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Hopwood: Was This the African-American Nightmare or the African-American Dream?

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History is replete with situations and circumstances in which happenstance and coincidence combine to produce a fundamental change in the given direction of an entire society. With regard to race relations, America has certainly experienced a number of crucial moments in its history. Moments where the sudden invasion of one particular body by an unexpected virus,[1] the unanticipated constriction of a vessel in a given heart, [2]or the failure of a particular individual to sneeze at an inopportune moment,[3] changed irrevocably the future of race relations in American society.

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1. On March 22, 1784 the Continental Congress voted on a resolution that, if passed, would have abolished slavery in all of the western territories after the year 1800. EDMUND CODY BURNETT, THE CONTINENTAL CONGRESS 599-600 (1941). The resolution was rejected by a single vote. But what is more interesting is the fact that John Beatty, a representative from New Jersey, was unable to cast his vote because he was ill. Beatty was known to be supporter of the resolution. *Id.* If Beatty had been there to cast the deciding vote, the southwest territories—which later became the states of Alabama, Mississippi, Tennessee and Kentucky—might have come into the Union as free states. Thus Beatty's untimely illness might have not only allowed slavery to spread throughout the South but also helped to set the stage for the intersectional conflict that erupted in the Civil War.

2. According to Justice William O. Douglas, when the Supreme Court originally took up the question of segregation in Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I"), a majority of the Justices—including Chief Justice Fred Vinson—was prepared to uphold Plessy v. Ferguson, 163 U.S. 537 (1896), and the "separate but equal" doctrine. Justice Douglas's views were contained in a memorandum he wrote to his files on the day that the Court announced its decision in *Brown I.* He thought that five justices—Chief Justice Fred Vinson, Stanley Reed, Tom Clark, Felix Frankfurter and Robert H. Jackson—expressed the view that segregation was probably constitutional. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 187 (1994). Even if the doctrine of "separate but equal" had been struck down, the evidence seems to show that Chief Justice Vinson certainly would not have functioned as a consensus builder to unite the Court in a unanimous opinion. But the single most fateful judicial event of that long summer occurred at 3:15 on the morning of September 8, 1953: Vinson suffered a heart attack and died at his Washington hotel apartment. In December of that year, the replacement for Chief Justice Vinson indicated that he felt segregation statutes violated the equal protection clause of the Fourteenth Amendment. Chief Justice Earl Warren's conscious effort to unite the Court set the stage for a unanimous opinion that marked the beginning of the end of Jim Crow segregation.

3. GERALD FRANK, AN AMERICAN DREAM 51 (1972). Frank relates the Reverend Martin Luther King, Jr.'s recount of a stabbing incident in New York City by a black woman on September 20, 1958 while King was autographing books at a Harlem department store:

> The only question I heard from her was, "Are you Martin Luther King?" And I was looking down writing, and I said, "Yes." The next minute I felt something beating on my chest. Before I knew it I had been stabbed by this demented woman. I was rushed to Harlem Hospital. It was a dark Saturday afternoon and that blade had gone through, and the X-rays revealed that the tip of the blade [of a steel letter opener] was on the edge of my aorta, the main artery, and once that's punctured, you drown in your own blood–that's the end of you. . . . It came out in the New York *Times* the next morning that if I had sneezed, I would have died.

America has also experienced moments when the conscious decision of one individual has led to consequences that radically altered the future of American society. At the outbreak of the Civil War, Robert E. Lee chose to turn down Abraham Lincoln's offer to head the Union Army.[4] Lee's skills as a military general might have allowed the Union to conquer the Confederacy in a relatively short period of time, thus obviating the need to emancipate the slaves in order to restore the Union to the Union it had been, based on slavery.

Another individual who helped set the stage for the future of American race relations was Booker T. Washington. One year before the Supreme Court delivered its 1896 opinion in *Plessy v. Ferguson*,[5] Washington delivered a speech at the Atlanta Exposition. He took this opportunity to deliver a speech in which he indicated that in exchange for economic assistance in terms of job training, African-Americans would be willing to accept a subordinate status in American society rather than agitate for integration or political power.[6] Washington's speech made it much easier to impose segregation because it could be cited as proof that intelligent blacks did not oppose the institution of segregation.

