

Getting Beyond a Property in Race

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The following essay is based on a presentation given by Professor Derrick Bell on 18 March 1999.

I am honored to be here, but I would be far happier were I sitting out there with you listening to the person originally invited to give this lecture. The Honorable A. Leon Higginbotham quite literally gave his life last December in the struggle in which he was often heard but too infrequently heeded. Now he has joined Dr. Martin Luther King, Jr., Malcolm X, and W.E.B. Du Bois in that uniquely American racial Valhalla, a place where each is accorded in death a place of high honor usually reserved for those who have achieved rather than failed to accomplish the goals for which in life they worked so hard.

The Reverend Peter Gomes, Minister to Memorial Church at Harvard University, wrote about Dr. King in a vein that applies as well to Leon Higginbotham:

In death he was able to claim the loyalty denied him in life, for it is far easier to honor the dead than to follow the living, and so we take the dead to our bosoms, for there they can no longer do any harm; and we can translate a living, breathing, both noble and fallible human being into a heroic impotence, satisfying our need to both admire and be protected from something larger than ourselves.¹

Higginbotham, like King, was determined to speak the truth about race as he saw it. His was more than a willingness; it was a determination to speak out on issues that concerned him without regard to the criticism he was almost certain to receive from those who felt his

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1. PETER GOMES, SERMONS: BIBLICAL WISDOM FOR DAILY LIVING 47 (1998).

remarks were inappropriate or untimely. He did not allow his position and prestige to prevent him from speaking out on issues in which others maintained a discreet silence.

On the bench he defied racial stereotypes. For many years after I began teaching in 1969, Leon was one of the few federal judges to whom I could refer black students with the assurance that their clerkship applications would be given serious consideration—even if they were not at the top of their classes and editors of their school's law review. Yet, his list of former clerks reads like a who's who of people of color. For many their careers were launched because Higginbotham was a great model and mentor who was not afraid of ignoring tradition in the furtherance of justice.

Leon Higginbotham was a race man. In addition to his duties as judge and law teacher, he labored for several years to compile his pathbreaking book, *In the Matter of Color*.² It was the first book-length publication that treated the body of case law dealing with slavery in a systematic, scholarly fashion. By filling that void this volume served to remind the legal academy that major precedents in contract, property, wills, and criminal law dealt with slavery, an unhappy fact of American legal history and one that holds contemporary significance.

Judge Higginbotham excelled in every aspect of law as practitioner, jurist, teacher, and scholar, and yet his lofty status did not alter his willingness to speak out and to do so strongly for the civil rights cause as he did on many occasions. Following a major address to black historians in the early 1970s, officials of a white union defending an employment discrimination case before him filed a motion asking him to recuse himself from their case. The motion referred to the speech to support a charge that Higginbotham was a black, civil rights advocate and thus could not objectively preside over their case. Higginbotham, far from intimidated by the allegations, responded at length and in the strongest terms both refused to recuse himself and condemned the subconscious but widely held view that only white judges could decide

2. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

racial issues fairly.³

Of course, many know Higginbotham from his public condemnations of the Clarence Thomas appointment to the Supreme Court.⁴ He did so knowing that his hard-hitting remarks were viewed by many of his judicial colleagues as inappropriate, intemperate, and out-of-place. As is so often the case, prophetic words fell on deaf ears. Higginbotham's criticism did not prevent Justice Thomas from gaining a seat on the Court, and, to date with few exceptions, Justice Thomas has voted in a manner that justifies the opposition of the thousands for whom Higginbotham spoke.

One may say that I am too harsh and that Justice Thomas can cast only one vote on a conservative Court. However, that response reminds me of what my late wife Jewel would say when I complained that some conduct of mine was no different than that of other men. She would reply quietly, "I did not marry those other men." Whether he likes it or not, Justice Thomas is one of us, and in a society in which we remain the subordinate other, what he does affects us in a way that the votes of others on the Court do not.

There is, though, a basis for consolation. The vehemence of Higginbotham's critiques have frustrated the expectation of those who appointed Thomas. They had hoped his conservative positions could be cited as reflecting the views of at least a percentage of the black community. However, Justice Thomas speaks only for himself. Even so, it is distressing to realize that Justice Thurgood Marshall's successor on the Supreme Court seems to personify a path to success for minorities that an unfortunate number have chosen. If we ignore the continuing perversity of racism and act as though the law is fair and color-blind, those who grant positions and prestige will reward conformance with these rose-colored assumptions.

