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# KEYNOTE ADDRESS

## “FROM RACISM TO AFFIRMATIVE ACTION: WILL UNIVERSITIES SPAN THE GAP?”

Address by The Honorable A. Leon Higginbotham  
Judge, United States District Court For  
The Eastern District of Pennsylvania

Some years ago, a motorist followed a small truck going up a winding mountain road. The motorist became terribly annoyed by the slow progress of the truck, and especially by the driver's habit of stopping frequently to hit the side of his truck with a large stick. Finally, he left his car to complain of these delays: "What in the hell are you doing?" he asked. "I've got a one-ton truck," the driver explained, "and I'm carrying two tons of birds: if I don't keep one ton of birds in the air at all times, we're all going back down the hill."

Similarly, many college and university administrators feel that they must keep several tons of birds in the air at all times and that unless we expand both the capacity and performance of our society to handle their load, maybe we will all roll down hill to extinction. Thus, I sense that many administrators with an overloaded truck, even those of good intention, are suggesting, "Look, we already have more than enough unsolvable problems. Please don't add a few extra tons of minority demands to this over-burdened institution. Please wait or at least scale down your just demands until we have a better engine, a better economy, a better investment return, less hostile alumni, and more supportive federal and state governments."

I recognize that we meet at a time of substantial anxiety for most college administrators and perhaps that tension is even greater among those who have the demanding, yet ambivalent, responsibility of transplanting affirmative action theory into practice at academic institutions. No sane college administrator can feel euphoric or exhilarated by the state of affairs within and outside American colleges.

As a trustee of three universities I am aware of the litany of frustrations which faces every trustees', faculty, and administrators' meeting. Though volumes could be written on these problems, in short they can be captioned as escalating costs versus decreasing income, increased demands from all sectors versus decreasing support from most.

Finally, many feel that the ultimate blow comes from the federal government by its demands for affirmative civil rights action while simultaneously federal support of college budgets is being systematically reduced.

I understand these frustrations from having too many problems and too few resources, but nevertheless I submit that if we are concerned about racism, and its consequences on our society, now is not the hour to retreat

even an inch, thereby permitting administrators to condemn apathy in Washington or elsewhere while dragging their feet at home. I am concerned about all of the deprivations which affirmative action concepts are designed to eradicate. I am not asking for justice for Blacks and injustice for women, American Indians, Chicanos, or Spanish-surnamed individuals. However, for the purpose of focus, I will address my comments basically to those pertaining to the deprivation of Blacks.

Why do I say now is not the hour to retreat? I would rely on the lessons of history, and I will examine briefly this evening four situations which have a relevant message for us.

## I

### FREDERICK DOUGLASS

It may be ironic that I start by quoting, at Harvard, a Black man, born a slave, who never had the opportunity to be trained in any school or college. But from my view, Frederick Douglass was one of the most learned and noble statesmen to walk this earth. More than a century ago, Douglass said:

Let me give you a word of the philosophy of reform. The whole history of the progress of human liberty shows that all concessions yet made to *her* august claims, have been born of earnest struggle. The conflict has been exciting, agitating, all-absorbing, and for the time being, putting all other tumults to silence. It must do this or it does nothing. If there is no struggle there is no progress. Those who profess to favor freedom and yet deprecate agitation, are men who want crops without plowing up the ground; they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters.

This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical. But it must be a struggle. *Power concedes nothing without a demand. It never did and it never will.* Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them. And these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress. . . .<sup>1</sup>

While Douglass, in 1857, discussed both a moral and physical struggle, today I believe he, just as I do, would exclude the suggestion of physical violence and would urge reliance on the law, the political process, and all those non-violent mechanisms which have been utilized by some now in power to shape the quality of life so that their primary concerns and aspirations were satisfied through the courts, the legislatures, the political and related processes.

Douglass also spoke of men who oppose better and immediate options for Blacks as tyrants. Yet no person of good will would consider himself a tyrant. Thomas Jefferson, though owning slaves, probably did not consider himself a tyrant because, after all, he had penned those immortal words to the Declaration of Independence that "we hold these truths to be self-evident, that all men are created equal." George Washington, while owning hundreds of slaves, probably did not consider himself a tyrant because he had led the revolution against King George. History teaches us it is always

1. F. Douglass, *Two Speeches by Frederick Douglass*, as printed in *THE VOICE OF BLACK AMERICAN: MAJOR SPEECHES BY NEGROES IN THE UNITED STATES, 1797-1971* 200 (1972).

the other person who is perceived as wearing the cloak of evil, immorality, or tyranny. Tyranny is defined differently by masters and slaves, by those who can oppress, and those who are being oppressed. And tonight, at the very hour of this conference, we must recognize that any of us can be tyrants in our daily lives by the acts which we do or by those which we fail to do.

