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WHY UNIVERSITIES ARE MORALLY OBLIGATED TO STRIVE FOR DIVERSITY: RESTORING THE REMEDIAL RATIONALE FOR AFFIRMATIVE ACTION

RICHARD DELGADO*

Professor Michael Olivas provides an impressive road map for making our way amid existing case law and testing studies to preserve diversity admissions in higher education.¹ I do not know of a better such treatment. Unfortunately, two of his premises—the imperative of distributive justice² and the continued vitality of *Regents of the University of California v. Bakke*³—are under attack right now. Our society is not in a redistributive mood these days,⁴ while *Bakke* stands in danger of continued erosion, of outright defiance by lower courts, and of possible eventual reversal by the Supreme Court itself.⁵

With those realities in mind, I would like to propose a complementary approach for diversity's defenders to pursue while the kind of present- and future-oriented reconstruction that Michael outlines proceeds. We can and should do the things he suggests: strengthen our admissions criteria, make them more defensible, put more effort into the admissions process itself, and

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1. See Michael Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997).

2. See Olivas, *supra* note 1, at 1068 ("New evidence on what constitutes 'success' in graduate or professional schools . . . [has] made it necessary to review and refine admissions practices and criteria so that they have . . . heightened sensitivity to the increasingly heterogeneous student body . . .").

3. 438 U.S. 265 (1978). See Olivas, *supra* note 1, at 1066 ("*Bakke* remains the law of the land.").

4. See, e.g., JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996) (detailing efforts to roll back social programs like affirmative action, immigration, bilingual education, and welfare).

5. See *id.* at ch. 4; see also *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 U.S. 2581 (1996) (striking down race-conscious admissions program at University of Texas and implying that 18-year-old Supreme Court precedent is no longer valid).

do a better job of explaining to others what we are doing and why.⁶

At the same time, however, I propose that we resume work on a second basis for affirmative action, namely retributive or remedial justice. This second approach, which would be backward-looking, would root affirmative action on a basis everyone seems to agree is morally defensible, namely redress for past discrimination.⁷ This approach has the advantage of intuitive defensibility, drawing as it does on the age-old maxim that one should make amends for harms caused.⁸ It also has the advantage of being well-established doctrinally, at least for now; if one can show that one or one's class has been discriminated against by some social institution, that institution may be ordered to make amends in the form of affirmative action.⁹ I respond by tightening evidentiary and proof requirements to make proof of past discrimination increasingly more difficult.¹⁰ As I will argue in a moment, the effort is worth making nevertheless.

This approach would entail working to expose how our institutions of government and higher education have operated together to perpetuate discrimination and class privilege. In Colorado, for example, as late as the 1920s, state government was dominated by the Ku Klux Klan.¹¹ The governor was alleged to have been a member, as were a majority of the House of Repre-

6. See Olivas, *supra* note 1, at 1088-89 (setting out the author's suggestions for reform of university admissions process).

7. On the two general approaches to justifying affirmative action (viz, the forward-looking social engineering approach and the remedial, rooted-in-history approach), see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

8. *The King James Bible, The Declaration of Independence*, and other classic social texts all refer to the moral imperative of making amends for past harm or injustice one has inflicted on another. See, e.g., *Leviticus* 5:5, 17, 6:4; 2 *Samuel* 12:13-17; *Jonah* 3:5-10; *Isaiah* 1:17-18, 17; THE DECLARATION OF INDEPENDENCE (U.S. 1776).

9. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978) (approving race-conscious affirmative action when "the extent of the injury and the consequent remedy . . . have been judicially, legislatively, or administratively defined").

10. See Richard Delgado, *On Taking Back Our Civil Rights Promises*, 1989 WIS. L. REV. 579.

11. See, e.g., ROBERT GOLDBERG, *HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO* 34, 87 (1981); Steven Rosen, 'Roaring Twenties' Exhibit Bares Rage, Shame of Racial Inequality, DENV. POST, Jan. 24, 1993, at 4F; Steven Rosen, Colorado's Label as Hate State Shows Parallel to Klan Activities in '20s, DENV. POST, Dec. 16, 1992, at 1F [hereinafter Rosen, *Colorado's Label*].

sentatives and many mayors and police chiefs.¹² This took place at a time when many western states were experiencing heavy immigration and resettlement. If you were an African American family thinking of relocating in the West, the land of opportunity, would you have chosen Colorado? Not many did; Colorado's black population was small then and is so today.¹³ The KKK period occurred only a few generations back, so the pool of potential black students at Colorado colleges and universities is smaller now than it would have been had our state not enjoyed a justly deserved reputation for racism. Nor did the climate improve dramatically when the governor and Klan legislators stepped down; Denver has been rocked by race riots periodically throughout the last century, even as recently as the 1990s.¹⁴

