

## REFLECTING ON THE DREAM OF THE MARATHON MAN: BLACK DEAN LONGEVITY AND ITS IMPACT ON OPPORTUNITY AND DIVERSITY

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NEWSFLASH: THIRD BLACK LAW DEAN RESIGNS WITHIN YEAR'S TIME

"Damn," I said to myself. "It's hard at the top, hard in the middle, and sure enough hard at the bottom. We need a legal defense fund."

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I am running as fast I can, fearing for my life and uncertain whether the cacophony of footsteps behind me is an army of assailants or just the exaggerated echo of a few.

"Who do you think you are, boy?" a voice blurted out with visceral bitterness.

"If we can unseat three African-American deans . . . in a year, we can do whatever we damn well please. And that Latino fella . . . had better not think about applying for another deanship."

"Three!" I thought to myself. "That's nearly half of all of them. These people are unscrupulous."

I continue to run despite some heaving and palpitations. I'm nearly 42, so my primary swiftness doesn't reside in my body anymore. I marvel at that number—three. Wow. Is there no place or position in the legal academy where people of color can be protected from gratuitous assaults on their competence and dignity? The question is likely rhetorical, for even black law schools have done a number on their ranks by de-emphasizing scholarship, failing to follow in the Thurgood Marshall/NAACP tradition of cutting-edge legal thought, and emulating the nepotism and patriarchy that minorities harangue whites for. There really is no safe haven for people of color in the academy or anywhere else.

"Come here, boy, what you running for?" exclaims one of the uglier assailants on my heels. In glancing back to unexpectedly encounter his want of pulchritude, I see black, brown and yellow faces chasing me along side the whites. It's a Rainbow mob. The blacks are yelling warnings to me—I know it is they because professional blacks know the speech intonations of other professional blacks in a way that simply confounds white people. "You're trying to mess it up for all of us. Why can't you be content?" Another voice then inveighs, "Let him keep trying to bring qualified minorities in here. Don't you get it? White people prefer just a couple of politically savvy Negroes like me." She laughs as I turn to identify her. She is not a particularly agile runner because her pockets appear to be weighed down by racial

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emoluments. I think to myself, "Politically savvy?! That must mean an ability to count to zero, the number of minority hires the white folks wanted and the number you got them."

I run as fast as I can because I think these people are trying to kill me . . . .

I awaken in a cold sweat. It was just a nightmare. With the clarity brought by my ascent from somnolence, I realize that nobody wants to kill me. They only want to kill my spirit. With the certainty that this will never happen, I return to a more reposeful sleep.<sup>1</sup>

PROFESSOR Smith originally posted the above controversial thoughts as a blog for discussion, debate, and reflection on [www.Blackprof.com](http://www.Blackprof.com), a site maintained for law professors of color to discuss topics related to race, culture, and society. His strong reaction to the challenges of being a dean of color is particularly significant as a snapshot of concern among, not just professors of color, but potential candidates for future deanships. Terry Smith's nightmare has been a wide-awake ordeal all too often over the recent past. At the time of his sharing his thoughts, reactions ranged from affirming outrage to critical denial. Professor Smith is an articulate spokesperson for his position, and the purpose of this brief essay is merely to return to his base concern and to further reflect on its implications for legal education and any sense of shared goals and commitment. Specifically, some thought should be given to the specific implications of the shortened tenure of African-American and Latino deans in particular.

My thoughts, like Professor Smith's dream, dwell on the fact that at the beginning of the 2005-2006 academic year there was, what many viewed, as a comparatively bounteous crop of African-American deans of ABA-approved law schools. However, several changes during that year caused the crop to diminish rapidly: the controversial involuntary removal of Percy Luney<sup>2</sup> at the newly provisionally approved Florida A&M College of Law; the departure of Burnelle Powell at the University of South Carolina; the resignation of Patricia Mell at John Marshall (Chicago); and the announced resignations of Gilbert Holmes at the University of Baltimore and Alexander Johnson at the University of Minnesota at the end of the academic year. As a result, consternation has arisen over the future of deans of color in the highest leadership positions at American law schools.

