

"You could even see environmentalism as a form of affirmative action for snail darters and polar bears who can't survive on their own.<sup>34</sup> It all sounds ludicrous when you put it that way. But I suppose Sander's allies could try to distinguish legal education from those other programs in some

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33. See LEONARD BASKIN, *JONATHAN SWIFT: A MODEST PROPOSAL* (Grossman Pub. 1969) (1729).

34. See Delgado, *Remonstrance*, *supra* note 1, at 283-97 (proposing an endangered-species approach to the protection of black males).

fashion.”

“I don’t think they can,” Rodrigo replied. “But Laz posited a second argument against the mismatch theory. Would you like to hear it?”

#### IV. IN WHICH RODRIGO POINTS OUT A NEGLECTED OPPORTUNITY COST: THE SOCIAL BENEFIT FROM AN EDUCATED BLACK ELITE

“I would. Please go on,” I said. But before Rodrigo could continue, the waiter reappeared to ask if we had finished with our meals and would like to consider dessert. I looked at my rail-thin friend, who raised an eyebrow in my direction.

“Sure,” I said. “Do you have gelato?” When the waiter said yes, we nodded, he placed dessert menus in front of us and began picking up our empty dishes.

“What looks good to you?” Rodrigo asked. “I’m thinking of ordering the flan.”

I wrestled with my conscience. I loved the creamy custard, common to both Mexican and Italian cuisine, but my doctor had been after me to drop a few pounds I gained on a recent vacation in the former country.

“I’ll settle for a tangerine sherbet,” I said. “I gather you’re having the flan?”

“You can have a spoonful of mine, if you like,” Rodrigo said, rescuing a clean spoon from the table before the waiter took it away. After he took our orders, I settled back and looked at Rodrigo expectantly.

“Where were we? Oh, yes. Laz said that Sander, strangely for a hard-nosed, quantitative sort, ignored what he called an opportunity cost of eliminating affirmative action.”<sup>35</sup>

“I’m not sure I follow. What opportunity cost?”

“Laz said that denying all those blacks a chance to get a first-rate legal education . . . .”

“Even the ones who drop out of law school after a year or two,” I exclaimed, getting a glimpse of where Rodrigo was going.

“Right. Or who don’t pass the bar. Sander seems to assign the value of their legal education as zero. Do you recall, professor, Martin Luther King’s educational career?”

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35. “Opportunity cost” is a law-and-economics term for a forfeited opportunity when one chooses a course of action incompatible with another one. *See, e.g.*, RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 6 (6th ed. 2003) (“[T]he benefit foregone by employing a resource in a way that prevents its use to someone else.”). In the example mentioned above, the resource would be three years of a student’s life. The benefit foregone would be the use of that time for something other than law study.

“I do. As a young man, he was fascinated by social theory and wanted to earn a Ph.D. in sociology. But he flunked the GRE and ended up enrolling in divinity school instead.<sup>36</sup> He went on to become perhaps the greatest social reformer this country has known.”

“By the same token, Laz pointed out, one cannot assume, as Sander does, that the value of an unfinished legal education is zero. The students who do not complete their legal educations or who, after completing them, flunk the bar, may well be going on to socially useful careers.”

“Like Martin Luther King, they may end up working as businessmen, social workers, or politicians,” I said, “and doing more for society than many a corporate drone slogging away in a back room month after month doing documents review for a big case.”<sup>37</sup>

“Exactly,” Rodrigo replied with alacrity. “And this is an important element in the cost-benefit analysis that Sander neglected.”

“Perhaps because he was predisposed to show that affirmative action was counterproductive, he didn’t think to ask what the black drop-outs were doing. With their knowledge of the legal system, they may well be going on to careers of great worth, even if they are not practicing law. Sander defines success too narrowly.”

Rodrigo went on. “Laz and I are thinking of looking into this. In fact, he knows a program officer at a conservative foundation he’s thinking of applying to for a grant. We would study the careers of students, both white and nonwhite, who started but did not complete law school, or who completed it but did not become lawyers. Among other things, we’d like to see how many of them became opinion-makers or organic intellectuals.”

“You mean in Antonio Gramsci’s sense?”<sup>38</sup> I asked. When Rodrigo nodded, I added: “Better not put that into your grant application.”