What of the state university? The University of Colorado Law School, at least, seems not to have had a single professor of color until about 1977 and only two black graduates before 1961.¹⁵ Even after that time, black enrollment ebbed and flowed. As late as the mid-1980s, one entering class contained not a single African American student.¹⁶ Now, imagine all those dinner table conversations at which Mom and Dad gently ask Junior what he or she plans to do in life—maybe practice law just like them? Not many of those conversations took place among black families, at least in Colorado, for the simple reason that Mom and Dad were not lawyers. Consider also the recent findings that many of

12. See, e.g., GOLDBERG, *supra* note 11, at 30-34, 84-87, 157; Rosen, *Colorado's Label*, *supra* note 11, at 1F.

13. Today, Colorado's black population is about 4.24%. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1996 STATISTICAL ABSTRACT OF THE UNITED STATES 34.

14. See, e.g., Gene Amole, *Summer Memories: Race Riot, Jonas Salk*, ROCKY MTN. NEWS, Jul. 9, 1995, at 5A (race riots at Washington Park lake in the 1930s); Rueben Sosa Villegas, *Latino Group Works for Quality Education*, ROCKY MTN. NEWS, Aug. 29, 1994, at 3N (1969 riot by Latino students protesting racist attitudes in school); Berny Morson & Christopher Broderick, *Denver Busing Ends; Judge Frees Schools from Order That Reshaped City*, ROCKY MTN. NEWS, Sept. 13, 1995, at 1A (race riots resulting from desegregation in the 1970s); John C. Enslin & Mark Brown, *King Day Observance Explodes into a Riot, Confrontation is Worst in U.S. as Nation Honors Civil Rights Leader Who Preached Non-Violence*, ROCKY MTN. NEWS, Jan. 21, 1992, at 6 (race riot on Martin Luther King Day in 1992); Patrick O'Driscoll, *Demonstrators Go on Rampage for Two Hours*, DENV. POST, Jan. 21, 1992, at 1A (Martin Luther King Day riot).

15. See Oscar J. Miller, History Project (Mar. 17, 1993) (unpublished manuscript, on file with the *University of Colorado Law Review*).

16. This fact was remarked upon by a faculty member at a meeting of the University of Colorado Law School law faculty in the Fall of 1996.

the state's campuses are falling behind their legislatively established diversity targets.¹⁷ These findings are as close as you are likely to get to the kind of showing the current Supreme Court likes to see before remedial affirmative action can go forward. But the Court also considers that admissions or findings of past discrimination on the part of an agency itself will suffice.¹⁸ Of course, the university, like most institutions, rarely engages in this kind of breast-beating. Still, consider the findings of a Boulder campus task force on educational climate for students and professors of color, giving the campus generally low marks,¹⁹ or the recent rash of lawsuits in which the university settled charges of discrimination brought by a woman or person of color, sometimes for large enough amounts of money as to suggest it saw the cases as representing more than nuisance value.²⁰ Are those not tantamount to admissions of wrongdoing?

The city of Boulder maintains a conscious no-growth land use policy, which has the direct effect of keeping housing prices high.²¹ As a result, not many working-class and minority people can afford to live here. What does that do for the ability of the campus to attract African American or Latino students? The town is about one percent black; the student body is not much higher; and the situation is not that much better for Latino Americans.²² The university is not a passive participant in

17. See Diana Somerville, *The Human Face of Affirmative Action Goals*, COLORADO: VIEWS FROM CU-BOULDER, Apr. 1997, at 9; Fawn Germer, *CSU Fails to Hit Diversity Target; Fort Collins Campus Shows 8.2% Minority Graduation Rate in 1996; State-Set Goal Is 10%*, ROCKY MTN. NEWS, Feb. 6, 1997, at 4A.

18. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978) (but noting that the factfinder must be one competent to make such a finding and observing that an institution whose mission is education alone lacks such competence).

19. See Carol Chorey, *CU Needs More Minorities, Faculty Diversity Termed Crucial*, BOULDER DAILY CAMERA, May 13, 1995, at 1A; Editorial, *A More Diverse CU Faculty*, BOULDER DAILY CAMERA, Feb. 21, 1996, at 1C.

20. See *Bias Suits Cost CU \$2 Million, 191 Suits Filed at 4 Campuses Since '92*, BOULDER DAILY CAMERA, Apr. 9, 1996, at B1; *Senate Rejects Budget Increase for Education*, DENV. POST, Apr. 9, 1996, at B5.