There is value to understanding the interrelationship between time and tyranny as a continuum. Daniel Bell, Chairman of the Commission on the Year 2000, has written:

Time, said St. Augustine, is a threefold present as we experience it. The past as a present memory, and the future as a present expectation. By that criterion, the world of the year 2000 has already arrived. For in the decisions we make now, in the way we design our environment and thus sketch the lines of constraints, the future is committed . . . the future is not an overarching leap into the distance; it begins in the present.<sup>2</sup>

As we face the challenges of affirmative action in the 1970's, we must recognize that the racial polarization and problems of the 70's have been partially determined by the history of 30, 100 and even 300 years ago. We must recognize that if we fail in this generation to remove the vestiges of prior discrimination, we are merely compounding the problem for future generations.

#### THE *SOMMERSETT* CASE<sup>3</sup>

Since I am speaking on the hallowed premises of the Harvard Business School, famed for its case study approach, there might be some who are not moved by the eloquence of a Frederick Douglass and the profoundness of his analysis of the power structure and the prerequisites for change. But maybe some of you can be reached through the case method.

Perhaps one of the most dramatic cases exemplifying the tensions of race and the legal process occurred in 1772 in England, in the *Sommersett*<sup>4</sup> case before Lord Mansfield of the King's Bench. There in England, a Virginia lawyer, Stewart, was attempting to send his runaway slave, Sommersett, to Jamaica for sale. In behalf of the slave the abolitionists had filed a writ of *habeas corpus* arguing that, by English law, slavery was not permitted in England, and thus Sommersett should go free. There was tension and great public interest in the trial, for the abolitionists had made it a cause célèbre. Hargrave, the barrister for the slave, had argued eloquently as to the destructive consequences of slavery. He relied on the 1529 case of *Cartwright*<sup>5</sup> involving a Russian slave, where the English court said "That England was too pure an Air for Slaves to breathe in",<sup>6</sup> and thus that slave was freed. However, Hargrave knew that the *Cartwright* case was different than the challenge he faced to free Sommersett. Hargrave felt compelled to increase the court's consciousness about the impact of slavery. He asserted a theory which might be relevant to us today. He not only argued that slavery was wrong because of the cruelty it imposes on the slave, he noted the

2. Daniel Bell, Report of the Commission on the Year 2000.

3. The Case of James Sommersett, a Negro, Kings Bench, 12 Geo. III 1771-72, Lofft I [20 How. St. TR. I] June, 1772.

4. *Id.*

5. 2 Rushworth 468 (1569) (John Rushworth Historical Collections).

6. See note 3 *supra*, at 51.

"implacable resentment and hatred (it) . . . excites . . . in the slave".<sup>7</sup> Finally, he emphasized that it corrupts the morals of the master. He concluded: "That slavery, in whatever light we view it, may be deemed a most pernicious institution: immediately so, to the unhappy person who suffers under it; finally so, to the master who triumphs in it, and to the state which allows it."<sup>8</sup> Hargrave's opponents were fast in rebuttal. They were the pragmatists of the day. They argued that slavery must be valid in England because "It is found in three quarters of the globe, and in part of the fourth."<sup>9</sup> They stressed the economic consequences of freeing the 14,000 Negroes in England and thus suggested that economics should prevail over liberty, and that morality should be equated with what others did wrong.

Lord Mansfield did not welcome the *Sommersett* case; he had hoped it could be settled by the parties privately or by the Legislature so that a decision of this magnitude would not have to be made by the court. He emphasized that "setting 14,000 or 15,000 men at once loose by a solemn opinion, is very disagreeable in the effects it threatens. . . . (but) . . . If the parties will have judgment, 'fiat justitia, ruat coelum'; let justice be done whatever be the consequence."<sup>10</sup> He concluded his opinion by holding "the Black must be discharged."<sup>11</sup> Thus, with the stroke of Mansfield's pen, *Sommersett* was freed from slavery.

