



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works


Faculty Scholarship

2012

Peacemaking & Provocation: A Response to Professor Tracey Jean Boisseau

Dan Subotnik
Touro Law Center, dans@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>

 Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

45 Akron L. Rev. 943

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

PEACEMAKING AND PROVOCATION: A RESPONSE TO PROFESSOR TRACEY JEAN BOISSEAU

Dan Subotnik

There must be a term in the science of rhetoric for an argument like this: the writer complains about Problem X. But problem Y clearly dwarfs X. Therefore, the writer would do better to concern himself with Problem Y.

This is Professor Boisseau's opening and closing response to my article: the world is so full of disadvantaged individuals stuck in the maw of the criminal justice system, that concerns about the "Privileged and/or Wealthy and Powerful White Males" (PWWM, her acronym) on the Duke lacrosse team are frivolous. She is right about the legal environment for America's "vulnerable populations." If I do not accept her critique here, it is largely because I believe that the world is chock-full of problems needing resolution making multi-tasking among scholars obligatory. But there is also another reason why my concerns should not be dismissed. I will show in this response a psychological link between what the academics did in the Duke Lacrosse case and the very circumstances they and Professor Boisseau decry.

But first, this. Pace Boisseau, my primary concern is not with the members of the Duke lacrosse team. The players did indeed come out all right. Nor do I worry much about real PWWM, like Dominique Strauss-Kahn, who are ground up in the criminal justice system. Indeed, the primary focus of my article is not the criminal justice system at all. Rather, it is women's studies and minority studies professors who, through ads like that taken out by the Group of 88 and scholarship generally, poison relations between minorities and whites, and between men and women, and in the process undermine the self-confidence of women and minorities. I hastily add that I do not charge Boisseau, a women's-study professor herself, with these faults; I do not know her work well enough. I do charge her with defending those who damage the body politic in the foregoing ways.

I quote Houston Baker several times in my article to illustrate the destructiveness of campus commentary on the Duke Rape case.

[M]y wife and many, many, many, women. . . on the campus of Duke this evening are afraid to walk across the campus. . . . In tier-one, traditionally all-white universities across this country, administrators know that a culture of violence, a culture of rape, a culture of gay-bashing, a culture of racism and misogyny exist.

How soon will confidence be restored to our university as a place where minds, souls, and bodies can feel safe from agents, perpetrators, and abettors of white privilege, irresponsibility, debauchery and violence?¹

How does Boisseau view the foregoing virulent comments, which echo those of other Group of 88 signatories? What scholars such as Baker are thinking, Boisseau explains, is that they are:

deepening the public conversation that the controversy created so as to encompass a larger discussion about what *they* see as the failure of institutions such as the Academy, the Media and the Criminal Justice System to protect those without much power or resources. . . . The deeper history that the controversy invokes²

she further explains, “is privileged and wealthy white men enslaving and systematically raping”³ black women. The Group of 88 was simply providing “context and clarity regarding the outpouring of rage directed at the lacrosse players.”⁴

In short, eliding the issue of whether she would have signed the ad in question, Boisseau wants the focus on the nobility of the efforts of the Group of 88. But we all know about the perversity of good intentions. In this case, *tout comprendre c’est tout pardonner*.⁵

But is forgiveness appropriate for the Group of 88 and their supporters? Let us consider: who is better at “deepening” the public conversation about social justice in our country? At providing “context and clarity”? Someone who terrifies the public and sets minorities against white males by invoking a shameful history of racial abuse (including someone who defends such a person)? Someone who would, by extension, lash out at Germans today for the sins of their grandfathers? Or, rather, someone who shows, whatever the history books might report on sexual assault, that history is not a prison, that,

1. *Nancy Grace: Duke University’s Lacrosse Team Coach Resigns in Wake of Gang Rape Allegations Against Three of his Team Members* (HLN television broadcast Apr. 5, 2006).

2. Tracey Jean Boisseau, *Response to “The Duke Rape Case Five Years Later: Lessons for the Academy, the Media, and the Criminal Justice System,”* 45 AKRON L. REV. 923, 934 (2012).

3. *Id.*

4. *Id.* at 935.