21. See, e.g., Patricia S. Straub, *Rental Market Ups & Downs, High Prices in Boulder Fuel Rental Market Outside the City*, BOULDER DAILY CAMERA, Jan. 14, 1997, at D1; Laura Bishop, *Residents: Boulder a Nice Place, but Traffic, Housing Are Problems*, DENV. POST, July 12, 1995, at B2; Mary George, *Boulder Sets Limits on Business Growth*, DENV. POST, Sept. 20, 1995, at A1; James Burrus, *Growth Questions Looming for Voters*, BOULDER DAILY CAMERA, Oct. 29, 1995, at A1.

22. As of the 1990 census, blacks made up 1.22% of Boulder's population. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, COUNTY AND CITY DATA BOOK

Boulder's no-growth land use policy, either—it benefits from and has supported it in a number of ways.²³

Boulder is not unique. Diligent research would likely unearth similar stories elsewhere. In one college town, oral history holds that when the state decided to build a new campus there, the town's elite realized that much money stood to be made. Located in an agricultural region in the West, the town, like others in the area, boasted a good-sized Mexican neighborhood with a cantina and store. Harassment by local merchants, police, and health inspectors soon drove the Mexican residents out, so that the town today is solidly yuppified and real estate values high. Notice how many law schools, unlike medical schools, are located in small, attractive college towns. As with medical schools, locating law schools in urban areas would make it easier both to run legal clinics and attract minority students. But that is not where you find them. Recently, someone proposed to relocate one unit of a state law school from the attractive college town in which it is located to the large metropolitan area nearby. The proposal was quickly vetoed—the faculty didn't want to uproot their families. Any color coding there?

Finally, consider the LSAT, used by practically every law school as an integral part of its admission process. Doctrine, as well as common sense, suggest that a test's history of segregative intent bears directly on its present legitimacy.²⁴ Most people today know that the SAT has a thoroughly disreputable past—its designers out and out white supremacists.²⁵ The first president of the College Board opposed immigration of non-whites and warned that the United States was at risk of being swamped by

1994, 686 (12th ed. 1994). As of 1995 at the University of Colorado, Boulder campus, African Americans made up 1.89% of the student body and Hispanics/Latinos/as made up 5.77% of the student body. See OFFICE OF PLANNING AND INSTITUTIONAL RESEARCH, UNIV. OF COLO. AT BOULDER, 1995 STATISTICAL PROFILE (1995).

23. For example, its real estate holdings benefit by the increase in value resulting from high demand and low availability; the value of the houses of faculty, staff, and administrators increases, as well; and various members of the campus community have served in, or as consultants to, city government over the years when the land-use policy was formulated and enforced.

24. See Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1744 (1995) (including discussions on merit, standardized testing, and the justifications for affirmative action); STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO* 64 (1994).

25. See Delgado, *supra* note 24, at 1741-45; FISH, *supra* note 24, at 64-65.

persons bearing inferior genes.²⁶ Nor has the agency repudiated his legacy—the Educational Testing Service library still bears its founder's name,²⁷ while the test until recently contained items about regattas and polo mallets.²⁸

What about the law school version? Developed in the late 1940s as the latest in a line of ability tests, the LSAT's developers drew not from existing tests composed by legal educators or experienced attorneys, but from Navy and Pepsi-Cola Scholarship tests, all variations of the original IQ tests with checkered pasts.²⁹ Since its early days, the LSAT has yielded scores for African American and Latino test takers well below those registered by whites.³⁰ A traditional defense has been that the test is necessary now that law school admissions are so selective, but the test came into use not in the late 1960s, when law school applications rose sharply, but earlier, when numbers of Jews, Southern Europeans, and minorities of color first began seeking entry to the profession.³¹ In 1912, the ABA admitted three black lawyers, some of the first in that organization's history.³² When it learned of its error, it rescinded their admission.³³ As late as 1939, thirty-four of eighty-eight accredited law schools maintained formal rules excluding blacks.³⁴

26. See Delgado, *supra* note 24, at 1741-42, 1744; FISH, *supra* note 24, at 64.

27. See Delgado, *supra* note 24, at 1744.

28. See *id.* at 1741-42; see also Daria Roithmayr, *Deconstructing the Distinction Between Merit and Bias*, 85 CAL. L. REV. (forthcoming Oct. 1997) (manuscript at 18 & n.78, on file with the *University of Colorado Law Review*).

29. See Roithmayr, *supra* note 28 (manuscript at 23-24 & n.133, 28 & n.166); see also, e.g., Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415, 426 n.55 (1987); Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 372 (1987).

