

# Getting Real: A Reply to Dan Subotnik

By RICHARD DELGADO\*

IN THIS REJOINER TO Dan Subotnik's *Are Law Schools Racist?*—*Part II*,<sup>1</sup> I would like to make three points.

The first concerns Subotnik's choice of format. In his original twenty-eight-page article in the previous issue of the *Law Review*,<sup>2</sup> he employed a dialogue style to attack a number of features of my Rodrigo chronicles, one of them in particular.<sup>3</sup> But when I replied, taking him to task for certain failures of taste and tone,<sup>4</sup> he responded in straight, expository prose.<sup>5</sup>

Why would he shift from his previous dialogue format to straight-forward exposition? He might easily have stayed "in character," responding to my critique with yet another dialogue between Riccardo and Bianco, or even one between Riccardo and "the professor."<sup>6</sup> Using these characters as foils, he could have responded to my criticism and further staked out his own position. For example, his Euro-American character, Bianco, could have discussed the indignity of being labeled (as Subotnik thinks he was) a racist.<sup>7</sup> He and Riccardo could

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\* University Professor of Law, Seattle University School of Law. J.D., University of California at Berkeley (Boalt Hall), 1974. Thanks to Jean Stefancic for suggestions and critique.

1. Dan Subotnik, *Are Law Schools Racist?—Part II*, 43 U.S.F. L. REV. 761 (2009) [hereinafter Subotnik, *Part II*].

2. Dan Subotnik, *Are Law Schools Racist?: A "Talk" with Richard Delgado*, 43 U.S.F. L. REV. 227 (2008) [hereinafter Subotnik, *Part I*].

3. See *id.* at 228 (discussing Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637 (2007) [hereinafter Delgado, *Riposte*]); Subotnik, *Part II*, *supra* note 1, at 766.

4. See Richard Delgado, *The Sincerest Form of Flattery?*, 43 U.S.F. L. REV. 253 (2008) [hereinafter Delgado, *Sincerest Form*].

5. See Subotnik, *Part II*, *supra* note 1, at 766.

6. The professor is Rodrigo's foil in the Rodrigo chronicles. A man of color teaching at a major law school, he is Rodrigo's friend and mentor.

7. Subotnik, *Part II*, *supra* note 1, at 762 ("The more I considered Delgado's arguably racist charge . . ."); *id.* at 762 ("I started re-reading the quoted language as, 'White racists at the law schools, including you, Subotnik . . .'" (ellipses in original)); *id.* at 763 ("Delgado . . . 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."); *id.* at 766 (discussing my "spurious . . . message to and about white law professors").

have analyzed weak points in my response. Instead, Subotnik wrote a first-person *apologia*, reminiscent of the “agony tales” he elsewhere derides when they come from the pens of minorities.<sup>8</sup>

I have a theory for Subotnik’s change of voice. I think he adopted a dialogue format the first time around because he felt playful. He thought the idea of minorities writing dialogues and narratives is pretty silly and wanted to write his own spoof. That is why he wrote a twenty-eight-page conversation that was, by turns, playful,<sup>9</sup> dismissive,<sup>10</sup> rude,<sup>11</sup> and flip.<sup>12</sup>

But when I confronted him for poor, tasteless writing, it became serious. So, he changed his format and wrote in standard prose. One never knows precisely what is going on in the mind of another person. But I suspect that for Subotnik, attacking minorities is an enjoyable pastime. Being attacked by those same minorities, however, is deadly serious; almost as bad as what happened to those lacrosse players at Duke University, which also struck him as indefensible.<sup>13</sup> Even though I have nowhere discussed the Duke incident, it seems to have made a deep impression on Subotnik, who appears certain he knows what I would have said if I had said anything about it.<sup>14</sup>

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8. See generally DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER AND LAW TALK IN AMERICA* (2005) (discussing first person “agony tales” by minority authors recounting incidents of racism in stores and other settings) [hereinafter SUBOTNIK, *TOXIC DIVERSITY*].

9. See, e.g., Subotnik, *Part I, supra* note 2, at 228 (“You’re so linear, Bianco. Isn’t everyone entitled to a little riff?”); *id.* at 234 (“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?”).

10. *Id.* at 232 (“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 [ . . . ]”); *id.* at 230 (“Of what use are dialogue and free speech if truth-telling inclinations are stifled?”); *id.* at 231 (“[R]ace and gender unhinge even the best human minds.”).

11. See, e.g., *id.* at 228 (“Who does he think he is, Julia Child? Oprah?”); *id.* at 228–29 (“I understand perfectly well the joy of signifying. . . . But . . . minorities and women are not playing some harmless little game, but are rather undermining civil society and in some cases helping to terrorize people.”).

