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AFFIRMATIVE ACTION: DIVERSITY OF OPINIONS—AN OVERVIEW OF THE COLORADO LAW REVIEW SYMPOSIUM

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Three decades after enactment of the Civil Rights Act of 1964,[1] affirmative action has become once again a lightning rod—the focus of attention by legislators, university governing boards, newspaper editors, and courts. Debate about affirmative action addresses questions of legality, fairness, and the various rationales put forth to justify or condemn it. As controversial as the issue itself are the questions of who should be able to put affirmative action programs and policies into effect, and on what kind of showing.

In 1964, Congress passed civil rights legislation prohibiting race and gender discrimination by private employers, agencies, and educational institutions receiving federal funds.[2] Shortly thereafter, President Lyndon B. Johnson issued Executive Order 11,246, which provided equal opportunity to qualified federal employees, regardless of race, creed, color, or national origin.[3] Congress then created the Equal Employment Opportunity Commission to advise and review federal affirmative action policies.[4] By the 1970s, federal agencies began enforcing regulations calling for timetables and goals to implement affirmative action. Opponents of the measures began referring to them as quotas.

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1. Civil Rights Act of 1964, 42 U.S.C. § 2000 (1996).
2. *See id.*
3. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).
4. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (codified as amended in scattered sections of 5 & 42 U.S.C.).

Regents of the University of California v. Bakke[5] brought new resistance to affirmative action policies and charges of reverse discrimination. Once a policy issue, affirmative action increasingly became subject to judicial review with a line of cases running from *Bakke* to *Adarand Constructors, Inc. v. Pena*[6] and *Hopwood v. Texas*.[7] A concerted effort to dismantle affirmative action programs gained strength in the 1980s when conservative think tanks and foundations that funded them mounted campaigns and lawsuits to have the programs declared unconstitutional.[8]

In 1996, affirmative action was assailed on two fronts in the nation's two largest states, Texas and California. In March, the U.S. Court of Appeals for the Fifth Circuit ruled in *Hopwood* that the University of Texas Law School could no longer consider race in admissions or financial aid decisions.[9] The U.S. Supreme Court's denial of certiorari in July on grounds of mootness[10] left unresolved an important question: Could the Texas higher education affirmative action policies continue to comply with the 1964 Civil Rights Act if those policies were to become race-neutral? Texas attorney general Dan Morales had the final word in a legal opinion that mandated abolishing affirmative action, not only at the University of Texas Law School, but in all public colleges and universities in Texas.[11] Texas legislators have subsequently introduced several bills in the hope of retaining diversity and increasing minority enrollment.

In November 1996, Californians passed Proposition 209 with fifty-four percent of the vote, prohibiting race and gender preferences in state hiring and contracting, as well as in higher education admissions.[12] A suit filed the following day by civil rights attorneys in San Francisco won a preliminary injunction to

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5. 438 U.S. 265 (1978).

6. 115 S. Ct. 2097 (1995).

7. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

8. *See* JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 45-81 (1996).

9. *See Hopwood*, 78 F.3d at 932.

10. Texas v. Hopwood, 116 S. Ct. 2581 (1996).

11. Opinion Letter from Dan Morales, Texas Attorney General, to William P. Hobby, Chancellor, University of Houston System (Feb. 5, 1997) (No. 97-001) (on file with *University of Colorado Law Review*).

12. *See* Edward W. Lempinen & Reynolds Holding, *Affirmative Action / Legal Duel over Prop. 209; Both Sides Sue, and Wilson Orders Immediate Enactment*, S.F. CHRON., Nov. 7, 1996, at A1.

prohibit the implementation of the proposition pending examination of the possibility that it might inhibit remedies that addressed past discrimination.[13] However, in April 1997, the U.S. Court of Appeals for the Ninth Circuit in a unanimous ruling overturned the district court.[14] California supporters of affirmative action have requested a rehearing by the full panel of the Ninth Circuit.[15]

Where does this leave affirmative action? The lull following the implementation of Proposition 209 in California and the U.S. Supreme Court's denial of certiorari in *Hopwood* provide an opportunity for further debate on a number of questions, some of which the authors in this symposium address: Should a less-qualified minority applicant be admitted over a white applicant with stellar qualifications? And with what justification? What do we mean when we talk about "merit" and "qualifications"? Should we end race-based diversity programs and replace them with ones based on class or disadvantage? If diversity programs are discontinued, what will happen to upward mobility for minorities and women? What should we do about jury verdicts colored by race—or about police or prosecutors who single out minorities for special treatment?

Paul Butler reviews affirmative action's moral justifications, including reparation for past discrimination, correction of present discrimination, and diversity, and then applies these three rationales to criminal defendants. Examining white supremacy and the society it creates, Professor Butler argues that the three rationales justify the extension of affirmative action to criminal law. Furthermore, Professor Butler demonstrates how the criminal law already countenances race-consciousness through racial incongruity, segregation of racial groups in prison, and the hiring of minority law enforcement personnel, and non-racial fairness preferences through rape shield laws and proportionality review in capital cases. Professor Butler then makes the case for applying such considerations and preferences to black criminal

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13. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431 (9th Cir. 1997).