While historians will debate endlessly whether Mansfield was abolishing slavery throughout England, or whether, as I believe, the actual holding of the case was merely the freeing of one slave who was about to be deported by his master, there is nevertheless a profound message to us in Lord Mansfield's opinion when he asserted "fiat justitia, ruat coelum", which literally means "let justice be done though the heavens may fall", or, as he interpreted it, "let justice be done whatever be the consequence".

In freeing *Sommersett*, Lord Mansfield was confronted with significant precedents and arguments to the contrary. He had an option in the *Sommersett* case, as judges often had in common law cases, just as administrators today generally have, to exercise some discretion to move forward the frontiers of racial justice or to retard their advance.

What is the significance to us of Lord Mansfield's pronouncement in 1772? It is simply that he was willing to take a bold step forward and in the process his action and his opinion became a milestone which Professor Coupland asserted was the moral judgment which marked the "beginning of the end of slavery throughout the British empire."<sup>12</sup>

A comparison of Lord Mansfield's decision in the *Sommersett* case and the position which the signers of the Declaration of Independence took on slavery reveals the persistent frustration which confronts Blacks and other minorities in that the advancement of the minority cause will often be subordinated to and comprised for what constantly is supposed to be the greater good of all.

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7. *Id.* at 26.

8. *Id.*

9. *Id.* at 69.

10. *Id.* at 79.

11. *Id.* at 82.

12. R. COUPLAND, *THE BRITISH ANTI-SLAVERY MOVEMENT* 56 (as quoted in ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 45 (1966)).

Benjamin Franklin, referring to the *Sommersett* case, condemned “. . . the hypocrisy of this country which encourages such a detestable commerce (the international slave trade) while it piped itself on its virtue, love of liberty, and the equality of its courts in setting free a single Negro. . .”<sup>13</sup> Yet, though he disparaged the British on the *Sommersett* case, four years later in 1776, Franklin refrained from condemning the international slave trade in the Declaration of Independence because he did not want to slight the representatives from Georgia and South Carolina.<sup>14</sup> For Franklin, establishment of the union was a higher priority.<sup>15</sup>

Abigail Adams understood the hypocrisy of arguing for freedom from England while sanctioning slavery at home, for she wrote to her husband in Philadelphia that:

I wish most sincerely there was not a slave in Providence. It always appeared a most iniquitous scheme to me—to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have. You know my mind upon this subject.<sup>16</sup>

### III

#### THE DEMISE OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS

To solve twentieth century problems there may be some in this audience who will not find persuasive either a Black abolitionist or an English judge. They might think that references to slavery are irrelevant. They might ask, Why doesn't he look at the operation of the rule of law after the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution had been passed? True, those amendments were designed to eradicate slavery and, in the words of Charles Sumner—the conscience of the U. S. Senate—were designed so “that hereafter in all our legislation, there shall be no such words as ‘Black’ or ‘white’, but that one shall speak only of citizens.”<sup>17</sup>

From my reading of the history of the Thirteenth, Fourteenth, and Fifteenth Amendments and the related Civil Rights Acts, it is clear that the framers of those amendments and the authors of the related statutes concurred with Charles Sumner's hope. They believed that with the enactments, as Loren Miller has said:

The long sickness had come to end; now the majestic rhetoric of the Declaration of Independence had full meaning: “All men are created equal (and) are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.” The “Government . . . instituted among men” in the United States of America was committed to “secure these rights” and to safeguard them against the aggressions of individuals, of the states, and of their agents and servants. By constitutional fiat and statutory direction, the national writ would run to guarantee privileges and immunities, due process, and equal protection of

13. *Id.* at 45.

14. This issue is discussed in detail in Higginbotham, *Race and the Legal Process in the United States*, ch. V (unpublished monograph). See also JOHN H. HAZELTON, *THE DECLARATION OF INDEPENDENCE: ITS HISTORY*, 208-209 (1906).

15. [Author's note]: Of course, I am not unaware of Benjamin Franklin's Posture as an Abolitionist in Pennsylvania.