I will not attempt, directly or indirectly, to comment on the performance of any dean or whether an institutional decision to seek or accept change was justified specific to that institution. It is also important to recognize that the transition of any dean away from a deanship is often a natural and mutually agreed-upon process of academic life, absent rancor, and part of a very individual positive professional growth pattern. Most of us do not wish to be a dean forever.

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1. Terry Smith, *Marathon Man*, Apr. 28, 2006, <http://www.blackprof.com/archives/2006/04/>. Terry Smith is an Associate Professor/Full Professor at Fordham Law School. I wish to publicly thank Professor Smith for his kind permission to use his material.

2. Ron Matus, *Blame Flies in FAMU Scandal*, ST. PETERSBURG TIMES, June 14, 2005, at 1B, available at [http://www.sptimes.com/2005/06/14/Tampabay/Blame\\_flies\\_in\\_FAMU\\_s.shtml](http://www.sptimes.com/2005/06/14/Tampabay/Blame_flies_in_FAMU_s.shtml).

More specifically, these comments address, not necessarily the absolute number of African-American or Latino deans at any one point in time, but rather the implications of the lack of maintaining long-term tenure or extended experience for those of us who choose to pursue such a calling.

At the time of this writing, there are eighteen deans of color at American Bar Association (“ABA”) approved law schools within the United States. Of these, fifteen are African-American and two are Latino.<sup>3</sup> Of this number, five African-American deans are deans of law schools associated with historically black universities. Of this number, also, two African-American deans of majority white institutions have announced that this is their last year as dean (Gilbert Holmes and Alex Johnson), and two African-American deans<sup>4</sup> are interim or on a short term—deans at institutions where an active dean search is in progress or will soon begin. The net result is there are eight African-American or Latino deans of majority white ABA-approved law schools who are not either interim or resigned. As a point of comparison, this is the same number that existed when I wrote my first essay in 2000 about deans of color.<sup>5</sup>

My focus on African-American and Latino deans, in particular, speaks to several specific concerns regarding historic exclusion; it is in no way a failure to recognize the importance of widespread diversity in academic leadership in legal education. The significance of the African-American and Latino dean is directly tied to the critical mass concerns articulated by the United States Supreme Court in *Grutter v. Bollinger*.<sup>6</sup> In *Grutter*, the Supreme Court addressed the issue of race, diversity, and legal education in a straightforward discussion of the role of conscious recognition of race in the matrix of educational goals.<sup>7</sup> It is particularly interesting to note that the Court accepted the idea of underrepresentation as a key component of racial diversity. Addressing the challenge of achieving a “critical mass” for the benefit of the educational environment, the Court noted that building the community of “underrepresented” as a matter of policy, represented for the plaintiff “racial and ethnic diversity

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3. The deans range in tenure as follows: LeRoy Pernell (Northern Illinois University, 1997); Robert Piatt (St. Mary University, 1998); W.H. (Joe) Knight (University of Washington, 2001); Gilbert Holmes (University of Baltimore, 2001); Alex Johnson (University of Minnesota, 2002); Vincent Carrington (Texas Southern University, 2002); Kurt Schmoke (Howard University, 2003); Peter Alexander (Southern Illinois University, 2003); Freddie Pitcher (Southern University, 2003); Chris Edley (University of California, Berkeley, 2004); Frederic White (Golden Gate University, 2004); Veryl Miles (Catholic University, 2005); James Douglas (Florida A&M University, 2005); Raymond Pierce (North Carolina Central University, 2006); Cynthia Nance (University of Arkansas, Fayetteville, 2006); Linda Ammons (Widener University, 2006); and Jose Roberto Juarez (University of Denver). Although not included in the 17 African-American and Latino deans, I would be remiss to not mention the deans of the two law schools in Puerto Rico: Dean Efren Rivera-Ramos, University of Puerto Rico School of Law and Dean Angel Gonzalez Roman, Pontifical Catholic University of Puerto Rico School of Law.

4. James Douglas (on leave from Texas Southern University, Thurgood Marshall School of Law) and Cynthia Nance (appointed to a two-year term).

5. LeRoy Pernell, *Deans of Color Speak Out: Unique Voice in a Unique Role*, 20 B.C. THIRD WORLD L.J. 43, 46 n.9 (2000).

6. 539 U.S. 306 (2003).