12. *Id.* at 233 (“Adolph Eichmann, John Gotti, Richard Dahmer, and Timothy McVeigh were fairly tried. What’s so terrible about a defense of white men generally?”); *id.* at 246 (“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.”).

13. See *id.* at 229 (discussing the Duke rape-charge case as an example of why outsider scholars are not playing some “harmless little game”).

14. *Id.* at 229 (“Tell me, Riccardo, would your law faculty have done anything more than the highly esteemed Duke Law faculty or dean did . . . to make sure that similarly situated white students at your school were not being railroaded by the prosecutor . . . ?”).

Next, consider how Subotnik's reply article subtly rephrases my principal criticism of his first piece. That criticism was that he gratuitously redrew my main characters—the professor and Rodrigo, both of them men of color—in unflattering ways.<sup>15</sup> For example, he has the younger man lusting after a white female clerk in a coffee shop.<sup>16</sup> He describes the older gent—the professor—as addled,<sup>17</sup> when he is actually sharp as a tack. As for Subotnik's characters “Riccardo” and his colleague “Bianco”—thinly disguised versions of my Rodrigo and Laz—they come across as jive-talking hipsters acting out in a public place.<sup>18</sup> Later, when the two young law professors become engrossed in their conversation, they consciously decide to commit the deadliest sin for an academic—skipping class in order to continue their conversation.<sup>19</sup>

I called readers' attention to these and other qualities he attributed to my characters and the unlikelihood that intellectuals of color would act that way in public.<sup>20</sup> I raised the possibility that Subotnik has an attitude problem regarding minority men.<sup>21</sup>

He did not reply to this charge, but merely cited a few black academics (neoconservatives) whom he respects,<sup>22</sup> and explained that he disliked my two characters (Rodrigo and the professor) because they are too “perfect.”<sup>23</sup> They speak politely and do not use slang. They eat good food, know how to order without insulting the waiter, and have

15. See Delgado, *Sincerest Form*, *supra* note 4, at 253–56.

16. Subotnik, *Part I*, *supra* note 2, at 227; see also Delgado, *Sincerest Form*, *supra* note 4, at 253.

17. See Subotnik, *Part I*, *supra* note 2, at 235; Delgado, *Sincerest Form*, *supra* note 4, at 255.

18. See Subotnik, *Part I*, *supra* note 2, at 228; Delgado, *Sincerest Form*, *supra* note 4, at 254–55.

19. Subotnik, *Part I*, *supra* note 2, at 234; Delgado, *Sincerest Form*, *supra* note 4, at 255–56.

20. Delgado, *Sincerest Form*, *supra* note 4, at 253–56.

21. *Id.* at 256 (“What does it say about Professor Subotnik that each of these departures serves only to paint a man of color in unflattering terms? Notice . . . that Subotnik does not mistakenly describe Riccardo or the professor as a member of Mensa, a former college swimming star, a Rhodes Scholar, or a Pulitzer Prize nominee. Instead, Riccardo comes across as a slang-speaking opportunist who interrupts his colleague in the middle of his reading, badmouths his own mentor, and cannot be bothered to show up for a scheduled class.”).

22. See Subotnik, *Part II*, *supra* note 1, at 765 n.25 (citing a book about minorities who go about bluffing); *id.* at 765 n.27 (citing another about blacks who are paranoid); *id.* at 767 n.45 (citing a third, this one about racial resentment).

23. *Id.* at 766 (“Delgado's characters[,] . . . much as he loves them, . . . are too perfect. Aside from a sweet tooth, none seems to have any weakness. The characters ooze seriousness of purpose.”).

strong marriages. Unhappy with my portrayal, he revised them to help them, as he put it, get “real.”<sup>24</sup> He redrew Bianco at the same time—perhaps so that Riccardo’s boorish behavior would not stand out quite so starkly.

It is hard, though, to see how two characters, one white, the other black, who use jive talk, make fun of an absent mentor, lust after counter clerks, and decide to skip class are merely getting real. I doubt that Subotnik’s neoconservative icons, Orlando Patterson and John McWhorter, act that way. I am tempted to conclude that Subotnik altered Riccardo and the professor not to make them more realistic, but to bring them more in line with how he believes minority law professors behave. That is why I think Subotnik has an attitude problem regarding black men, at least those of the liberal persuasion.

My third point is that Subotnik, in *Are Law Schools Racist?—Part II*, is at pains to depict himself as a victim. Although he did not bring this charge the first time around, he now believes that my *Syracuse Law Review* article labeled him a racist.<sup>25</sup> It nowhere does anything of the kind. Indeed, other than raising the possibility of his attitude problem toward black men earlier in this Reply,<sup>26</sup> I have not done so and believe it unnecessary. (I believe in the old adage “Show, not tell.”)

