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Are Law Schools Racist? - Part II (Symposium: Deconstructing Race: When Reasonable Minds Differ)

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Symposium

Are Law Schools Racist?—Part II

By DAN SUBOTNIK*

> [I]n things racial we have always been, and we, I believe, continue to be, in too many ways, essentially a nation of cowards. . . . [W]e, average Americans, simply do not talk enough with each other enough about things racial. . . . [I]f we are to make progress in this area, we must feel comfortable enough with one another and tolerant enough of each other to have frank conversations about the racial matters that continue to divide us.
>
> United States Attorney General Eric Holder[1]

Introduction

A FEW MONTHS AFTER Barack Obama announced his candidacy for president, an assertion in a law review article caught my attention. Responding to the argument that affirmative action was responsible for the relatively poor grades of many African American law students, Professor Richard Delgado wrote, "Racism at the law schools . . . and sheer economic hardship are equally plausible hypotheses."[2]

Sometimes it is true, of course, that people's deficiencies are the fault of others. Too often it is not true so we must be skeptical of such claims. In vilifying law schools, to take just one example, Delgado did

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1. Eric Holder, U.S. Attorney Gen., Remarks at the Department of Justice's African American History Month Program (Feb. 18, 2009), *available at* http://www.youtube.com/watch?v=3RtzGraUV9c.

2. Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 644 (2007).

not even consider the deeply troubling fact that, *on average*, African American students come to law school much less prepared than white students[3]—a fact that undergirds affirmative action—and that this is a likelier and less inflammatory explanation for the poorer grades.

The more I considered Delgado's arguably racist charge[4] the more disturbing it became. For the same reason that good writers normally avoid the passive form—because it hides the real subject—so the personal subject is hidden in Delgado's formulation. In the end, it is people who are, or are not, racist. I also started thinking that like many of my colleagues who have been in legal education for a quarter-century and more, I could not readily disclaim responsibility for what is happening in our law schools. To shorten a long story, I knew that I could not be a "coward"[5] and fail to respond to Delgado when I started re-reading the quoted language as, "White racists at the law schools, including you, Subotnik . . . ."

And respond I did in a manner that reflected my distress at how all of my own, my school's, and the legal academy's efforts at being good were being judged.[6] This response to Delgado's article drew two strong ripostes, one by Delgado himself and a more extensive one by Professor Rhonda Magee, both published in the same volume as my article.[7] The editors of this Law Review have thought the debate productive enough to allow another round of commentary—in these pages.

3. In 2007, the average white/black LSAT gap for admitted applicants to at least one ABA-approved law school was 7 "points," 157 versus 150. E-mail from Phil Handwerk, Institutional Researcher, Law School Admission Council (Feb. 5, 2009, 2:22 EST) (on file with author) (discussing an LSAC graph attached to the e-mail entitled "Admitted Applicants to at Least One ABA Approved Law School"). For a sense of the significance of this disparity, consider that at the University of San Francisco School of Law, the LSAT scores of 160 and 152 respectively represented the 75th and 25th percentile of the 2007 entering part-time division. LAW SCHOOL ADMISSION COUNCIL ET AL., ABA LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 2009 EDITION 653 (2008). More generally, scores of 150 and 157 correspond to candidates in the 19.5 and 53.7 percentiles of students who are admitted to at least one ABA law school. E-mail from Phil Handwerk, *supra*. The undergraduate white/black grade-point-average gap was .25 points, 3.40 to 3.15. *Id.*

4. The case for racism would be founded on the moral superiority of minority faculty implied in the charge.

5. *See* discussion *supra* note 1 and accompanying text.

6. Dan Subotnik, *Are Law Schools Racist?: A "Talk" with Richard Delgado*, 43 U.S.F. L. REV. 227 (2008) (discussing a program at Touro designed exclusively for minority students) [hereinafter Subotnik, *Law Schools*].