7. *Id.* at 311.

with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics[,] and Native Americans.”<sup>8</sup>

African-American and Latino deans represent much of the same interests, benefits, and importance associated with students. Like the student subjects of the University of Michigan Law School affirmative action policy, African-American and Latino law school deans have traditionally been so few in number that a “critical mass” has never been reached within legal academe.<sup>9</sup> The unique contributions, similar to those recognized by *Grutter*,<sup>10</sup> of deans of color are reflections of a combination of leadership, opportunity, and educational and cultural background.<sup>11</sup>

I outlined a few of these in my essay *Deans of Color Speak Out: Unique Voice in a Unique Role*.<sup>12</sup> Within the framework of opportunity that deans have, the ability to raise these “voices” at a national level is enhanced by numbers. The choir outsings the soloist. Such is the essence of critical mass. Like the metaphoric choir, the multiple voices of deans of color are even more effective when, because of the size of the ensemble, orchestration of multiple parts can occur. The successful fundraiser dean of color can speak more effectively and consistently to the unique perspective that her cultural voice can give when she knows that other deans of color exist who can simultaneously both concentrate their message and speak consistently to harmonious themes of faculty diversity or student opportunity.

In my time as dean there have been many instances where I have experienced the sense of being stretched thin to the breaking point while trying to express the imperatives of culture and political need regarding the broad range of issues that racial justice and the legal profession demand. The extraordinary range of talent that is represented within other deans of color, indeed, what led to their being drawn into decanal life, for me is deeply missed and sharply felt when our ranks are reduced but not replenished.

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8. *Id.* at 315 (quoting Brief of Respondent Univ. of Mich. Law Sch. at 120).

9. Prior to 1997, the date that I, the longest currently serving African-American dean, assumed the position, there were, by my count, only 10 ABA-approved law schools (not counting historically black or Latino law schools) that had an African-American or Latino dean. A statistic of which neither law schools in general or the ABA should be proud. No majority white law school has ever had more than one African-American or Latino dean. The law schools that have had an African-American or Latino dean prior to 1997 include: Duquesne (the first white law school to have an African-American dean—Ron Davenport), Temple University (Carl Singley), University of Oregon (Derrick Bell), University of Tennessee (Marilyn Yarbrough), DePaul University (Elwin Griffith—a Caribbean national), City University of New York (Haywood Burns), University of Akron (Isaac Hunt), University of Mississippi and Loyola University of New Orleans (Louis Westerfield was the dean at both law schools and is one of only two African-American deans to ever be dean at more than one predominantly white law school), University of Missouri—Kansas City and University of South Carolina (Brunelle Powell), Northeastern University (David Hall), The Ohio State University (Gregory Williams), University of Wisconsin (Daniel Bernstine), Albany Law School (John Baker) and University of Houston (Stephen Zamora).

10. *Grutter*, 539 U.S. at 315.

11. Pernell, *supra* note 5, at 47.

12. *Id.* at 49.

It is the ability to address the consequences of historic denial of justice aided by our cultural experience that, in part, makes the multiple voices of African-American and Latino deans so especially valuable in the American legal history framework. It is an integral part and reflection of the concept of historic discrimination that the *Grutter* Court implicitly accepted as a permissible foundation of diversity need.

Yet it is not external legal mandates that have created and exacerbated the crisis of the “Marathon Man.” Rather, it is the political and race-infused cultural milieu of legal education itself that appears to drive out, deny, and fail to achieve growth and opportunity for significant numbers of African-American and Latino deans—particularly in institutions that have long established traditions of non-access.

A somewhat paranoid perception that is not hard to accept is the appearance of a set number of black deans that the academy is willing to accept and the sense that continuity and longevity are goals to which to aspire, but are not ready to be realized. Such a suspicion is not necessarily unreasonable and, within the legal profession, not unheard of as a barrier to opportunity.

I can remember years ago, when I had a notion that judicial service was to be my calling, standing for countywide election for the position of common pleas judge,<sup>13</sup> an achievement that no African-American had ever accomplished at that time in Franklin County, Ohio. Following my loss in the general election I was advised that I would receive consideration for appointment to a judicial vacancy in some court other than common pleas, should one occur, only if one of the sitting African-American judges stepped down. My negative reaction to the concept of being considered only for the designated “black seat” dissuaded me from ever seeking judicial office again.