That road to prominence is so clear—see Ward Connelly⁵—that it

3. *Commonwealth of Pennsylvania and Raymond Williams v. Local Union 542, International Union of Operating Engineers*, 388 F. Supp. 155, 181 (E.D. Pa. 1974).

4. *See, e.g., An Open Letter to Justice Clarence Thomas from the Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405 (1994).

5. *See Amy Wallace, He's Either Mr. Right or Mr. Wrong*, LA TIMES, Mar. 31, 1996, magazine, at 12.

is little short of a miracle that so few blacks have succumbed. Perhaps Justice Clarence Thomas' prominence serves as a continuing reminder to people of color—particularly legal professionals—that what many of us condemn in him for his compromise of the truth in favor of profitable racial fiction is, as well, a constant temptation to us all.

The historic pattern of finding members of the victim class willing to extoll the system while blaming their own for their miserable state is neither a new nor fortuitous phenomenon. I continue to cite Robert L. Allen's 1969 book, *Black Awakening in Capitalist America*,⁶ because it reminds us that what we deem as progress, measured by the number of blacks who have moved into management-level positions, is quite similar to developments in colonial Africa and India. The colonizing countries maintained their control by establishing class divisions within the ranks of the indigenous peoples. A few able (and safe) individuals were permitted to move up in the ranks where they served as false symbols of what was possible for the subordinated masses. In this and less enviable ways, these individuals provided a semblance of legitimacy to the colonial rule that it clearly did not deserve.

Robert Allen applies his colonial analogy to present-day America. He views black America as a domestic colony of white America. Colonial rule, Allen claims, is predicated upon "an alliance between the occupying power and indigenous forces of conservatism and tradition."⁷ Allen finds aspects of this policy in American slavery where slaveowners created divisions between field hands and house hands. "Uncle Tom" is the term used to describe the collaborator torn with conflicting loyalties between his people and the slave owners.

We cannot escape the burden of Allen's analysis, nor should we wish to. The oppression that challenges people of color and those with the status as law professionals is not perpetuated when we resist the temptation to serve as apologists of the status quo. There is not a less real or potentially less destructive dilemma in Allen's analysis. We view our professional positions as valuable because they offer an

6. ROBERT L. ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTICAL HISTORY* (1969).

7. *Id.*

opportunity to push the legal system and the larger society in the direction of racial justice. Our involvement, though, may be having a very different effect than we hope or even recognize. Instead of gaining access to real influence, it is more likely that we are legitimizing a system that relegates us to an ineffectual but decorative fringe.

What happens for those minorities less fortunate than ourselves? In ways that none of us are prepared to recognize, we unintentionally can make things worse instead of better for minorities who have been excluded from the programs that have helped us gain skills and acceptable credentials. Enjoying our positions and the occasional opportunity to do good, we are pointed out to the majority of blacks who are still without work or trapped in low-wage, dead-end jobs. We want to serve as models for the disadvantaged, but as scholars, judges, and practitioners we are for many whites living proof that there is no color bar.

After our most militant speeches decrying the continuing evils of racism, there is always the response, "But, Professor Bell you are black. You must have experienced discrimination, and yet look at all that you have accomplished. Why cannot the rest of black people do as you have done?" Asking why the most disadvantaged blacks cannot equal the success of the most fortunate in a society still filled with racial barriers speaks to the logical hoops the questioner and many others are willing to jump through in order to avoid the reality of our condition and theirs.

Issues of race continue to make us all crazy in America. Consider the impeachment nightmare that occupied the nation for two years. Many Americans acted against their interests in part because of race. Conservative whites for whom President Clinton has served well (despite his rhetoric) wanted to get rid of him at any costs. However, many blacks for whom Clinton has done precious little (beyond making us feel good with appointments and sympathetic words) were ready to defend him to the bitter end. This is due in part because they know that those who attack Clinton also hate them. It is a muddle and one all too common in contemporary politics marked by contradiction.