7. Richard Delgado, *The Sincerest Form of Flattery?*, 43 U.S.F. L. REV. 253 (2008) [hereinafter Delgado, *Flattery*]; Rhonda Magee, *Toward an Integral Critical Approach to Thinking, Talking, Writing, and Teaching about Race*, 43 U.S.F. L. REV. 259 (2008).

Query: Did I have a "right" to personalize the attack? Does it matter whether Delgado's charge offended me? Isn't the issue, at bottom, whether the charge is fair?

As to the first question, Delgado would seem to say yes, having long advocated tort actions for hate speech directed at groups.[8] Magee tells readers up front, that while my article lay still unopened, "I know that the essay I am about to read will very likely be an attack on critical race and gender theorists in the legal academy" and—although I never refer to Magee in any of my writings—that "[i]t will therefore be an attack on me—and it will feel like one."[9] Professors Delgado and Magee should thus be able to see why, even though it was not explicitly directed at me, I took Delgado's charge of white racism in law schools as a personal attack.

Magee nevertheless wants to understand what in my experience might lead me to have written my article.[10] In my book, I related an incident where a dean of mine refused to let me teach a course on race and racism because of my views on the subject.[11] More recently, the *Journal of Legal Education* refused to review the book on the grounds that it had too many other commitments,[12] although the book was favorably reviewed in the *Wall Street Journal*[13] and deals centrally with race and gender in the legal academy, a subject that has been at the heart of academy concerns for years. But that is only half the story. Although I am unsure how much it helps to understand my *argument*, because it has nothing to do with race, I will summarize the rest here to honor Magee's request.

As a youngster, I quickly came to the conclusion that much of what I heard from adults was bunk and that their motive was either to deceive themselves, or worse, to manipulate me into thinking one way or another. My theory of discourse during this formative period of my

8. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134 (1982). Delgado seems dubious, however, about whether a charge of white racism can constitute "hate speech," and indeed, whether any verbal assault on whites by minorities should be actionable as "hate speech." *See* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 175–87 (2004) (discussing hate speech against whites).

9. Magee, *supra* note 7, at 259.

10. *Id.* at 282–83.

11. DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA, at xiii (2005) [hereinafter SUBOTNIK, TOXIC DIVERSITY].

12. E-mail from Mark Tushnet, Co-Editor, Journal of Legal Educ. (May 12, 2005, 11:47 EST) (on file with author).

13. John D. McGinnis, *Bookshelf: At Law School, Unstrict Scrutiny*, WALL ST. J., July 27, 2005, at D10.

life was not so different from that of American folk hero Holden Caulfield, who also suffered from the belief that he was surrounded by phonies.[14] To this day, when confronted with (what I perceive as) a deliberately false accusation, particularly one designed to elicit feelings of guilt, I need to clear the air.

The most important point I need to make at this point is that for all the distress allegedly induced by my article, neither Delgado nor Magee has responded in any specific way to my defense against the charge of rampant and systemic law school racism. They apparently believe that the law-professors-are-racists charge is simply too self-evident. Or, alternatively perhaps, that my argument on behalf of whites is irrefutable. Because I am stymied by their non-responsiveness on this issue, I turn now to what Delgado and Magee do say.

I. Delgado

Delgado objects first to my use of fictitious characters, claiming they closely resemble ones that he created for dialogues that have become his trademark (the "Rodrigo chronicles").[15] I readily concede some parallelism. I wanted to show Delgado and his allies that I know Delgado's work well and beyond that, to elicit Delgado's response—which happily I did.