America has once again come to a racial crossroads. The markers above the paths in front of it are hewed in stone. One says color-blindness and individual meritocracy. The other says diversity and the conscious celebration of racial and ethnic differences. I write this comment recognizing that this is a time where happenstance or the willingness of one individual justice on the United States Supreme Court[7] will have the ability to alter the landscape of American race relations for at least the next forty years.

Seeing into the future is like seeing around a corner. Such a venture is fraught with the difficulty of trying to perceive the causes of the future that may not even have begun to spin out their inevitable effect. Even the best of us have experienced how the future turns us from adroit prognosticators into doomsayers and pessimistic fanatics. I wish to submit the following as a vision of the future of legal education if the Supreme Court eventually follows the reasoning of the Fifth Circuit opinion in *Hopwood v. Texas*[8] and thereby strikes down affirmative action programs in admissions. It is my fervent desire that history proves my following vision to be the product of a

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4. STEPHEN B. OATES, WITH MALICE TOWARD NONE 231 (1977).

5. 163 U.S. 537 (1896).

6. Booker T. Washington, Atlanta Exposition Speech (1895), *in* THE VOICE OF BLACK AMERICA: MAJOR SPEECHES BY NEGROES IN THE UNITED STATES, 1797-1971, at 577 (Philip S. Foner ed., 1972).

7. *See* Sanford Levinson, *Hopwood: Constitutional Interpretation by an Inferior Court*, 2 TEX. F. ON C.L. & C.R. 113, 121-22 (1996).

8. Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *reh'g denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

pessimistic fanatic and not an adroit prognosticator.

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"Today is the last graduation ceremony that I will ever attend." This was the thought that was on the mind of Professor Marshall DuBois Douglass[9] as he awoke on this May morning in the year 2036. Professor Douglass was reflecting upon the termination of his distinguished fifty-year career as a legal academician. Nearly all of those years had been spent as a member of the faculty of The University of Texas School of Law. For the last 35 years Professor Douglass was the only tenured African-American law professor at UT.

Professor Douglass was born in Birmingham, Alabama, in 1956—the same year that the Reverend Martin Luther King Jr. led the Montgomery Bus Boycott. Douglass attended a segregated all-black elementary school until age thirteen. Shortly after the Supreme Court's opinion in *Green v. New Kent County School District*,[10] his elementary school was desegregated. In 1974, Douglass matriculated at Indiana University. That was the same year that the Supreme Court decided *Milliken v. Bradley*.[11] In 1978, shortly before Justice Powell wrote his opinion in *Regents of the University of California v. Bakke*,[12] Douglass was accepted to the University of Michigan Law School.

Professor Douglass joined the UT faculty during the peak years of racial and ethnic diversity at the law school. In his early years, African-American and Mexican-American students constituted fifteen to twenty percent of each entering class. In 1992, for example, the entering class of 513 students consisted of forty-one African-Americans and fifty-five Mexican-Americans.[13] Over the years Douglass often reflected on the day he received his offer from the law school. At the time he did not feel that he was an "affirmative action" hire. Almost everyone at the law school had enthusiastically embraced his candidacy. His faculty colloquium was described by the most skeptical of his colleagues as "brilliant." Subsequent to his appointment, he turned the colloquium into his first article, which was published in the *Harvard Law*

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9. Professor Douglass was named after three of the most famous fighters against racial subordination—Thurgood Marshall, W.E.B. DuBois, and Frederick Douglass.

10. 391 U.S. 430 (1968) (holding that a "freedom of choice" plan improperly placed the burden of desegregation on parents and students where *Brown II* held the school board responsible for dismantling the dual systems of segregated education through other reasonably available means).

11. 418 U.S. 717 (1974) (holding that an interdistrict school plan calling for a proportional racial balance among students was not justified in a district in the absence of constitutional violations by the state that would cause such imbalances throughout other districts).

12. 438 U.S. 265 (1978). The *Bakke* opinion was delivered on June 28, 1978.