This is far from the first time race has confused what should have been a clearer picture. For instance, without this kind of race-related

confusion three hundred fifty years ago, slavery would never have begun in this country. Historian Edmond Morgan explains that in colonial times plantation owners, needing compliant labor to tame the wilderness and tend the profitable crops of tobacco and cotton, convinced working-class whites to support African slavery in America even though they could never compete with those owners who could afford slaves.⁸ Slaveholders appealed to working-class whites, urging that because they were both white, they had to stand together against the threat of slave revolts or escapes. It worked; in their poverty whites took out their frustrations by hating the slaves rather than the slave masters who held both the black slave and the free white in economic bondage.

Slavery ended, but the commitment to whiteness, camouflaging the economic disadvantage of racial division, continues to work to subjugate Blacks. During the latter half of the nineteenth century, a shared feeling of superiority to blacks was one of the few things that united a nation of immigrants. They were exploited horribly by the mine and factory owners for whom they toiled long hours under brutal conditions for subsistence wages. Of course, many of these immigrants were far more recent arrivals than the blacks they mocked. The blackface and racially derogatory minstrel shows of that period helped immigrants acculturate and assimilate by inculcating a nationalism whose common theme was the disparagement and disadvantaging of blacks, rather than unity across racial lines to resist the exploitation and deprivation that does not respect any color line.

This history mirrors the present. The ideology of whiteness continues to oppress whites as well as blacks. It is employed to make whites settle for despair in politics and anguish in the daily grind of life. Segregation solidified because working-class whites insisted that they needed government reassurance that despite their lowly economic condition they were better than blacks. As historian C. Vann Woodward concluded after studying this period, "Political democracy for the white man and racial discrimination for the black were often

8. EDMOND MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* (1975).

products of the same dynamics.”⁹ Jim Crow laws were intended “to bolster the creed of white supremacy in the bosom of a white man working for a black man’s wages.”¹⁰ Given the awful history of the 1917 riots in East St. Louis,¹¹ you certainly did not need me to journey here to tell you that when economic conditions are bad the frustration of this sense of superiority drives some whites to lynch, riot, and massacre blacks. They do so with a special rage when the black communities they attack (as in Rosewood, Florida and Tulsa, Oklahoma) have had the audacity to do well despite living in a racist, segregated culture.¹²

Early on, many of us viewed segregation as the enemy, the true evil. Much later we recognized that segregation was only a manifestation of the real evil. In other words, Jim Crow could end and the evil would remain. The real evil was racism and not the beliefs, statements, and actions by outright bigots. Rather, it was the deeply held assumption of a privilege or even a property right based on being white. This is a very tough message to communicate to a nation in denial about the continuing influence of race.

Today, few whites would openly espouse racial superiority as the cause of any animosity they may feel toward blacks. Indeed, most whites vigorously deny any claim that they are racist or that they are prejudiced against black people. It is true that since Dr. King was killed and civil rights policies motivated by the riots that followed his death were enacted, many whites now work with, live near, and are friendly to black people. What many do not recognize, however, is that racism is not simply open bigotry. As Beverly Daniel Tatum explains in her book, *Why Are All the Black Kids Sitting Together in the Cafeteria?* racism is a system of advantage that benefits all whites whether or not they seek it.¹³ This system is far more than personal

9. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

10. *Id.* at 68-77.

11. For a brief summary of this and many other riots (really black massacres), see DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME*, 120-129 (1996).

12. *Id.*

13. BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 7 (1997).

ideology based on racial prejudice; it involves cultural messages and institutional policies and practices that operate to the advantage of whites and to the disadvantage of people of color. Tatum explains, “Racial prejudice when combined with social power—access to social, cultural, and economic resources and decision-making—leads to the institutionalization of racist policies and practices.”¹⁴

In America whites are not simply in the majority, hold most positions of power, own much of the wealth, and set most of the nation’s policies; they are for all of these reasons the norm. As a result many do not consciously think of themselves as white but just normal. Being white provides a wide range of presumptions and assumptions that people of color may gain, but cannot assume. Much of this social structure is masked by the myth of meritocracy. This myth is maintained in part by keeping blacks at the bottom—a status that provides a sense of well-being to even the most disadvantaged whites. Charges of racial discrimination threaten the image that anyone who has talent and works hard can be successful. In all but the most blatant cases, many whites find it difficult to take them seriously. Thus, when blacks assert that racism is alive and flourishing, whites find disbelief is the easier and more comforting route. These inaccurate assertions that racism has been eliminated nurture denial and serve as a connection across economic and other lines with whites using as adhesive the commonality of their sense of difference from blacks, a difference that blinds them to their class disadvantages.