In particular, Delgado objects that his characters would never act or say what my characters say and do and that I paint an unflattering portrait of black people.[16] He insists, for example, that his "highly educated young law professors" would not intrude on someone who was reading with "What's up?" as my characters did.[17] Nor, Delgado gripes, would they ever use "street slang" in a public place.[18] Rather, his characters would have broken the ice with "Hi, Bianco, got a minute?" or "Hi, Bianco, want company?"[19]

Similarly, after one of my characters avoids looking at a woman he runs into "because they had previously dated and the wound of loss was still raw,"[20] Delgado charges not only that his (related) character was true to his wife and that what I was describing was a "middle-aged

14. J.D. SALINGER, CATCHER IN THE RYE 14, 19 (1951) (describing Dr. Spencer and Mr. Haas).

15. Delgado, *Flattery*, *supra* note 7, at 253.

16. *Id.* at 255.

17. *Id.* at 254–55.

18. *Id.* at 255.

19. *Id.*

20. Subotnik, *Law Schools*, *supra* note 6, at 227.

lecher," but also that I was offering a negative and "common stereotype of black men lusting after white women, an image long used to rally sentiment against men of color and to keep them in their place."[21] When I suggest that "the professor" is a little addled, Delgado similarly universalizes by wondering whether it might "have escaped Subotnik that minority men can have caring relationships based on mutual respect[.]"[22]

But surely I cannot reasonably be bound by Delgado's characters when I give my characters names of their own that are recognizably different. (I turn Rodrigo into "Riccardo" and Laz into "Bianco.") Delgado created his characters to serve his purposes, e.g., to agree that racism in law schools may be responsible for poor grades of African American students. Am I not at liberty—is it tasteless of me, as he claims[23]—to borrow from his characters and yet to put my own words into my/his characters to disprove the point?

As for how I portray African American scholars, it simply defies the imagination that black academics, and particularly close friends, are always in academic mode, that they are never "real." Regarding the sexual stereotype, I did not write or even imply that my character was married. I suggested only that he had had a bad experience with the woman in question at some earlier point and did *not* want to engage with her. Under no reasonable interpretation was I describing him as "lusting" after a "statuesque Italian clerk."[24] But if Delgado is truly offended by the idea that a black academic is strongly attracted to a "white Italian woman," one wonders, why does his character marry one? As for the charge that I think that black scholars are incapable of relationships based on mutual respect, I am, for what it is worth, just flabbergasted.

I will explain my inclusion of the ex-girlfriend in a moment. For now, consider that the real problem, as I have complained, is that the Critical Race Theory school, of which Delgado is a prominent member, goes out of its way to interpret any situation involving whites and blacks as reflecting ill on the former.[25] *Cui mal cerca, mal trova.*[26] Whether the purpose of such calumny is to manipulate law school

21. Delgado, *Flattery*, *supra* note 7, at 254.

22. *Id.* at 255.

23. *Id.* at 254.

24. *Id.* at 253.

25. SUBOTNIK, TOXIC DIVERSITY, *supra* note 11, at 23–24; *see also generally* RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT RACE MAKES THINGS WORSE (2007) (discussing Critical Race Theory).

26. He who looks for evil will find it.

admission policies or not is irrelevant. What matters, as a number of black authors have highlighted, is the destructive effect of contemporary black paranoia on African Americans themselves.[27]

The preceding discussion hints at a problem with Delgado's characters that should be noted: much as he loves them, they are too perfect. Aside from a sweet tooth, none seems to have any weakness. The characters ooze seriousness of purpose. As Delgado reminds us, Rodrigo's wife is a published poet and playwright, and he remains true to her throughout their marriage.[28] Rodrigo himself is not some street urchin made good but a true aesthete who shuns Starbucks[29] and values Italian delicacies such as trippa-stuffed cabbage.[30] Delgado's self-righteous characters do not admit mistakes and the arguments they make always crush those of their opponents. Is it any wonder that I wanted to bring some verisimilitude to the characters?

The second major point Delgado makes is that he is not hiding behind his characters so as to make himself invulnerable to criticism, as I charged. "I have made practically every statement that [my characters] make elsewhere, in straight, expository prose."[31] Having read only a small part of Delgado's massive and often impressive oeuvre, I cannot assess this claim. But the key word here, it seems to me, is "elsewhere." My argument was only that he made the racism/grades argument through fictitious characters and thus is fairly charged with trying to avoid personal responsibility for it.