5. LEO TOLSTOY, *WAR AND PEACE* (1868) (To understand all is to forgive all).

whatever the cultural continuities, the past is not the present? In this evolving world, I am thrilled to be able to report, white males have apparently learned their lesson. As far as can be determined from Bureau of Justice reports, the rate of white-on-black sexual assault is so low today as to be *statistically insignificant*.⁶

For Boisseau, this ostensible good news is not even worth mention. More established and honored authorities, however, highlight the moral difference between the two approaches. It is the peacemakers—not the provocateurs—whom Scripture adopts as the Children of God.⁷

A would-be child of God, I must respond to another of Boisseau's charges. The real problem in the academy, she complains, is that it "is one of the most obvious class-perpetuating institutions in our society."⁸ She surely means this complaint as a call to action. But what action? A little background. Our public school systems are by and large woefully and tragically inadequate. The gaps seem to be enormous even in our prestigious schools. At New York City's Stuyvesant High School, a pure exam school, only 1.5% of accepted students are black while black people make up 25% of the city's population.⁹ In Shaker High School outside of Cleveland, described as one of the best in the country, white students graduate with honors at a rate of 77% compared to 2.5% for black students, who make up just short of 90% of the bottom 20%.¹⁰ For what it is worth, the distinguished black author who provides the latter data does not blame administrators or faculty, but rather parents who are not pushing their children hard enough.

The gap seems no smaller in law school. The mean LSAT score of African Americans is almost eleven points less than that of whites¹¹ while the median grade of African Americans in the first year of law school is too low relative to whites to be highlighted here without risking an uproar.¹²

6. See Subotnik, *The Duke Rape Case Five Years later*, 45 AKRON. L. REV. XX (2012), at 900 n.59 and accompanying text.

7. See *Matthew 5:9*.

8. Boisseau, *supra* note 2, at 936.

9. Wesley Yang, *Paper Tigers: What Happens to All the Asian-American Overachievers when the Test-Taking Ends?*, NEW YORK MAGAZINE, May 8, 2011, at 24 (12 out of 773 students).

10. See JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT 6-7 (2003). Ogbu's data related to the late 1990s. Given the sensitivity surrounding studies such as these, it is hardly surprising that more current data is impossible to find.

11. LSAC, LSAT TECHNICAL REPORT SERIES, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS 2003-2004 THROUGH 2009-2010, at 19 (2010).

12. See Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 426-27 (2004) (citing LSAC Bar Passage Study).

In the light of these deeply troubling circumstances, what would Boisseau have the *academy* do? Water down teaching standards? Would that help make us more competitive with the rest of a world which is increasingly “eating our lunch”? To be sure, one cannot expect an answer to these questions in what was just a response to my article. But a complaint is only valuable if a solution is in sight. One would like to know what that might be.

The distinguished scholar and father of critical race theory, Richard Delgado, has blamed white racism *in our law schools* for the dreadful grade gap therein,¹³ a charge I have contested in several law review articles.¹⁴ In this respect he has much in common with the minority-studies and women’s-studies professors like Boisseau. This similarly suggests a question that Delgado, Boisseau, and others should be asking themselves: Is it possible for minority men and women to become fully competitive with whites when their professors regularly profess that the white man, with his boot on their necks, is just spoiling to rape or otherwise traumatize them?

Lastly, a response to Boisseau’s silence on the concluding section of my article. I report there that in an effort to deter sexual assault—and presumably as a result of pressure from women’s studies professors like her—the U.S. Department of Education Office of Civil Rights has recently mandated a lower evidentiary standard on American campuses for determining culpability on sexual assault charges. Under the new guidelines, and in a challenge to due process, charges must be evaluated based on a preponderance of the evidence rather than on evidence that is clear and convincing. One might assume that this regulatory change would be celebrated by someone with a “deepen[ed]” understanding of the violence perpetuated by white males against minority women, someone who defended the need to galvanize the campus against sexual assault. But Boisseau perhaps understands that such cheering could be self-defeating for minorities. If American campuses are as stacked against black males as Boisseau and her colleagues suggest, and if, as Bureau of Justice data suggest, white males are in fact not assaulting black females, what group of students will be thrown out most disproportionately and most unjustly?

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

14. See Dan Subotnik, *Are Law Schools Racist?: A “Talk” with Richard Delgado* (pts. 1 & 2), 43 U.S.F. L. REV. 227 (2008), 43 U.S.F. L. REV. 761 (2009).