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A. Leon Higginbotham

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Open Letter to Arthur Liman

The Honorable A. Leon Higginbotham[†]

Dear Arthur:

Your family misses you. Your law firm misses you. Yale Law School misses you. The nation misses you. You left us much too early, and, since you've been gone, we struggle every day to fill the void you left behind. As Shakespeare wrote, all in all you were a man, but we will never see the likes of you again.

I write to you today, several months after your death, and I speak from the podium of a great law school, which we both attended and admire deeply. But, primarily, I write to you in the tradition of the Black Baptist Church, a faith into which my parents raised me as a boy, and in which, in these my twilight days, I still find solace, peace, and grace. Black Baptists believe in Heaven, and they believe in Heaven with a fervor owing as much to religious faith as to historical necessity. In the days of slavery, Heaven was a place of freedom. In the days of segregation, it held out the promise of equality. And today, in what sometimes feels as a period of modern Reconstruction, it still remains a place where one day justice may yet be finally and completely realized. To us, Heaven is not a mystical idea; it is not a sentimental chimera. It is real, as real as the summers of my childhood when my grandmother used to gather the children on her porch and sing to us:

*I have got shoes, you have got shoes, all God's children got shoes,
and when we get to Heaven we are going to put on those shoes and
walk all over God's Heaven.*

Arthur, if, as I believe, you are now walking all over God's Heaven, I know you will understand why today I write to you on the still continuing struggle for racial justice and equality in America. You once explained: "I grew up in an era when the formative influences were produced by

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World War II, Nazism and intolerance . . . anybody that grew up in that kind of environment opted for tolerance and what was more open-minded." Indeed, even though you moved in a professional world of wealth and privilege, your career as a lawyer was proof that you were also a person with enormous personal compassion for the weak, the untutored and the poor. This compassion was not simply the result of a professional obligation to perform pro bono work, but instead, sprung from a far deeper source. You used to say: "Having a successful career in private practice was more than a matter of earning a good living. It gave me the independence when I took public assignments to do what was right." Unfortunately, some public officials do not believe in doing what is right, and thus, the struggle continues.

I.

Arthur, suppose I were to tell you that at one time, California, the most populous state in America, registered exactly one African-American student in the entering class of the University of California at Berkeley, School of Law (Boalt Hall). Suppose I were also to tell you that at that same time, Texas, the second most populous state in the country, managed to enroll no more than four African Americans in the entering class at the University of Texas Law School. You might think that these five African-American law students were the brave challengers of the rigid Jim Crow laws of the 1940s, or perhaps the heroic pioneers of the desegregation battles of the 1950s and 1960s. You might think that you have read about them in some history book, or caught sight of their pictures alongside the magazine photographs of Medgar Evers or Rosa Parks. You might think you remember seeing them on television, or reading about them in a newspaper, during Black History Month or during the holiday for Dr. Martin Luther King, Jr. You might be gratified to believe that, after their dedicated struggles, they went on to achieve fame, like James Meredith, who desegregated the University of Mississippi, or success, like Charlayne Hunter-Gault, who desegregated the University of Georgia. And, you might, therefore, revel in the idea that these students are the cherished symbols of an inspiring time not very long ago, when many blacks and whites joined hands together in the fight for freedom and equality. You might think all of that, but unfortunately, your timing would be wrong by decades. In fact, you probably have never heard and will not likely recognize the names of any of these five students: Eric Brooks, Aja Dyani Henderson, Latosha Terrell Lewis, Kiele Lokahi Linroth, and Carlos Ray Rainer. They have not yet achieved great fame or success. Their photographs may never be reproduced in any national magazines. No one is likely to ask them any time soon to

give an inspirational speech during the next celebration of some civil rights victory. If they are heroes, they may be so to their families. Only time will tell whether, like Andrew Goodman, Michael Schwerner and James Chaney, they too will become historical icons. *They enrolled in law school after you died.* For now, however, these five students are the only African-American students enrolled in the entering law school classes of the most prestigious state-supported California and Texas law schools in 1997-98.

II.

The story of how all of this came to pass is the story of a single federal judicial opinion and a statewide anti-affirmative action initiative in Texas. In *Hopwood v. Texas*,¹ Cheryl Hopwood, a white woman, along with three white men, sued the University of Texas Law School, claiming that the Law School's affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Hopwood and the other white plaintiffs had all applied and been rejected for admission to the Law School for the 1992-93 academic year. In their complaint, they alleged that for the University to deny them admission was unconstitutional, because each possessed a higher grade point average and test scores than 93 African-American and Mexican-American students who had been admitted in that same year to the Law School.

In 1996, a panel of the United States Court of Appeals for the Fifth Circuit upheld Hopwood's complaint and decided that the Law School had, indeed, violated the white plaintiffs' equal protection rights when it rejected their application in favor of the ninety-three supposedly less qualified minority candidates. The Court reasoned that the Law School could not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the Law School, to alleviate the Law School's poor reputation in the minority community, or to eliminate any present effects of past discrimination. In adopting this rather drastic reasoning, the Court of Appeals ignored settled precedent and the facts of the case before it. As Professor Lani Guinier has pointed out, more than 100 white students were admitted who had lower scores and grade point averages than Cheryl Hopwood did. Although two of the judges concluded that the consideration of race or ethnicity in the admission of Asian Americans, Latinos, or African Americans would always be unconstitutional, they apparently saw no constitutional problem when more than

1. 78 F.3d 932 (5th Cir. 1996).