Rodrigo smiled. “We won’t. The point, though, is that the mismatch

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36. On this early chapter in King’s life, see, e.g., *The Most Respected and Accomplished Black Man in the Recent History of Our Country had Significantly Below-Average Scores on Standardized Tests*, 15 J. BLACKS IN HIGHER EDUC. 26, 26 (1997) (citing 2 THE PAPERS OF MARTIN LUTHER KING, JR. (Clayborn Carson et al. eds., 1994)) (noting that King scored in the lowest ten percent in the GRE for quantitative science, and the lowest quartile in physics, chemistry, social studies, biology, and the fine arts. And even though he became one of the finest writers and speakers in recent history, his verbal score was below average); Richard Delgado, *Official Elitism or Institutional Self-Interest?*, 34 U.C. DAVIS L. REV. 593, 608 (2001).

37. See generally JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005) (describing lawyers’ unhappiness with routine, soul-killing work).

38. For a discussion of the role of organic intellectuals in Gramsci’s thought, see, e.g., ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 3-23 (Quintin Hoare & Geoffrey Nowell Smith trans. & eds., 1971).

theory by its nature holds that law school, conventionally defined, with a diploma at the end and a standard denouement—passage of the bar exam—is a social good, so that a student who falls short of achieving it ends up short-changed. . . .”

“Or denying a more worthy candidate a slot,” I chimed in.

“Indeed. But as Martin Luther King’s example shows, the drop-out may go on to just as useful a career as the graduate of Texas or Cornell who gets a job in a 300-lawyer firm and writes briefs at increasingly higher billable rates for 30 years, before retiring to Florida.”

Just then the waiter arrived with our desserts. “Would you gentlemen like some coffee?” I noticed he spoke with a slight foreign accent and wondered if he were a recent immigrant.

“Do you have cappuccino?” Rodrigo asked. When the waiter said yes, I ordered decaf (caffeine after 3 o’clock keeps me awake half the night), and he picked up our remaining dishes and departed.

“Where were we?” Rodrigo asked.

“You were going to mention some other weaknesses in Sander’s theory.”

#### V. IN WHICH RODRIGO POINTS OUT THAT PEOPLE AND ENVIRONMENTS ARE NOT FIXED, BUT INFLUENCE EACH OTHER

“Right. This one is my own invention. It’s that the mismatch theory rests on the idea that one can match people and environments. In some cases, of course, you can. A very short person should probably try marathon running, not tennis or basketball. A person with bad eyesight but perfect pitch should probably study music, not microbiology.”

“But beyond those obvious cases, the theory fails?”

“It does,” Rodrigo continued. “And the reason is that people and environments are not fixed. People change their environments, and vice versa. Law professors like to say that law school teaches you to think like a lawyer.<sup>39</sup> By the same token, diversity defenders point out the new ideas and perspectives that it brings to the classroom.<sup>40</sup> Even Richard Sander would probably concede that.”<sup>41</sup>

“So you are saying that the notion of ascertaining a fixed quality about

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39. On learning to “think like a lawyer,” see, e.g., Susan Daicoff, *Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1385-1401 (1997).

40. See, e.g., *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312-13 (1978).

41. See *Systemic Analysis*, *supra* note 5, at 369, 370 (mentioning this contribution to classroom dialog).

an applicant that fits him to a first- or second- or third-tier law school, is wrong?"

"Yes. People can surprise you. You can put a student with an unimpressive undergraduate record into a tough law class, and they shine. Other times, you can take someone with a stellar transcript from a top school, and they disappoint."

"And it's not because of the inherent difficulty of prediction," I summarized. "But because the law school actually brought something out in the one person but not the other. The legal education 'took' on the first student, but not the second."

"Most educators today reject Plato's theory about classes of citizens.<sup>42</sup> We know that education can change almost any person."

"Weren't we talking about something like this once before?"

"I think we were," Rodrigo said, snapping his fingers. "We called it the Paradox of Distributed Merit.<sup>43</sup> It highlights the moral irrationality of distributing an increment of a social good based on a claimant's pre-existing possession of a quantum of that very good. We say law school can teach you how to think like a lawyer. If that's true, then a year or two of it ought to improve anybody's LSAT score. How irrational, then, to go on admitting people on that very basis, especially ones whose LSAT scores fall within a narrow range."<sup>44</sup>

"That would be like a paint store that only sold yellow paint to owners of yellow houses."

Rodrigo smiled. "That reminds me of a famous experiment entitled 'Pygmalion in the Classroom.'<sup>45</sup> A social scientist told a group of teachers that certain of their students would show an intellectual growth spurt that year. In fact, he had picked the students completely at random. Sure enough, the students changed from being lackadaisical scholars to A students who were constantly waving their hands in the classroom."<sup>46</sup>

"I remember that study. It's a classic demonstration of the effect of teacher expectations. The instructors who heard that Johnny was a latent genius, whose brilliance just had not yet surfaced, showered Johnny with smiles and attention. Sure enough, Johnny bloomed and started getting all

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42. On Plato's division of society into classes based on their innate ability and likely contribution to the Athenian state, see *THE REPUBLIC*, in *THE REPUBLIC AND OTHER WORKS* 27 (Benjamin Jowett, trans. 1982).

