

PANEL DISCUSSION

Judge A. Leon Higginbotham, Jr., the first panelist, presented some aspects of blacks in America from his published and ongoing historical writing.†*

*The following excerpt captures the flavor of the comments of Professor Jack Hexter:***

Equality has a peculiar status, as far as I can see, in the history of western man. The reality has always been of gross inequalities. That is part of the story of western man—gross inequalities of opportunity and, particularly, gross inequalities of results. And yet, there is something in the idea of equality of results that has an extraordinary attraction for men in the West. There is a sense that people are sufficiently alike so that everybody really ought to get the same or fair share. Somehow things such as status, honor, character, appearance, physical power and prowess, beauty, and brains did not get equally distributed. There is no way of saying that there is anything fair about this distribution. There is something odd about it rather than fair about it. Nobody who is born with brains, born with beauty, born with good parents, or born with wealth “earned” to be born that way. That little creature trying to catch his first breath did not “earn” to have rich parents or poor parents, wise or unwise parents; did not “earn” to be bright or stupid. Somehow or other nature has never provided fairness in the sense of equality of results for mankind.

But there is a sense that it is not just that this should be so—that results should be so unequally distributed among mankind. Thus, on the side of ideas, the burden of proof for why things should be distributed unequally—why talents should be distributed unequally, why opportunities should be distributed unequally—tends to fall upon those who accept in one way or another and benefit from the unequal distribution of those things. It falls on those who argue that inequality should not be altered to give the unfortunate a fair or a fairer shake, or a fairer share of life’s bounty.

Now, Professor Handlin’s most compact and interesting talk told about a slow, sometimes miserably slow, activity in the United States that did

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begin in some ways to level out some of those inequalities that were inherent in genetic endowment and in the social institutions of the society brought from the old world. The process really was that of slowly getting rid of the most outrageous and conspicuous of those inequalities, those obstacles to equalizing results—titles of honor, heredity, privilege, discrimination against people for their religion or for their national origins or for their cultures. These steps as they were taken, according to Mr. Handlin, increased equality of opportunity, but they did, in fact, have the effect of giving greater equality of results. In fact, more people were bound to get some of the good of this life. Now, all those things were achieved, as Professor Handlin said, by negative actions.

But it is not quite true to say that Americans have been willing to stop with negative action. Those actions did not require redistribution of goods, but nevertheless, in American society there has been and there is an increasing willingness to accept redistribution in favor of deeply underprivileged classes. The most conspicuous case is the willingness to bring about some redistribution for the benefit of the physically and mentally handicapped. In effect, society is required to bear a charge, to do something for those who were naturally deprived of vision, of hearing, and, nowadays, of capacity to move about. Society has been increasingly willing to accept and to bear some redistributive charge in order to even out to some degree the gross inequalities that are imposed upon people by physical and, in some measure, mental handicaps.

There has appeared recently a very strong demand—a very positive demand—saying there are people who are culturally and economically handicapped. They are definable as deprived groups; either by law or by social practice our society has so discriminated against these groups that they have been deprived of the means to enter into what is called the mainstream of society. And further inference has been made that this deprivation is so profound that it cannot be balanced except by some redistributive process. And at that point one comes up against the problem of the willingness of those whose goods are going to be redistributed to accept redistribution.

After Judge Higginbotham commented about unequal starting points, Professor Handlin made the following observation about the appropriateness of shaping governmental policies to take account of that inequity:

The point that requires most thought is that which Judge Higginbotham phrased in terms of the question whether it is not more proper to call this a quest for inequality than a quest for equality. One might say that these are just two sides of the same coin—that inequality is the other side of equality. And one might ask what difference it makes in terms of

which direction we discuss. I think it does make a difference; and it is here that I part company with him.

I put the issue to him this way. Let us use as our reference point what I think was the most difficult and most tragic phase in the history of group relations in this country: the period that extended roughly from 1850 to 1930 or so. Now, everything Judge Higginbotham said about that period is true and if I had time, I could expand indefinitely the roster of incidents involving bad judgment—bad in law, as Justice Curtis pointed in his minority opinion, and bad in history as well. But I ask not why these dramatic injustices went as far as they did, but why they did not go farther? In the 1880's not only did a majority listen to and approve of the kind of views that President Cleveland expressed, but in addition, a firm substratum of ideas justified racism in its most acute sense. Why did we not have the laws to implement racism or apartheid? That question brings us to the kinds of comparisons that are germane to the issue. Why was it necessary even in as treacherous a case as *Plessy*—a bad case, which I am happy was reversed—to add “but equal”? However the phrase would be applied in practice, the judges had to add it. They did so because even in that horrible period the judges, legislators, and ordinary people who were racists were nonetheless so bound by that fundamental precept of the Constitution that they could not deny equality without denying their whole heritage. They dealt with persons and, therefore, dealt with equals; and they could not legislate about groups within this constitutional frame. Nor can we.

I condemn those slave advertisements as he does, although I would remind him that the same columns sometimes carried similar advertisements about white servants. But what is the direction in which this country has been moving, however slowly, however imperfectly? I suggest that it is a direction dictated by the founding assumptions of this country—that the kind of people who are brought together in it will be equal in law and later in opportunity.

Finally, I want to make one point that was suggested by Professor Hexter's statement, one with which I did not deal—perhaps I should have, but it would have taken a lot more time than I had and maybe a lot more thought than that of which I am capable at the moment. How do we decide what is fair or what is just when it comes to dealing with the real inequalities of life? I do not mean inequalities associated with group membership—because I think that is a temporary aspect of our existence, which in twenty or thirty years may be far less important than it is now—but real inequalities that do exist in talents, physical endowment, and the like. In these matters I believe universal formulae are hazardous.

I give you an extreme case. Suppose a number of people all want to be

neurosurgeons and the facilities for training neurosurgeons are very limited. How do we decide among the competing applicants for that limited opportunity? I suggest that the appropriate standard of decision is not the right of the prospective neurosurgeon, but the rights of future patients. Justice in that case requires a judgment about what would best serve the people who will require neurosurgery ten years hence—of whatever background, wealth, or degree of familiarity with the health care system those patients may have.

At the opposite extreme are a whole range of callings in our society in which the exercise of the client's interests will be equally served by wide gradations of skills. It is more possible to take account of the demands of competing people for entry into those fields. Hence, it is perfectly legitimate to separate what happens in the building trade from what happens in the medical schools. I do not mean this in any elitist sense; but it simply is a fact that the range of skills that goes into being a good bricklayer or a good carpenter is not the same as that which goes into being a good neurosurgeon. I fly home tonight. I do not care who is going to be a stewardess on my plane. But I want to be sure there is a good pilot, whatever his color or ethnic background may be. One of the consequences of administrative judicial reordering in our society is the elimination of those distinctions: the executive order that is appropriate to the building trades gets pushed to an extreme when it is transposed to altogether different realms.

I conclude with the statement that the dream of freedom and equality is one we must all share in this society because our society simply is not viable in any other terms. We must not be diverted by immediate issues into kinds of irrevocable judgments that will haunt us in the future.