100 white students had been admitted with test scores lower than those of Ms. Hopwood. Finally, the Court ignored the significance of the history and evidence of discrimination against minorities at the Law School and in the field of higher education in Texas. Throughout the 1960s, Latino students were required to live off-campus and were officially excluded from university-sponsored organizations. Similarly, African Americans were forbidden from living or even visiting white residence halls. As recently as 1980, following a three-year court-ordered investigation, the United States Department of Health, Education and Welfare concluded that Texas's higher educational system remained segregated and was in violation of Title VI of the 1964 Civil Rights Act. Indeed, even though the landmark civil rights case of *Sweatt v. Painter*² desegregated the Law School in 1950, in some years between 1950 and 1971, the Law School did not have a single African American in its entering class.

III.

The Fifth Circuit opinion in *Hopwood* has had a detrimental effect on minority enrollment not only in the states of Texas, Mississippi, and Louisiana, where it has jurisdiction, but also in almost every other public and many private higher education institutions throughout the country. Moreover, *Hopwood* also casts a pall over affirmative action policies and diversity programs throughout American society. In October 1997, relying on the *Hopwood* rationale, the Center for Individual Rights, the same group that litigated on behalf of the plaintiffs in the Texas case, filed suit to have the affirmative action program for undergraduates at the University of Michigan declared unconstitutional. Thus, in many ways, *Hopwood* is but the latest and most drastic assault on racial progress in this country, an assault that has its genesis in the restructuring of the federal court of appeals during the twelve years of the administrations of Presidents Ronald Reagan and George Bush. Indeed, the decision in *Hopwood* was issued by a court panel composed solely of Bush and Reagan appointees: Judges Jerry E. Smith, Harold R. Demoss and Jacques L. Wiener. The majority, without hesitation or pain, eagerly struck a death blow to affirmative action programs in college and post-secondary education in Texas, Mississippi, or Louisiana, even though the United States Supreme Court had not so ruled and the precedents did not require such an absurd result. As the single counterpoint of wisdom to an otherwise absurd majority opinion, Judge Wiener disagreed with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school. Instead, Judge Wiener correctly rea-

2. 339 U.S. 629 (1950).

soned that diversity can be a compelling interest, but concluded that the admissions process here under scrutiny was not narrowly tailored to achieve diversity.

IV.

If the *Hopwood* case exemplifies racial retrogression, is it partially attributable to the legacy and values of Presidents Reagan and Bush? There is no doubt that, on several occasions during their mature careers, before they became President, Ronald Reagan and George Bush displayed significant hostility to the most basic civil rights statutes that now permit African Americans full rights to citizenship. In 1964, then-Senatorial candidate from Texas, George Bush, and then-Governor from California, Ronald Reagan, argued that the 1964 Civil Rights Act was unconstitutional. In the 1980s and early 1990s, during their presidential administrations, they succeeded in partially restructuring the federal courts and, particularly, the federal courts of appeals, into a significantly more conservative institution. The significance of this restructuring cannot be overestimated, because the federal courts of appeals are the final arbiter in determining the vitality and scope of the Constitution. Federal judges do not make decisions to please those who appointed them, but is there any merit in former Attorney General Edwin Meese's declaration that, through judicial appointments, the Reagan administration would "institutionalize the Reagan revolution so it can't be set aside no matter what happens in future presidential elections"?

In the 1980s and early 1990s, Judge Stephen Reinhardt of the Court of Appeals for the Ninth Circuit said that Presidents Reagan and Bush had made the federal courts a symbol of white power. Indeed, this restructuring of the federal courts of appeals into far more conservative institutions is perhaps the most important anti-civil rights legacy of the Reagan and Bush years. In many ways, the federal courts of appeals are the final arbiters in determining the vitality and scope of the Constitution. For ninety-nine percent of federal litigants, the twelve courts of appeals are the courts of last resort. Thus, while in a typical term, the Supreme Court hears slightly more than 100 cases, during an equivalent period, the courts of appeals decide over 50,000. Yet, in eight years in office, out of a total of eighty-three appointments to the courts of appeals, President Reagan found only one African American, Judge Lawrence W. Pierce of New York, that he deemed worthy of appointment to a court of appeals. President Bush's record was almost as abysmal. On the eve of his campaign for reelection, and of Senator Arlen Specter's hotly contested reelection bid in Pennsylvania, the President managed to appoint one African American, Judge Timothy Lewis, of Pittsburgh,

Pennsylvania, to the court of appeals. However, in the previous three years of his administration, out of thirty-two appellate appointments, President Bush was able to locate only one other African American he considered qualified to serve on the court of appeals: Clarence Thomas.