43. See, e.g., Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1737-39.

44. See *id.*

45. See ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATIONS AND PUPILS' INTELLECTUAL DEVELOPMENT* (1965).

46. *Id.*

the answers right.”

“So, going to a top law school, where the professors expect all the students to succeed may be good for you, not bad. If some minorities are doing poorly, the reason may have nothing to do with the supportive environment and high expectations. Without them, their performance might well be even worse.”

“You went to a top law school.<sup>47</sup> It certainly didn't hurt you.”

Rodrigo brushed aside the compliment. “By the same token, might not minorities in dull environments be receiving many reminders that they are not likely to make it, reinforcing what Claude Steele and his co-authors call stereotype threat?”<sup>48</sup>

“I'm familiar with the concept,” I said. “But why do you think blacks are at greater risk of it at lower-ranked schools than at Harvard or Stanford?”

“It's because at the top schools the faculty assume that all their students are bright and will go on to distinguished careers, while at schools further down the ladder, they don't give off as many of those signals.”

“And black and white students hear those signals—or lack of them—differently?”

“Right,” Rodrigo said. “Claude Steele showed that if you tell a white student that he is about to take a difficult test, their performance does not change. Say the same thing to a black student and their performance will suffer. The black student experiences stereotype threat because they worry that their performance will confirm the widespread view that they are intellectually inferior.”<sup>49</sup>

“Hi, you two. It looks like you're having fun.”

We looked up to see a familiar black-haired young woman with an animated expression standing next to our table.

“Giannina!” Rodrigo exclaimed. “Welcome. Have a seat. We were just talking about admissions. Would you like some dessert?”

The young woman gave me a quick hug and radiant smile, and said, “Great to see you, Professor. I didn't know you were in town. Would you like to spend the night with us?”

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47. See Delgado, *Rodrigo's Chronicle*, *supra* note 1, at 1359-60 (explaining that Rodrigo went to a law school “even older than yours, Professor,” in Italy, graduating near the top of his class.) Rodrigo then earned an LL.M. degree from a prestigious American law school. See Delgado, *Third Chronicle*, *supra* note 1, at 389 n.6.

48. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP 401* (Christopher Jencks & Meredith Phillips eds., 1998).

49. *Id.* at 407.



I explained that my flight left early the next morning and the hotel was already paid for, but that I was very glad to see her. The arrival of the waiter saved me from further explanation.

“Would madam like to see a menu?”

“I recommend the flan,” Rodrigo said. “The topping is caramelized, just like they make it in Mexico.”

“The sherbet isn’t bad, either,” I added.

Giannina ordered the sherbet, draped her coat on the bench beside her, and said. “Why don’t you two go on? My reading group was discussing college admissions.<sup>50</sup> I’d like to hear more about the law school version.”

“Rodrigo just listed a number of reasons why Sander’s mismatch theory does not explain minorities’ law school performance,” I said. “If he’s right, we have to look for a deeper reason and can’t just sit back and say affirmative action created the problem.”

“I’ve heard some of those reasons at home,” Giannina said, as the waiter arrived. She took a small spoonful of her sherbet, pronounced it excellent, and went on as follows: “The notion that talents and environments are not fixed and permanent, that they have the potential to change each other; that even a partial legal education can benefit a person; that the mismatch theory could apply just as easily to other groups, such as the elderly; and most basically, that Sander hadn’t eliminated other, more likely explanations for minorities’ low grades.”<sup>51</sup>

“Not bad,” Rodrigo said at his wife’s lightning display, and added: “Remind me to tell you something funny the Professor said.”

“I will,” she replied. “But I have a theory of my own for the two of you.”

#### VI. GIANNINA’S REVERSAL: MISMATCH COULD INJURE WHITES JUST AS SURELY AS IT DISADVANTAGES MINORITIES

“I’d love to hear it,” I said. “Does it have anything to do with left brain-right brain thinking?” I knew that Giannina was interested in various types of intelligence, including the emotional variety.

“Come to think of it, it does. You two know, I’m sure, how deconstructionists are fond of showing how concepts often come in

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50. To be specific, they were discussing DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2006), which exposes the corruption and gamesmanship surrounding the college-admissions rat race.