This brings me to my argument that Delgado uses his narrative to distract readers from his spurious—and I would say vicious—message to and about white law professors.[32] I can discern no other reason for the great emphasis he gives to the succulent Italian delicacies and all the other irrelevant descriptive details in a discussion of racism in law schools. Here again Delgado fails to respond. *Qui tacet consentire videtur.*[33]

I hope the reader will now understand that I meant to highlight the complete irrelevance of Delgado's descriptive material, not sug-

27. *See, e.g.*, FORD, *supra* note 25; JOHN L. JACKSON, JR., RACIAL PARANOIA: THE UNINTENDED CONSEQUENCES OF POLITICAL CORRECTNESS (2008) (discussing the destructive effects of contemporary black paranoia).

28. Delgado, *Flattery*, *supra* note 7, at 254.

29. *Id.* at 253.

30. *Id.* at 257.

31. *Id.* at 258.

32. *See* Subotnik, *Law Schools*, *supra* note 6, at 251.

33. He who is silent is deemed to assent.

gest that black men obsess about white women, by bringing in the old-girlfriend story near the outset.

II. Magee

Professor Rhonda Magee writes that she was struck by an intense "surge of negativity" when sitting down to read my article.[34] She is "beside [her]self."[35] She feels as if she had been "hit with a vein-deep infusion of deflating toxins."[36] "[M]y shoulders and jawline tense."[37] She is "deeply afraid."[38] She feels "defensive and devalued."[39] When coming across the title of my book, *Toxic Diversity*, she experiences "an emotional and psychological blow—a spirit injury—that nearly incapacitates [her]."[40]

Describing emotional states and developing the legal implications thereof is a staple of Critical Race Theory.[41] The underlying idea seems to be that traditional legal analysis is too abstract, that it fails to consider the emotional responses of people to real-world events. The theorists are not wrong in this regard, which is why I have not shied from spelling out my own personal reactions.

The issue I am raising, however, is what to do about race not in hate crime settings but in formal political and legal discourse. Magee proposes an Integral Critical Approach that would commit to "minimizing the alienative potential of our work."[42] She asserts the need for "mutually respectful engagement and compassionate listening."[43] A new "Humanity Consciousness calls for a privileging of human dignity through . . . raising awareness of the interconnectedness of all humankind . . . [and] acknowledging the emotional impact of injuries to human dignity."[44]

If only we could conduct our social business in this manner. The problem we face at present, however, as black Harvard sociologist Orlando Patterson greatly laments, is that "no Euro-American person, except one insensitive to the charge of racism, dares say what he or

34. Magee, *supra* note 7, at 259.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 261.
39. *Id.* at 282.
40. *Id.* at 262.
41. SUBOTNIK, TOXIC DIVERSITY, *supra* note 11, at 53.
42. Magee, *supra* note 7, at 265.
43. *Id.* at 266.
44. *Id.* at 281.

she really means."[45] Moreover, as Professor Alan Dershowitz has complained, many writers on race (and gender) manipulatively employ the syllogism: "I am offended, [so what you say] must be wrong."[46] If "the truth hurts," as is often said, the syllogism itself is wrong.

As the reader should see, I faced a dilemma. I did not set out to cause Magee any pain. But given the implication of Magee's response to the very idea of my article—that one would have to suffer from sociopathic inclinations to mount a zealous defense of white law academics accused of racism—how was I supposed to counter the false charge that hurt me so deeply? It is not as if Magee says where I should have pulled punches, so to speak. Or should we now posit that white legal academics simply do not deserve a zealous defense?

As for Delgado, should he have to hold back on his charge of law school racism because of my likely reaction? No one, I suggest, is promised a stress-free life.