14. *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997).

15. *See* Emelyn Cruz Lat, *Groups Request Prop. 209 Review, Say Appeals Court Panel's Upholding of Anti-Affirmative-Action Measure Is Unconstitutional*, S.F. EXAMINER, Apr. 23, 1997, at A7.

defendants, offering six proposals to extend affirmative action to criminal law.

Margaret Montoya critiques Paul Butler's justifications on the grounds that they lack sufficient constitutional foundation under current law. She examines an integrationist and a white supremacist model of racial power, as well as ways the dominant society racializes various groups. Professor Butler's jurisprudential reform proposals, based on a white supremacy model, are doomed, she believes, because Supreme Court Justices for the most part adhere to an integrationist model. Professor Montoya also questions who would implement the proposals, whether they would imply preferences or quotas, and how strict scrutiny would apply. Seeking to broaden the debate, she calls for a more complex analysis of the criminal justice system that would take into account the experiences of non-black racial minority groups.

Richard Collins does not agree that all of Paul Butler's solutions can be properly designated as affirmative action. Though not all discriminatory actions can be litigated because of the difficulty of proving intent, Professor Collins suggests that a number of them might be subject to legislative remedies were the majority motivated to provide such remedies. He then outlines three approaches to address present-day racial discrimination in the criminal justice system; to illustrate the difficulty of allocating the cost of affirmative action measures, Professor Collins offers a reparations hypothetical. Like Professor Montoya, he questions how Professor Butler's proposals, addressing only African Americans and whites, would apply to other minorities of color. He points out the effect of money and resources on a defendant's ability to be acquitted regardless of race, and calls for a less abstract, more pragmatic debate on affirmation action.

Seeking to persuade white liberals who, like herself, are uncertain about affirmative action, Deborah Malamud contends that racial preference programs for middle-class African Americans are still justifiable. Professor Malamud argues that although the diversity rationale is considered to be the only one that the Supreme Court is likely to accept, discourse should not be limited to this rationale because it is an imperfect justification for affirmative action. Thus, she explores a compensatory rationale for affirmative action for the black middle class and examines many arenas in which the black middle class is economically disadvantaged compared to its white counterparts. Rejecting class-based affirmative action as too simplistic because

it fails to account for the role of race discrimination in the economic disadvantaging of middle-class blacks, Professor Malamud concludes that race-based affirmative action is still justifiable.

Sumi Cho, while commending Deborah Malamud's justification of a compensatory rationale for affirmative action, vigorously defends retaining the diversity rationale as well. Professor Cho responds to Professor Malamud's critique of diversity by demonstrating how the diversity rationale has the unique ability to address the often overlooked and devalued claims of the cultural injuries of racism. Furthermore, she points out that a diversity approach to affirmative action has broad-based appeal and enables coalition and community building. In addition, Professor Cho faults Professor Malamud for not questioning the use of criteria such as standardized testing to measure merit and for confining her discussion of the harm of white supremacy and racism to African Americans, thereby precluding reforms that address discrimination against other people of color.

Fran Ansley lauds Deborah Malamud's admonitions about tailoring discourse on affirmative action to fit Supreme Court jurisprudence, as well as Professor Malamud's attention to the combination of race and class in her comparison of middle-class blacks and whites. However, she takes issue with Professor Malamud's analysis on a number of points. First, she questions the arena in which the debate on affirmative action takes place. Rather than making intellectual arguments to unpersuaded white professionals, Professor Ansley believes that affirmative action proponents should turn to and learn from those at the "bottom"—working class people of both races who have the most to gain from affirmative action. Second, she articulates a more complex analysis of how diversity and compensatory justifications implicate and affect each other. Professor Ansley discusses six values and goals that underlie affirmative action, thereby laying the groundwork for a more nuanced approach to preference programs and enlarging the debate to address questions of working-class access to education and livelihood and to unmask class privilege and oppression.

Focusing on admissions decisions of law and other professional schools, Michael Olivas examines admissions criteria such as standardized test scores and grade point averages and evaluates the predictive success of such measures. Turning to a deeper analysis of statistical method, Professor Olivas then

reviews eight fair-selection models, showing how assumptions that are neither value-free nor apolitical guide the choice of variables used to make predictions about success in graduate programs. After considering whether parts of *Bakke* have been overruled, Olivas next examines a line of college admissions cases beginning with that case and ending with *Hopwood* to show how judges have viewed admissions criteria. Professor Olivas urges that affirmative action be continued, praising admissions programs that achieve diversity without relying solely on so-called objective measures.