I fear sometimes that there is a tendency to treat the concept of the black law school dean in much the same way. Law schools’ sense of urgency and collective motivation to meet the need for African-American deans seems to exist most in the face of loss in total number. But, unlike my mysterious judicial career advisor, within legal education there is seldom a filling of the “black seat” with another dean of color at the same institution. In other words, once is most often enough for that kind of social experiment.<sup>14</sup>

Almost as unheard of is the recycling of African-American deans, although multiple deanships are common for my white colleagues.<sup>15</sup> Likewise, there is a

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13. Franklin County, Ohio is the county in which Columbus is located. All judges in Ohio run for general election every six years. The common pleas court is the trial court of general jurisdiction for the county. In 1986, when I, then on the faculty of The Ohio State University College of Law, ran for the position of common pleas judge, at the request of the local Democratic Party, no African American had ever won a countywide election. Only one African-American common pleas judge had ever served (by appointment) on the bench. I ran against a twelve-year incumbent who had never had an opponent before. I lost.

14. *See supra* note 9 (noting that no majority white ABA-approved law school has ever seen fit to have more than one dean of color).

15. As of this writing, there are 32 white deans who have had at least one prior deanship.

marked difference in the longevity of the few deans of color currently in existence.<sup>16</sup>

I have shied away from the intriguing and obvious question of how decanal candidates are created and successfully appointed as well as the important issue of how do we interest and prepare more decanal candidates of color. On the latter point, I do note with pleasure and some satisfaction (it is something I have wanted to see for a long time) that more organized efforts are now being made to centralize and distribute information on potential candidates by way of the creation of a database similar to, in many respects, what has been done for women interested in law deanships.<sup>17</sup> Rather than address those points here, I instead would like to address some of the consequences to diversity of both a lack of numbers and length of service for African-American and Latino deans.

The importance of African-American and Latino deans who, in multiple voices, can address, by word and example, the value of diversity is a unique role and opportunity that is lost when numbers and longevity are not there. The role of the dean of color as spokesperson is particularly important in the often-contentious climate of conflicting analysis and political positioning that results from sorting through the expressions of numerous law faculty and legal analyzers. Deans of color speak to these issues from the unique vantage of administrative experience and cultural imperative. The deanship is a platform that rightly allows for attention to both word and deed. The dean of color is a special voice from that platform that decreases in volume when our visibility is diminished.

As I suggested in my *Deans of Color Speak Out* essay, the impact on diversity of a dean of color is probably most profound in the recruiting and hiring of faculty of color.<sup>18</sup> There are numerous times in the course of trying to convince desirable faculty candidates of the seriousness of our interest in them that the non-verbal clincher is seeing living proof that there is a real likelihood that they can succeed professionally within a climate that respects, without limitation, what they bring to the table. However, many candidates also look to the possibility that the dean that "brought them in" will be in the position to look out for them over the multi-year process leading to promotion and tenure.

The rate of turnover for deans of color raises a special problem in this regard. The lack of longevity and numbers of deans of color both creates a sense of foreboding regarding the future tenure-tracked career of faculty of color, and it

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16. No dean of color has more than nine years. While it is generally thought that the average length of service of a dean is somewhere in the neighborhood of five years, there are many white deans whose years of service at a given institution exceed the five-year mark.

17. The Association of American Law Schools has now established the Minority Deans' Databank. The purpose of the databank is to gather names by nomination and other solicitation of minority candidates interested in consideration in dean searches. This effort follows the successful maintenance of a similar databank for women interested in decanal positions. See Ass'n of Am. Law Schs., Women and Minority Deans' Databank, [http://www.aals.org/services\\_databanks.php](http://www.aals.org/services_databanks.php) (last visited Feb. 27, 2007).

18. Pernell, *supra* note 5, at 48.

discourages those same faculty who aspire to positions of leadership within legal education.

Indeed, I find it increasingly more difficult to explain to faculty of color why they should want to become a law school dean. My difficulty is not caused by any lack of ability to point out the tremendous good and accomplishments that can be gained for the community at large as well as the legal academy, but rather it becomes harder to convince very bright individuals who have already overcome obstacles (that my white colleagues have yet to fully understand) that they should voluntarily become the lightning rod for forces within the law school, the university, and the world beyond that appear to systematically seek to limit the time in office and the opportunity to grow in numbers.