13. *Hopwood*, 78 F.3d at 937.

Review.

Last night Professor Douglass hosted an annual dinner to honor the graduating African-American law students and their families. This was a tradition he began with the class of 1996. Forty years ago the dinner was held in the Tom Clark Student Lounge at the law school and over one hundred people attended. But the Fifth Circuit's opinion in *Hopwood v. Texas*[14] had a dramatic impact on the number of black and brown law students admitted to the law school. Within ten years of that decision, Douglass was able to comfortably host the graduation dinner at his spacious Austin home. Normally the families of the three or four graduating black students were comfortably seated in his large dining room. Sometimes, however, when the graduates brought in an inordinate number of family members, it was necessary to set up additional chairs and tables on the wood deck outside his dining room.

The dinner last night was similar to many of the other ones Douglass had hosted since the turn of the millennium. There was a particularly poignant moment last night that Douglass kept replaying in his mind. During the dinner Douglass reminisced about the "good old days" when there were over 100 African-American and 150 Mexican-American law students enrolled in the law school. He rambled about how he taught courses on the Reconstruction Amendments and Latinos and the Law. In those days his classes would attract between thirty and fifty black and brown law students and an equal number of Anglo students. Douglass talked about seeing himself as on a mission. He reflected with pride on how his cutting-edge scholarship and teaching had purpose, direction, and meaning. He was one of a few committed radical law professors who were attempting to fundamentally restructure American legal discourse. Their goal was to open the discourse to multiple perspectives and provide alternative means in which to envision solutions to racial and ethnic legal disputes. This group of law professors felt that part of what they were doing in the classroom was training a generation of progressive lawyers that would be committed to righting the historical racial and ethnic evils of Texan and American society. During those years Douglass viewed being a law professor as tantamount to being a social revolutionary.

The fifteen-year-old younger brother of one of the black graduates, Clarence T. Washington, was not aware of the history of affirmative action and the numbers of opportunities it had created for black and brown students at mainstream colleges and universities. Though Clarence never actually articulated the thought, it was obvious that he considered Douglass' recollections to be the product of prevarication or senility. The only way that

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14. *Id.* at 932.

Douglass was able to prove to Clarence that at one time there were so many black and brown students at the law school was to show him the yearbook pictures of the graduating classes in the early 1990s.

As Professor Douglass placed on his graduation robes for the last time, the double-edged thought ran through his mind again. This thought was one of those nagging existential paradoxes: even though it can never be resolved, it can never be permanently confined to the realm of the disregarded. This thought had haunted him since the day he first read the Fifth Circuit's opinion in *Hopwood v. Texas*. The thought was like simultaneously seeing both sides of the same coin: one view secured for him psychological salvation, but flip it over, and the other view begat psychological damnation.

Douglass was well aware that he had lived during an unprecedented period in American history for African-Americans. It was too plain to dispute that the time from the middle of the 1950s to the early 1990s would historically be viewed as the "Ebony Age" for African-Americans. Douglass knew that one could debate how serious America's commitment was during the Ebony Age to right the sins of the past or promote a true multicultural society. He knew that it could be argued *ad infinitum* that more could have, would have, or should have been done. Douglass was also familiar with those who would argue that what America had done during the Ebony Age was the product of mixed motives rather than moral convictions.[15] For Douglass, however, the Ebony Age could easily be contrasted with the treatment of Africans and their descendants during any other historical epoch. This was the time America ended legally sanctioned segregation. Douglass knew the historic significance of the Supreme Court's opinion in *Brown v. Board of Education*,[16] the Civil Rights Act of 1964,[17] the Voting Rights Act of 1965,[18] and the Fair Housing Act of 1968.[19] But during the Ebony Age, America did more than simply terminate segregation and legally sanctioned discrimination. Douglass witnessed and experienced the tangible benefits conferred on black and brown people by the conscious consideration of race. No one had to convince him that minorities had derived tremendous benefits from school desegregation; affirmative action programs in education, governmental contracts, and employment; and the creation of majority-minority electoral districts. Africans and their descendants were held as slaves in the New World for 250 years. After a brief period of Reconstruction, during the next

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15. *See* Derrick Bell, *Brown and the Interest-Convergence Dilemma*, *in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 91 (Derrick Bell ed., 1980).