At the time, Clarence Thomas's sole qualification for the bench seemed to be his blind willingness and docile ability to do the bidding of his conservative mentors. During the 1980s, Thomas moved up the ladder of Republican administrations by speaking out against the very equal opportunity programs from which he benefited. Congressman John Lewis (D-Ga.) accused Thomas of seeking to "destroy the bridge that brought him over troubled waters and pull down the ladder he climbed up." One of America's most distinguished historians, John Hope Franklin, said that by adopting a philosophy of alleged self-help without seeking to assure equal opportunities to all persons, Thomas "placed [himself] in the unseemly position of denying to others the very opportunities and the kind of assistance from public and private quarters that . . . placed [him] where [he is] today." As final proof of his willingness to "pull down the ladder he climbed up," Thomas single-handedly crippled the Equal Employment Opportunity Commission, which had been, prior to his appointment by President Reagan in 1990 as Chair of the Commission, the most vital civil rights enforcement agency in this country.

Thus, in appointing Clarence Thomas to the court of appeals, and then elevating him to the Supreme Court upon Justice Marshall's retirement, President Bush found the "right" kind of conservative; the sort of conservative whom Senator Strom Thurmond championed during Thomas's Supreme Court confirmation hearings, even though, in 1954, that very same senator argued on the floor of the Senate that the proposed Civil Rights Bill amounted to the enslavement of white people, because it caused them to share their public spaces with African Americans.

V.

It is in the light of the recasting of the federal courts as a symbol of conservatism, with Clarence Thomas being the most ironic and improbable promoter, that the Fifth Circuit's decision in *Hopwood* can be properly understood. For, if the appointment of Clarence Thomas has accomplished anything, it has accomplished this: it has made it safe for the enemies of racial progress, such as Professor Lino A. Graglia of the University of Texas Law School, to assert openly that "[b]lack and Mexican-Americans are not academically competitive with whites in selective institutions because their culture conditions them to accept failure;" it has made it acceptable and even fashionable to claim, as the former Secretary of Education William Bennett stated, that affirmative action to remedy

past and current discrimination against African Americans is, in fact, reverse discrimination against whites; it has given the seal of approval to the intellectually incoherent idea and the morally bankrupt belief that, even though affirmative action programs have been one of the factors in creating the largest, most educated and most accomplished African-American middle class this nation has ever known, they have, nonetheless, amounted to a “social failure.” In short, Thomas’s appointment has given birth to Ward Connerly, and sustained like-minded conservatives Abigail and Stephen Thernstrom, whose bottom line philosophy—if, indeed, it can be called a philosophy—seems to be that anything expressly benefiting African Americans, no matter how benign, useful, or good, is inherently suspect and wrong.

All around us, we can see the real-life consequences of that short-sighted philosophy. In 1995, the University of California at Berkeley, School of Law, in response to Proposition 209, instituted a purported color-blind admissions policy. This year’s entering class of law students is the first class that was admitted under the new criteria. Consequently, the number of African-American students enrolled at the University of California at Berkeley, School of Law in the September 1997 entering class of 268 dropped to one African American from the twenty enrolled in the entering class of 1996. This is all the more striking considering that, today, African Americans and Latinos comprise thirty-six percent of California’s population, and that, by 2000, whites will be a minority in that state. The state of Texas, in which no more than four African Americans enrolled in the first year class of the University of Texas Law School, has a minority population comprising thirty-nine percent of the state.

These facts ring contemporary relevance to Justice Brennan’s words that, “from the inception of our national life, [African Americans] have been subjected to the unique legal disabilities impairing access to equal educational opportunity,” and, as we view the civil rights cases now pending before the Supreme Court, I fear the answer to Justice Blackmun’s question of “whether the majority [of the Supreme Court Justices] still believes that . . . race discrimination against nonwhites is a problem in our society, or even remembers that it ever was.”

VI. CONCLUSION

Arthur, I will end this letter as I started it: with religion on my mind and God in my heart, but with references to a faith that is not my own, but yours. Until his death in 1991, Rabbi Louis Finkelstein spent his life preaching against the evils of racial discrimination and inequality. In 1969, he was invited by President Richard Nixon to deliver a sermon at

the White House. In his sermon, he spoke of the Jewish understanding of God's miracles. He said:

Miracles occur not only in historical crises; they are happening every day, all the time, for each of us. Everyone . . . is alive due to uncounted miracles, as commonplace as the rising and the setting of the sun. . . . We must try to do what we can, and are enjoying a great privilege when we do well and find the path of the right. At such times, we are cooperating with God.

I believe that this "Jewish Miracle" of which Rabbi Finkelstein spoke, is the same as the "Heaven of Black Baptists" my Grandmother used to sing to me. Rabbi Finkelstein's miracle—like my Grandmother's Heaven—is a real thing, a true thing, a thing that is not just a divine myth beyond our grasp but a sacred goal we can achieve "every day, all the time, for each of us," if we "find the path of the right" and "cooperate with God." In this way, I know I need make no apologies to you for speaking of racial justice and equality in the same breath as Heaven and miracles. For I know you will understand, as I still believe, in spite of all the setbacks and obstacles we continue to face, that equality is a miracle and justice is a Heaven we can seek every day, all the time, for each of us.

The Future of Legal Services: **The Arthur Liman Colloquium Papers**

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