Here is what I actually said. In my *Syracuse Law Review* article,<sup>27</sup> I took issue with Professor Richard Sander’s assertion that affirmative action enables black and Latino law students to gain admission to elite schools, when, if they had gone to the more “natural” environments of mid-tier schools, they would have been better off.<sup>28</sup> Sander points out that minority law students tend to earn grades, on average, lower than those of their white counterparts, which he attributes to affirmative action.<sup>29</sup> According to his reasoning, if those students had gone to schools further down the pecking order, the competition would have

24. *Id.* at 765 (“[T]hey are never ‘real.’”).

25. See discussion *supra* note 7 and accompanying text; see also Subotnik, *Part II, supra* note 1, at 769 (“The charge of racism against whites, if not leveled seriously, should be[ ] . . .”). He also thinks that my colleague Rhonda Magee and I are trying to silence him and that he is courageously speaking out in the manner of United States Attorney General Eric Holder, who called for a frank and honest national conversation about race. See *id.* at 761 n.1; *id.* at 768 n.47. This is preposterous; I published his book, *SUBOTNIK, TOXIC DIVERSITY*, *supra* note 8, in a series I co-edited with Jean Stefancic.

26. See discussion *supra* notes 23–24 and accompanying text (describing how he revised two of my characters almost beyond recognition).

27. Delgado, *Riposte, supra* note 3.

28. See Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367 (2004).

29. *Id.* at 371–72, 425–42.

been less keen. They would have earned better grades, suffered less, and dropped out in smaller numbers than they do now.<sup>30</sup>

In the *Syracuse Law Review* piece, I pointed out that the two events are not necessarily linked and that affirmative action may not be the cause of black and Latino students' subpar grades at all.<sup>31</sup> Elite schools, I noted, have very good records of graduating those minorities and launching them on to successful careers. If minority students' grades are lower than those of their white classmates, that difference may be the product of economic pressures or racism, not affirmative action.<sup>32</sup> This casual assertion is what set Subotnik off on his tirade.

But let's look at that assertion more closely. Could racism suppress the academic performance of a law student of color? Of course it could—Claude Steele's studies of "stereotype threat" show this plainly,<sup>33</sup> and Subotnik knows about and has cited that body of work.<sup>34</sup> Could a law school environment be racist, subtly or otherwise? Yes. Studies of unconscious racism, including the Implicit Association Test, show that a very high proportion of Americans harbor unfavorable attitudes toward persons of color, particularly blacks.<sup>35</sup> If the legal profession were completely devoid of racist attitudes, how did we get *Dred Scott v. Sandford*,<sup>36</sup> *Plessy v. Ferguson*,<sup>37</sup> the Chinese Exclusion cases,<sup>38</sup> jury-selection rules that systematically excluded Latinos,<sup>39</sup> and much more?

More importantly, though, I did not charge Dan Subotnik or any other individual with racism at all. I merely pointed out that something in the environment at some top schools may be suppressing the

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30. *Id.* at 410–18, 441–42, 447–48.

31. See Delgado, *Riposte*, *supra* note 3, at 643–49.

32. *Id.* at 644.

33. Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

34. See Dan Subotnik, *Goodbye to the SAT, LSAT? Hello to Equity by Lottery? Evaluating Lani Guinier's Plan for Ending Race Consciousness*, 43 HOW. L.J. 141, 144 n.17 (2000).

35. See, e.g., CRITICAL RACE REALISM (Gregory S. Parks et al. eds., 2008) (containing contributions by social scientists showing the significance of implicit-association studies to law and the legal system).

36. 60 U.S. (19 How.) 393 (1856) (holding that blacks have no rights which whites were bound to respect).

37. 163 U.S. 537 (1896) (upholding a state rule requiring separate railroad cars for black and white passengers).

38. This is the name for a series of Supreme Court cases decided during the 1880s and 1890s which made it difficult for native Chinese to immigrate to, or remain in, the United States. See, e.g., JUAN PEREA ET AL., RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 411–25 (2d ed. 2007).

39. See *Hernandez v. Texas*, 347 U.S. 475 (1954) (striking down discriminatory jury-selection practices in Texas).

performances of some students of color.<sup>40</sup> I also mentioned an impersonal factor—financial pressure—as an equally likely factor.<sup>41</sup> Nowhere did I accuse Subotnik, who does not teach at one of those elite schools, with responsibility for conditions there. But I do posit that he has fabricated that charge because he enjoys the role of victim. Why this might be so I leave for the reader to decide. I do believe, however, that it is time for him to get real, too.

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40. See discussion *supra* notes 30–31 and accompanying text (referencing explanations for minority performance in elite schools). Subotnik is wrong when he says that “[i]n the end, it is people who are, or are not, racist.” See Subotnik, *Part II*, *supra* note 1, at 762. Institutions and practices may be, as well.

41. See discussion *supra* notes 30–31 and accompanying text (referencing explanations for minority performance in elite schools).