16. 347 U.S. 483 (1954).

17. 42 U.S.C. §§ 2000a to 2000h-6 (1994).

18. 42 U.S.C. §§ 1971, 1973 to 1973ff-6 (1988 & Supp. IV 1993).

19. 43 U.S.C. §§ 3601-3619 (1988).

seventy years African-Americans were confined by the physical and psychological barriers of Jim Crow segregation. Thus, since Africans departed from the first slave ship in 1619, there had never been another period of time like the Ebony Age in which America did as much to incorporate their descendants into the mainstream of American life.

The election of Ronald Reagan in 1980 could be viewed as the beginning of the end of the Ebony Age, as the political process abandoned its efforts to eradicate racial subordination. With the legal decisions by the Supreme Court in the late 1980s and early 1990s such as *City of Richmond v. Croson*,[20] *Board of Education v. Dowell*, [21]*Shaw v. Reno*, [22]*Adarand Constructors v. Pena*,[23] and *Johnson v. Miller*, [24] and the Fifth Circuit's opinion in *Hopwood v. Texas*,[25] America embraced what it called the "Colorblind Era." In 2036, history vividly reveals what was apparent to many at the end of the twentieth century: that the colorblind philosophy was just a euphemism for the maintenance of the subordinated status of black and brown people. After all, a colorblind society has no way in which to attack that subordinated condition, because to amelioriate such subordination would require the abandonment of the colorblind philosophy. The last forty years stood as undeniable proof that the colorblind philosophy allowed America to ignore the subordinated status of its powerless minorities and thus to return to her more familiar ways of ignoring the plight of black people.

The nagging existential thought that troubled Douglass was due to his being fully conscious that he had lived during a time period that contained the destruction of Jim Crow segregation—the Ebony Age—and the institution of the Colorblind Era. Douglass, however, could not definitively interpret what it meant to see the destruction of one major form of racial subordination, the attempt to eradicate racial subordination, and the institution of another form

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20. 488 U.S. 469 (1989) (declaring societal discrimination and statistical disparties irrelevant and requiring an identifiable, particularized showing of prior discrimination by a particular industry to demonstrate a compelling interest for a race-sensitive public contracting plan).

21. 498 U.S. 237 (1991) (setting the stage for schools to contest their desegregation decrees and seek a declaration of unitary status based on good faith compliance with the decree even if schools are still segregated).

22. 509 U.S. 630 (1993) (creating a cause of action under the equal protection clause where it is alleged that a voting district is so extremely irregular on its face that it could rationally be viewed only as voting segregation without regard to traditional districting principles).

23. 115 S. Ct. 2097 (1995) (declaring that congressional race-sensitive plans must be subjected to strict scrutiny rather than intermediate scrutiny).

24. 115 S. Ct. 2475 (1995) (declaring that there is an equal protection violation where the shape and demographics of a voting district in conjunction with indirect evidence demonstrates that race was a predominant factor in the creation of the district).

25. 78 F.3d 932 (holding that (1) there is no compelling interest in diversity in education; (2) the law school—not the State of Texas—is the relevant governmental unity in measuring a constitutional violation; and (3) a hostile university environment is not a present effect of past discrimination).

of racial subordination in such a short period of time.

Douglass thought:

> Should I feel disappointed, angry, and frustrated about the fact that America did not do more, that the great promise of the sacred American creed of equality and justice for all was not achieved? Or should I feel fortunate to have lived during the time when American society did open its arms to me and my people? If one had to be an African descendant in America, the time to have lived would have corresponded to the time period that I actually lived.

Douglass simply could not resolve whether he should be irate about the American abandonment of its subordinated minorities or—given America's history—amazed that America ever attempted to eradicate racial and ethnic subordination in the first place. Having lived through the Ebony Age, Douglass knew he could feel despondent or delighted. Professor Marshall DuBois Douglass simply did not know if he had witnessed the African-American nightmare or the African-American dream.