At the end of his life, Dr. King increasingly saw through the camouflage of race to the hidden divisions of class. Poverty, illiteracy, and joblessness know no color line save the one imposed by those whites seeking some comfort in their own low status. King hoped the Poor People’s March and his efforts on behalf of the garbage collectors in Memphis would serve to shift the focus of civil rights to where perhaps it should have been all along. Were he alive today I think he would still be trying to convey the message that too few whites would want to hear or heed the truth about the benefits and the costs of their racism. In other words, he would continue trying to tell

14. *Id.* at 7-8.

them what we blacks all know but are unable to communicate across the color line of this still color-conscious citizenry that prefers reassurance rather than reality from black speakers.

One wonders if law and litigation can be used to further social change.¹⁵ The answer based on my experience is that sometimes it can but not for long. There are times when the nation's often-stated ideals are so compromised by the realities of a challenged injustice that the courts are pushed to respond out of idealism, to avoid embarrassment, or to prevent the injustice from worsening. As a result, decisions are handed down that alleviate the most serious of racial abuses for blacks. There are many examples: *Brown v. Board*,¹⁶ *Dixon v. Alabama State Board of Education*,¹⁷ *NAACP v. Alabama*,¹⁸ *Batson v. Kentucky*,¹⁹ *Gomillion v. Lightfoot*,²⁰ and *New York Times v. Sullivan*.²¹ The precedents then take on lives of their own, often enlarging the scope or quality of rights for whites to a greater extent than they did for those intended as the initial beneficiaries.

In reviewing the positive influence of these cases initially intended to curb serious racial wrongs, there is the sense that the quest for black rights has served well the cause of full citizenship generally. The value of recognizing this phenomenon and helping in its advancement was a major thrust of a speech Judge Higginbotham presented in 1987 at the hundredth anniversary dinner of the Harvard Law Review. Held at the Boston Harvard Club, it was a very posh, black-tie affair. Those who invited the judge must have expected something unique for the occasion, and the judge did not disappoint them. In a speech that lasted well over an hour, Higginbotham reviewed in great detail the failings

15. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

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

17. 294 F.2d 150 (5th Cir. 1961) (requiring state colleges to provide students with due process prior to imposing disciplinary action).

18. 357 U.S. 449 (1958) (establishing a right of association under the First Amendment).

19. 476 U.S. 79 (1986) (barring the exercise of preemptory challenges based on the race of the prospective juror).

20. 364 U.S. 339 (1960) (finding the use of racial gerrymandering in violation of voters' constitutional rights).

21. 376 U.S. 254 (1964) (barring defamation suits by public officials in the absence of proof of actual malice).

of Harvard graduates on the high Court both in practice and in writing in the area of race law. He said he did so not to embarrass anyone, although embarrassment was likely not the strongest emotion felt that night by his listeners. Rather, he concluded in words that reflected his beliefs and stood as a worthwhile standard for those who would follow in his footsteps. “In my opinion, lawyers must be the visionaries in our society. We must be the nation’s legal architects who renovate the place of justice and redesign the landscape of opportunity in our nation.”

The policy choices that lawyers promote will have far more significance for our children and our grandchildren than will the credentials that we wield as we confront the intricacies of government and private enterprise. Each lawyer’s vision of society and his or her dedication to the dignity of individuals will affect the quality of life in our country in ways that mere technical skill in drafting a document, constructing a statute, writing a brief, or authoring a law review article can never approach. If lawyers are to play the important social and moral roles that I believe we can and should, then we must begin by recognizing that our nation’s basic human problems have not arisen because the legal profession misunderstood Blackstone, the Bluebook, the Uniform Commercial Code, or the Federal Rules of Evidence. Poverty, hatred, malnutrition, inadequate health care and housing, corruption in government, and the failures of our public school system continue to haunt us today, because those in power often have lacked personal morality or have failed to make real the values that they have professed to hold in the abstract. To paraphrase Justice Oliver Wendell Holmes, the life of the law must not be mere logic; it must also be values. Each lawyer—whether judge, politician, professor, or entrepreneur—must make personal judgments. Those critical moral and human values cannot be acquired by even the most meticulous reading of opinions or statutes. Each lawyer must consciously and constantly assess his or her values and goals in forging rules of law for the future.²²

22. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (1881).