

TOO SOON TO BE TIRED

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Leon Higginbotham Talk

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Thank you, Legrome, for that generous introduction. Philadelphia – and the federal judiciary – are very lucky to have you.

Legrome may not know that I have a modest claim to be one of you. At the height of the campus turmoil of the early 1970s, a leader of the radical students at Princeton came to my office to debate the meaning of a campus statement on the limits of dissent. He complained that I was reading the statement “as if it were the Talmud.” He then exclaimed: “Mr. Bowen, you have a very good *little* mind; you would have been a great lawyer!”

It is a genuine pleasure to be here today to join in celebrating the legacy of Leon Higginbotham, who was indeed a great lawyer. I had the privilege of serving with Leon on the Board of Regents of the Smithsonian. More than that, along with countless others, including many in this room, I watched with admiration as he stood up for rights that should be common property but that too often have fallen prey to what Glenn Loury has called our “unlovely racial history.”

It is unnecessary to recite Judge Higginbotham’s history and accomplishment, especially before this audience. That would be “carrying coals to Newcastle.” But I cannot refrain from

mentioning a coincidence. One of my great friends in life is Derek Bok, distinguished former president of Harvard and co-author of *The Shape of the River*. It was Derek's father, Judge Curtis Bok, who gave Leon his first opportunity to clerk after he graduated from Yale Law School with a distinguished record; apparently no one else in Philadelphia legal circles at the time was interested in even giving this remarkable black man an interview. Times change – fortunately.

But they have not changed fast enough or moved us far enough in the right direction. Hence the title of my talk today: “Too Soon To Be Tired.”

When LBJ gave his last major speech, in the early 70s shortly before he died and against the strong advice of his doctors (he was very ill), he gave it at a Symposium on Civil Rights. In this much under-appreciated speech, LBJ said:

“To be black, I believe, to one who is black.., is to be proud, is to be worthy, is to be honorable. But to be black in a white society, is not to stand on level and equal ground. While the races may stand side by side, whites stand on history's mountain and blacks stand *in history's hollow.*” A great phrase.

To be sure, much progress has been made since Judge Higginbotham first met Curtis Bok and since LBJ gave that speech. The situation today is indistinguishable from the situation then. LBJ could not have imagined that our president today would be Barack Obama – a black American

who, in my opinion, dominates others on the political stage with his intelligence, eloquence, common sense, and courage.

But we should not be deceived; racial prejudice remains a potent force, and I am persuaded that many of the attacks on the president reflect a deep, if unacknowledged, racism. And this deep undercurrent of lack of respect is reflected in present-day political realities.

Stereotypes based on atypical instances of success only mislead. An example. At Princeton, I recruited to the faculty a Nobel-prize-winning economist from St. Lucia in the West Indies – Sir Arthur Lewis. A white woman from England asked if she could have the honor of serving as Sir Arthur’s secretary. Fine. At the time of the Johnson-Goldwater election, Arthur and his secretary fell to discussing politics. She said that she was going to vote for Goldwater. Arthur, in his direct manner, asked: “Why are you going to do a thing like that?” She responded, “because of the race question.” Undaunted, Arthur asked: “What about the race question?” She said, “Well, Johnson will force me to sell my house to a Negro.” Arthur replied: “That’s not a practical policy; there aren’t enough Negroes; imagine what the housing velocity of sales to Negroes would have to be!” Arthur, who was telling me this story, went on say, with a grin, “And, I have to report that my aunt, in Harlem, is going to vote for Goldwater for the same reason.” To the secretary, Arthur was not black; he was “Sir Arthur.” Both the secretary and the aunt misunderstood the character and depth of the race problem in America.

In preparing this talk, I originally contemplated driving home my point about present-day realities by presenting a brief scorecard. But I then decided that that would be superfluous before this audience.

You are all too familiar, for example, with the statistics showing the vast disparity in incarceration rates by race. The Pew Research Center here in Philadelphia tells us that, in 2010, “black men were more than six times as likely as white men to be incarcerated.” Six times! Gaps in mortality rates and in health generally are also dispiriting. In the field I know best, education and labor force behavior, figures are less dramatic but – especially from a long-term perspective – no less alarming. Among all Americans 25 and older, 38 percent of whites have attained a BA or higher degree; the corresponding figure for blacks is 27 percent – just three-quarters of the white rate. On average, weekly earnings for full-time black workers are also three-quarters those of whites. (A parenthetical note: These widely cited gaps in earnings and income are not nearly as pronounced as gaps in wealth – an indicator much harder to measure but very important. It is wealth, and especially liquid assets, that permit a parent simply to write a check when circumstances threaten to derail the college plans of an offspring.) Finally, as is well known, the black unemployment rate is twice the white rate – and unemployment rates fail to capture differences in labor force participation (the fact that some unemployed become so discouraged by their limited job prospects that they simply stop looking for work and thus are no longer counted as unemployed).