51. See *supra* notes 24-36 and accompanying text, explicating these arguments.

matched pairs that, on close inspection, collapse into each other.”<sup>52</sup>

When I must have looked blank, she added: “This is pretty recent stuff, Professor. But it’s a mainstay of a certain type of writing popular among the younger set. Not that I think it has any special value for that reason. But it offers another way of looking at the mismatch theory.”

“I could use a little help,” I admitted. “We old-timers try to keep up as best we can, you know. But sometimes this postmodern stuff escapes me. I could use an example.”

“Well, consider how Sander professes great concern over minorities who take class with supposedly smarter fellow students.”

I nodded.

“He says it’s bad for their confidence, not to mention their GPAs. But the logical consequence of his proposal would be practically all-white classrooms at the top schools.”

“I see where you are going!” I exclaimed. “The white students would gain an inflated sense of their abilities. They might think, without realizing it, that their group was smarter than blacks and Latinos, since so few of them attended class with them. They would carry this attitude when they went out into the world, where it could do considerable damage.”<sup>53</sup>

“Exactly,” Giannina said. “The mismatch theory assumes that allowing blacks to go to school in rarified circles is bad for their self confidence. But it ignores how it might just as easily encourage excessive self-confidence . . . .”

“Of an especially pernicious, racial, kind,” I interjected.

“Precisely. In white students.”

“That’s good,” Rodrigo said, looking at his wife admiringly. “Not even Laz thought of that.”

After a brief pause while the waiter asked Giannina how she found her desert, I added: “This reminds me of something that often happens in my seminar. I use the Bell materials,<sup>54</sup> and the class draws a lot of minorities, as well as a number of top white students including editors of the law review.”

“What happens?”

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52. See, e.g., Jamie Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1021-63 (1985) (which appears as part of Symposium of Critical Legal Studies).

53. See *Bakke*, 438 U.S. at 314 (opinion of Powell, J.) (holding that familiarizing future leaders with multiracial settings is a compelling interest); *Grutter*, 539 U.S. at 332 (opinion of O’Connor, J.) (holding that familiarizing future leaders with multiracial settings is a compelling interest).

54. See generally DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (5th ed. 2004).

“A lot of the white students like the rigor of the materials and do well. But many of them confide to me afterward that the seminar was a revelation.”

“In what way?” Giannina asked.

“They said they were able to see real black intelligence at work for the first time. And it blew them away to see a black or Latino who could see more deeply into an analysis than they could. Many were liberals who were pleased to have minority colleagues. But they had gotten used to seeing most of them sitting silently beside them in class, struggling to keep up. The seminar showed what black students can do with materials that interest them.”

“So, your class served as an antidote to white conceit. Or if that word is too harsh,” Giannina summarized, “their sense of the racial order of things.”

“I see the same thing in my own class,” Rodrigo said. “And it reveals a further weakness in Sander’s position. If mismatch is impermanent, contextual, and a matter of shifting perspectives and priorities, one setting might turn out to be a mismatch for student A for one reason, but a mismatch for student B for a different, even diametrically opposed, reason. One shouldn’t concede the analytical clarity or simplicity of the concept. If it does good work, fine. But if it does bad work, find another tool.”

“Take our waiter,” Giannina said. “When I got here, I asked the nearest staff person, who turned out to be he, where the two of you were sitting. Noticing his slight accent, I asked where he was from. Anyone care to guess?”

I looked at Rodrigo. “We give up.”

“He’s a Russian immigrant,” she said, “with a Ph.D. from the University of Moscow.”

#### CONCLUSION

We paid the bill and departed, exchanging hugs and promises to get together soon. As I walked back to my hotel in the gathering dusk, I reflected on Laz’s critique of Sander, which I thought commendable coming from this principled young conservative. I resolved to spend more time with the three of them and regretted that I hadn’t called ahead to set up a group meeting.

I thought Rodrigo’s and Giannina’s critiques of Sander’s scholarship were powerful and wondered how the UCLA professor would respond. I considered myself fortunate to count them as friends and reminded myself how we old-timers need young people’s energy and ideas at least as much

as they need our encouragement and steadying hand. I made a mental note to check my travel calendar for the next opportunity to get together with them.

As the hotel came into view I wondered idly what I had said that Rodrigo found so amusing. I yawned; it had been a long day. Maybe when I get home, I'll talk with the dean about putting off retirement for a year or two. Even if she does make me serve on the admissions committee, who would forfeit the opportunity to speak with Rodrigo and his many young counterparts, some in my very own classes, growing up, spreading their wings, and preparing to take their places in the world?

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