Jim Chen not only takes issue with Professor Olivas' assumption that academic freedom allows educators to institute race-conscious admissions policies without judicial scrutiny. He also challenges the use of race as a public entitlement in the affirmative action debate at large. Grounding his argument in an analysis of Charles Reich's path-breaking and much-cited article *The New Property*, which called for the Supreme Court to protect and guarantee the economic security of individuals against an unregulated market, he warns that affirmative action risks extending an unhealthy new nonwhite property interest in race. Using Professor Olivas' emphasis on the discretionary nature of admissions policies as a springboard, Professor Chen then argues that race preference entitlements, rather than being justified on the basis of procedural due process, are more akin to the Takings Clause because of the special status accorded to racial identity. He warns that these entitlements place racial issues outside the bounds of law into the public policy arena, which is more subject to private biases.

Richard Delgado, in agreement with Professor Olivas, proposes an additional approach to maintaining diversity in admissions processes, namely remedial justice. Recounting instances of Ku Klux Klan influence, antiblack admissions policies, higher cost of living in no-growth university communities, and overt harassment of local people of color in those communities, Professor Delgado advocates examining how government and institutions of higher education have worked together to perpetuate class privilege and discrimination. He then questions the ability of standardized tests to predict legal ability, giving an account of the professional achievements of diversity admittees in his own law school class.

Jody Armour examines ways opponents of affirmation action fail to deal with the empirical realities of race. Citing incidents

of scapegoating, corporate racism, housing discrimination, and the higher costs of mortgage loans and automobiles to minorities, he questions the conservative assumption that racial discrimination is a thing of the past. He then distinguishes prejudice (personal beliefs) from stereotypes (precognitive conditioning) and analyzes stereotype-congruent responses to blacks and Hispanics and the effect of stereotype vulnerability on young black test takers. Professor Armour then discusses the concept of just deserts in criminal law, whereby punishment meted out to an offender must accord with judgments about the offender's character, noting the controversies raised by law professor Richard Delgado's proposal to exempt those submitted to brainwashing and Judge David Bazelon's proposal to take into account disadvantaged social background. In each instance, the proposals were condemned on grounds that extending dispensation to brainwashed and disadvantaged persons was motivated by elitism and condescension and therefore insulted those persons. Professor Armour then draws a parallel between these arguments and those used by opponents of affirmative action who declare that racial preference programs demean their beneficiaries. Discussing preference arrangements that have little to do with merit, such as buddy networks, government subsidies, and legacy admissions programs, Professor Armour points out that a dominant group tends to make exceptions for programs that benefit itself whereas it excludes, on merit grounds, proposals that promote interests of marginalized groups.

Robert Nagel questions whether Professor Armour's empirical approach effectively refutes the conservative argument against affirmative action articulated by Shelby Steele and others. He focuses on each writer's skepticism about the objectivity and utility of judgments about moral culpability, showing that for Armour endemic and continuing unconscious racial stereotyping surpasses the issue of conscious intent to discriminate, while for Steele the debate over white guilt and black victimization subverts the cause of minority advancement. Given the lack of certainty about the consequences of affirmative action, Professor Nagel argues that institutionally these policies be implemented locally and not be subject to judicial decisionmaking that cannot easily be reversed.

Evelyn Hu-DeHart examines white male privilege and reviews the achievements of affirmative action. Though white women fared better than minorities in affirmative action pro-

grams during the past thirty years, they have yet to attain parity with white males. Consequently, Professor Hu-DeHart believes, minorities and white women do not compete with white males as much as they compete with each other—a phenomenon borne out by Cheryl Hopwood's suit against minority admissions policies at the University of Texas Law School. Professor Hu-DeHart concludes by calling for a reexamination of affirmative action to take into account the particular needs of each disenfranchised group.

What then is the future of affirmative action? The denial of certiorari in *Hopwood* leaves the question of racial preference programs unresolved. Legal foundations determined to strike down affirmative action once and for all continue to look for the perfect case to challenge *Bakke*. In March 1997, both the University of Washington School of Law and the University System of Georgia faced lawsuits challenging the ways they used race in admissions.[16] Regardless of whether one of them will become the test case, there is no doubt that the threat those suits pose will chill higher education diversity policies.

Before California voted to end affirmative action, the Regents of the University of California, led by the same Ward Connerly who authored California's Proposition 209, voted to dismantle affirmative action in admissions.[17] Bills to similar effect are pending in Congress and several states. Time will determine whether these bills will pass and what long-range consequences they will have on minorities and women in education and the workplace. Meanwhile, both sides have yet to grapple fully with the issue underlying the affirmative action debate, namely: race matters more to Americans than many are willing to admit.

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16. *See* Marsha King, *Affirmative Action Foes Targeted UW in National Legal Strategy*, SEATTLE TIMES, Mar. 21, 1997, at A1; Patrick Healy, *A Lawsuit Against Georgia University System Attacks a Range of Race-Based Policies*, CHRON. HIGHER EDUC., Mar. 14, 1997, at A25.

17. *See, e.g.*, Barry Bearak, *A Life in Black and White*, N.Y. TIMES, July 27, 1997, §1, at 1; Orlando Patterson, *Affirmative Action, on the Merit System*, N.Y. TIMES, Aug. 7, 1995, at A3.