Of course these problems interact, and we will continue to debate to what extent crime and incarceration are the products of inequality and despair. A former colleague of mine, Marion J.

Levy, Jr., was the author of a pamphlet titled “The Ten Laws of the Disillusionment of the True Liberal.” One of these laws went something like this: “Inevitably that element of society with whom one identifies most strongly as a true liberal turns out to be narrow-minded and bigoted.” A colleague, Stanley Kelley, paraphrased this observation as follows: “Last guys don’t finish nice.”

But simply wanting things to be better will not do the trick. Another of Levy’s Laws was: “Pray that your opposition be wicked, because there is the possibility of out-thinking them; good intentions randomize behavior.”

Education can help close gaps in opportunities – and then in outcomes. “Opportunities” and “outcomes” are not, I hasten to add, the same. My wife, Mary Ellen, and I were present when, in her installation address as Vice Chancellor of the University of Cape Town, Mamphela Ramphele (mother of Steven Biko’s son) told her audience, including many South African black students who may have thought that finally they had it made: “Everyone deserves opportunity; no one deserves success. Success has to be earned.”

Too much is made, I’m sure, of where students go to college. But it does matter. I remember well a meeting in Washington, shortly after publication of *The Shape of the River*, when a well-known white woman of decidedly conservative bent said: “There are many fine schools in America where black students can go; why all this fuss about affirmative action at the elite schools?” A black woman from across the room stood up and replied: “Just a moment, I want to understand you. Are you saying that all those white folks queued up and fought to get their

children into Stanford are just stupid? Or is it that where their children go matters, but not where my children go?” The room was engulfed in silence!

There is abundant evidence that most students who are fortunate enough to go to highly selective schools do in fact, benefit greatly, whether outcomes are measured in terms of lifetime incomes, or in other ways such as prestigious opportunities for public service. We do well, I think, to reject categorically one of the most pernicious myths that continues to circulate. It is called “the mismatch hypothesis,” and it holds that affirmative action often harms the intended beneficiaries by enticing poorly prepared minority students to attend schools that are too demanding for them, schools where they will be intimidated, out-gunned, and doomed to fail. Better, the argument goes, that they attend easier schools and not try to rise above their station.

This is an empirical proposition, and tons of data show that the mismatch hypothesis is, in fact, baloney. As Derek Bok and I first demonstrated in *The Shape of the River*, black students who enroll at schools where the average test score is higher than their own do far, far better than black students with comparable credentials who attend less selective schools. Apparently the combination of pressure to excel and strong educational environments pays off. Of course we should give admissions deans some of the credit for this impressive result: they are not admitting black students (or any students, for that matter) whom they do not believe can handle the challenges a school provides. Just recently a talented Israeli sociologist, Sigal Alon, published a book containing extensive findings from Israel as well as the US that document once again that there is no support for the mismatch hypothesis. The failure of this proposition to die a peaceful

death, in spite of innumerable blows to its vital organs, is a sad commentary on the lack of respect in America today for evidence.

A friend of mine, Charles Exley, legendary chairman of the NCR Company and a staunch conservative who describes himself as “to the right of Attila the Hun,” agrees with what I have just said. Chuck much prefers leaving the judgment about matters of admission to presidents like me than to having them subject to efforts to impose more and more “objective” tests of who deserves a place in a class. He worries about the pernicious effects of bigger and bigger rule books. “You will make mistakes,” Exley said to me, “but I can study outcomes and if you make too many mistakes, I can fire you!” He is right to join accountability to discretion. Those of us in higher education should want to be held to account.

Judge Higginbotham understood exactly what I have been saying, and I remember well the open letter he wrote to Justice Clarence Thomas bemoaning the fact that Thomas never acknowledged the advantage he received by having been admitted to Yale Law School. Sadly, not all of our ducks are swans.

But those of us gathered here today (including the ducks among us), will, I would hope, press on. We know that the work so boldly advanced by Judge Higginbotham in his day is far from over. It is, as I hope we can agree, much too soon to be tired.