There is a clear truth that is not often stated but is hard to deny. The day-to-day quality of life for most deans, whether they be of color or not, is exceeded by the quality of life left behind as full-time teaching faculty. The better flexibility of personal time and the ability to focus on scholarly thought, actions, and teaching of a “mere” faculty member is at the heart of the sentiment that I have heard expressed by more than one dean, upon leaving office, that they are “ascending” back to the faculty.

For African-American and Latino deans in particular, maintaining some semblance of credibility with African-American and Latino faculty candidates in situations where our common history suggests distrust of a system that has historically excluded us, is made more daunting by the reality that is visibly perceivable from the lack of significant numbers of African-American deans in position long enough to make a substantial difference.

Successful diversity that equates in any meaningful measure with racial justice is as much in the doing as in the thinking. It is the hands-on application of a commitment to opportunity that allows one to guard against the misapplication of diversity to the appearance of cultural heterogeneity but with no real change in opportunity for the historic victims of racial suppression. African-American and Latino deans know from their experience and state by their presence (or at least they should) that it is not words but deeds that count. Collective statements from law schools expressing support for development of a “critical mass” with demonstrable results are only words without deeds.

The ABA Standards for Approval of Law Schools were recently revised to provide for the following in two key sections:<sup>19</sup>

Standard 211. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY.

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender or sexual orientation, age or disability.

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19. ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, 2006-2007 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2006), available at <http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF>.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal opportunity to obtain employment. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment.

Standard 212. EQUAL OPPORTUNITY AND DIVERSITY.

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Both Standard 211 and Standard 212 provide for a goal of equal opportunity for faculty. Standard 212's provision in (b) is a new section and speaks specifically to a commitment to diversity demonstrated by concrete results as opposed to Standard 211's emphasis on equal opportunity.<sup>20</sup>

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20. John Sebert, Consultant on Legal Education for the ABA, suggested that the two sections differ in purpose although each would appear to address concerns of equal opportunity. See Memorandum from John Sebert, Consultant on Legal Education, to Deans of ABA-Approved Law Schools 2 (Feb. 16, 2006), available at [http://www.abanet.org/legaled/standards/adoptedstandards2006/standards210\\_212.pdf](http://www.abanet.org/legaled/standards/adoptedstandards2006/standards210_212.pdf). Although it is, perhaps, also suggested that "equal opportunity" is a term-of-art in law carrying with it its own legislative and judicial interpretation that somehow is not

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It is interesting to note that despite the obvious significance of decanal leadership to both equal opportunity and demonstrating by concrete example (Standard 211(b)) a commitment to diversity and equal opportunity, diversity in decanal appointments in the list of achievement goals is not included. While there may be many who would immediately respond by pointing out that a dean has faculty status, it is equally true that many faculty do not consider the dean to be among the faculty while she or he occupies the administrative position. Indeed, the ABA itself, when asking for statistics in annual questionnaire directs that that the dean not be counted among the faculty for purposes of a diversity headcount.

I wonder, in fact, where in the accreditation process consideration and monitoring occur regarding a diversity imperative in a law school's dean search process? More pointedly, is it a matter of accreditation concern regarding the longevity and treatment of deans of color?

I ponder these questions and raise the above points not out of any bitterness, disenchantment, or exhaustion with being a dean. I love it. However, I am alarmed that our lack of attention to the history of loss and lost opportunity for changing the complexion of legal educational leadership will lead to more bad dreams for all of us.

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automatically read into Standard 211's (old Standard 210) use of the phrase "equality of opportunity." This would perhaps be consistent with the general notion suggested by the interpretation of 212 (numbered as Standard 211 in Sebert's Memorandum) that its provisions are now designed in direct response to *Grutter*. *Id.* at 5. Sebert stated that one of the overarching goals is "[t]o distinguish the obligations of non-discrimination and equality of opportunity (Standard 210) [renumbered as Standard 211] and the obligations of equal opportunity and diversity (Standard 211) [renumbered as Standard 212]." *Id.* at 2.