Happily, nothing in Delgado's piece indicates that he reacted the same way as Magee. More important, it turns out that there are other responsible views of how whites and blacks should speak to one another about race that are perhaps more realistic. As I made explicit in my article, I was adopting a full-throated approach propounded by Patterson and by black Yale law professor Harlon Dalton.[47]

Magee charges me with "ridiculing" the narrative form used by Delgado, holding that that method has proved itself.[48] Whether or not the latter is true, I was not ridiculing it. Indeed, I was using it as I had charged Delgado with doing, i.e., to say some things that are, by Magee's standards, of highly dubious propriety. But that does not mean that there are no drawbacks to the narrative method, and I have pointed some of those out.[49]

Magee adds that (A) I interpret the great W. E. B. Du Bois' famous line about "double consciousness" as a boast about the higher

45. ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS 2 (1998).

46. Alan Dershowitz, *Harvard Witch Hunt Burns the Incorrect at the Stake*, L.A. TIMES, Apr. 22, 1992, at B7. I am not suggesting here that Magee is employing this syllogism.

47. *See* PATTERSON, *supra* note 45, at 115 ("Afro-American and Euro-American people should treat each another exactly alike; as responsible moral agents. We do not need any special set of sensitivities."); HARLON DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS & WHITES 97 (1996) ("If engagement is the first step toward healing, then the second is pure unadulterated struggle."). Holder is also arguing for full and frank discussion. *See supra* note 1 and accompanying text.

48. Magee, *supra* note 7, at 275.

49. *See* Subotnik, *Law Schools*, *supra* note 6, at 250–51.

cognitive skills of black people.[50] I do not. I note only that his analysis has led to attempts at self-aggrandizement on the part of some black academics;[51] (B) I use a cramped, dictionary definition of racism.[52] I do, though I admit that there are other definitions and complain that both Magee and Delgado fail to tell us what definition they are applying, much less specify where the racism *is*;[53] and (C) I believe that the "poor performance of Black students relative to others in law schools . . . weakens the case for affirmative action."[54] I do, for two reasons. First, because black students will get discouraged, with all the attendant consequences. And second, because other students, particularly those from socioeconomically underprivileged households, have rights too. The greater the gap between them and the minority students who are admitted through affirmative action, the greater the unfairness. Affirmative action was defended by Justice Brennan as a "plus factor,"[55] not an absolute trump card.

Conclusion

The charge of racism against whites, if not leveled seriously, should be; too much is at stake for anything less. All of us have a moral obligation to isolate and destroy racism when it rears its ugly face. For too long, however, we have undermined this goal by indulging in promiscuous charges of racism, thereby allowing our intergroup relations to be poisoned and our attention to be diverted from real problems, including the under-preparation of many minority law students.

Richard Delgado ends his article with a plea for more accuracy and care.[56] Rhonda Magee aspires to a Beloved Community.[57] Yet when I gave a presentation to my faculty that became the basis for this Article, a colleague publicly called me a "borderline racist."

The election of a president strikingly committed to civility in racial discourse seems a good moment for us academics to agree to charge "racism" only after defining it and then to restrict such a charge to those cases where racism is demonstrated. Have I not shown

50. Magee, *supra* note 7, at 273.
51. *See* Subotnik, *Law Schools*, *supra* note 6, at 232–33.
52. Magee, *supra* note 7, at 271–72.
53. Delgado, *Flattery*, *supra* note 7; Magee, *supra* note 7, at 271–72.
54. Magee, *supra* note 7, at 269.
55. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in part and dissenting in part).
56. Delgado, *Flattery*, *supra* note 7, at 258.
57. Magee, *supra* note 7, at 290.

in my various writings that Delgado and Magee have altogether failed to show *anti-black* racism in law school? Is acquitting whites cause not for pain and suffering, but, rather, for celebration? Or am I, perhaps, in spite of my argument here—or because of it—a public-spirited and courageous sociopath and racist, borderline or otherwise?