30. See Roithmayr, *supra* note 28 (manuscript at 28 & n.167); see also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) (critiquing paper-and-pencil tests as criteria for jobs and admissions); *Lower High School GPAs Do Not Mean That Black Students Cannot Cope with Coursework at Highly Selective Colleges*, J. BLACKS IN HIGHER EDUC. 26, 27 (Spring 1997); Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895, 897-98 (1996); Michael L. Principe, *A Response to Professor Graglia's Essay on Political Correctness*, 23 N. KY. L. REV. 515, 520 (1996); Simien, *supra* note 29, at 375-82.

31. See Roithmayr, *supra* note 28 (manuscript at 20).

32. See *id.* (manuscript at 28 & n.144).

33. See *id.*

34. See *id.* (manuscript at 26 n.150); see also *The Role of Rhetoric in the Attack on Affirmative Action*, J. BLACKS IN HIGHER EDUC. 62, 62-63 (Spring 1997) (citing

How well does this test predict legal ability? As Professor Olivas and others point out, only slightly better than relying on ZIP Code or family income alone.³⁵ And, after graduation, the test has almost no predictive value. At one law school at which I have taught, students of color pass the state bar examination at rates similar to those of their classmates at large and earn starting salaries that are the same or slightly higher.³⁶ They also obtain prestigious positions, such as that of judicial clerk or university professor, at rates higher than those of their Euro-American counterparts.³⁷ An anomaly? Recently, I gave the graduation address at Boalt Hall, where, by coincidence, my own class, twenty-plus years ago, had been the first to experience complete diversity across all three classes; this year's class, because of the California Regents' directive, is likely to be the last.³⁸ Choosing diversity as the theme of my address, I asked the Alumni Relations Director to provide me with information on where my own class of diversity admits had wound up. I was curious to find if half of them failed the bar, were on welfare, or eking out meager livings as solo practitioners in remote areas.

The statistics I received back were stunning: the minorities in my class included a huge proportion of partners in major firms, members of Congress, and Federal Circuit Court Judges.³⁹ One was serving as chief counsel of the largest black-owned financial institution in the United States.⁴⁰ I have never felt so much like an underachiever. Is Berkeley's experience unusual? I do not

examples of exclusion of blacks in U.S. colleges, for example, that Harvard awarded no degree to a black for the first 233 years of its history; no black graduated from Duke, Emory, or Vanderbilt until 1967; and the original charter of Rice University specifically forbade blacks).

35. See Olivas, *supra* note 1, at 1072 ("[T]he LSAT is a weak predictor, performing less well for certain schools and for later years in school. . . . For minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance."); Sturm & Guinier, *supra* note 30, at 971-76 (noting that standardized tests are unable to predict job performance or even grades).

36. Professor Richard Delgado, Graduation Address at the *University of California, Berkeley, School of Law*, Berkeley, Cal. (May 1996) (on file with *University of Colorado Law Review*).

37. See *id.*

38. See *id.*; see also Amy Wallace & Dave Leshner, *UC Regents Vote to End Preferences in Hiring, Admissions*, L.A. TIMES, July 21, 1995, at A1 (reporting University of California Regents' directive that all campuses in state system discontinue affirmative action based on race).

39. See Address, *supra* note 36.

40. See *id.*

believe so. Colleagues who teach at other law schools around the country tell me the same thing: drop in at the tenth or twenty-fifth year reunion of the Minority Alumni Association, and you find yourself in a roomful of extremely distinguished people—notwithstanding their admission, years before, with lower test scores and sometimes lower undergraduate grades than the others. Recent studies of affirmative action in the marketplace are finding much the same thing: workers hired under affirmative action programs and policies perform as well as anyone else, or better.⁴¹

It is easy to see how a judiciary disinclined to face up to the implications of findings like these could shut the door by tightening evidentiary rules, defining causation and injury narrowly, and so on. But the truth is a little like Michael's river,⁴² hard to dam up forever. We should dig around, ask the oldtimers what they know, and share the results in addresses, letters to the editor, Op-ed columns, and ordinary conversation. Sometimes a little history is the best corrective for the kind of social and institutional apathy we see today. And, with the details of our own sordid, and in some cases recent, history of transgressions fully in view, perhaps we will embark on the search for rational and effective solutions that Professor Olivas calls for, and with the commitment and seriousness of purpose that they deserve.

41. See HARRY HOLZER & DAVID NEUMARK, ARE AFFIRMATIVE ACTION HIRES LESS QUALIFIED? EVIDENCE FROM EMPLOYER-EMPLOYEE DATA ON NEW HIRES, (National Bureau of Econ. Research, Inc. Working Paper No. 5603, 1996) (on file with *University of Colorado Law Review*). One study of Harvard graduates showed a *negative* correlation between SAT score and success in later life. See Sturm & Guinier, *supra* note 30, at 976.

42. See Olivas, *supra* note 1, at 1114-16.