16. CATHERINE DRINKER BOWEN, *JOHN ADAMS AND THE AMERICAN REVOLUTION* 635 (1951).

17. 2 CONG. REC. 948, as quoted in L. MILLER, *THE PETITIONERS*, 97 (1956).

the laws for every man, white and Black. In spirit, "in all of our legislation," there was "no such word as Black or white . . . only . . . citizens."<sup>18</sup>

Tragically, by the 1880s it was apparent that the "original understanding" of these amendments was being steadily emasculated by a hostile Supreme Court.<sup>19</sup> The judicial and executive abdication had caused Frederick Douglass, in 1889, to wonder whether

American justice, American liberty, American civilization, American law, and American Christianity could be made to include and protect alike and forever all American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the land.<sup>20</sup>

The last rung of hope for Blacks dropped out in *Plessy v. Ferguson*<sup>21</sup> with the federal birth of the separate but (un)equal doctrine in 1896. There, the U.S. Supreme Court upheld the right of a state to pass a statute providing for separate railway carriages for the white and colored races. In the opinion, they gave implied approval of the right of a state to legislate separate school and other facilities for Blacks and whites, saying:

. . . we think the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment.  
 . . .<sup>22</sup>

In an eloquent dissent, Justin John M. Harlan said:

. . . (I)n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.<sup>23</sup>

Finally, he concluded:

"The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."<sup>24</sup>

Think of the type of nation we would now have if in 1896 our leaders had really followed the message of Justice Harlan that ". . . the common government of all shall not permit the seeds of race hate to be planted under

18. L. MILLER, *THE PETITIONERS* (1956).

19. See *Civil Rights Cases*, 109 U.S. 3 (1883).

20. As quoted in, R. LOGAN, *THE BETRAYAL OF THE NEGRO* 9-10 (1965).

21. 163 U.S. 537 (1896).

22. *Id.* at 548.

23. *Id.* at 559.

24. *Id.* at 560.

the sanction of law."<sup>25</sup>

If this message had been implemented, subtle or blatant racism would not be one of the underlying issues in the current political campaigns. There would be no problems of busing today; nor would there be the extensive racial ghettos now existing in the inner cities of our nation. The striking racial gaps between Black and white economic, health, and educational attainment would be either nonexistent or significantly diminished.

But we have these tragic disparities today because moral leadership of the nation and the legal process did not support the concept of an open society. Blacks were abandoned by the 1876 Hayes-Tilden Compromise<sup>26</sup> and the 1896 capitulation in *Plessy v. Ferguson*;<sup>27</sup> for decades no substantial moral leadership was provided in this field by the White House, by the courts, by the schools, by the Congresses, by the state governments, and often, not even by the churches.

The catastrophic backlash in education because of the 1896 *Plessy v. Ferguson* doctrine seems almost unbelievable.

In *Berea College v. Kentucky*,<sup>28</sup> in 1908, the U. S. Supreme Court upheld the validity of a 1904 Kentucky statute which prohibited a college from teaching white and Negro pupils in the same institution.

Berea College was established in 1854 by a small band of Christians in the Kentucky mountains who began their charter with the words: "God hath made of one blood all nations that dwell upon the face of the earth." After the Civil War it admitted students without racial discrimination and by 1904 had 174 Negroes and 753 white students. It was a private institution supported by those who subscribed to its religious tenets, and it neither sought nor received any state aid or assistance. Yet, the U. S. Supreme Court held that a state could prevent any private institution from promoting the cause of Christ if it did so through integrated education. What a tragic ruling!—a nation that pronounces loudly its faith in freedom of religion, yet sanctions a state's denial of the day to day application of religious concepts when practiced in an integrated school.

In *Berea College*, Justice Harlan wrote another eloquent dissent, and tragically, Mr. Justice Oliver Wendell Holmes—the darling of legal liberals—concurred in the majority's repressive opinion.

Today the choice is indeed a simple one: whether we will accept the goal which Justice Harlan suggested, that there be no caste here, or whether we will tolerate the perpetuation of a caste system.

#### IV

#### HARVARD AND SHAKESPEARE

But, again, there may be some here who find neither Frederick Douglass nor Lord Mansfield nor Justice John Harlan persuasive. If so, I will finally rest my case on insights from Harvard and Shakespeare.

25. *Id.*; *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

26. Hayes-Tilden Compromise (1876). See generally, R. LOGAN, *THE BETRAYAL OF THE NEGRO* 23-47 (1965).

27. *Plessy v. Ferguson*, *supra*, note 22.

28. 211 U.S. 45 (1908).



It is intriguing that we meet here today to discuss the rights of Blacks and others in a society which is supposedly predicated on egalitarian principles. Yet, two hundred and one years ago, the debate at the Harvard commencement of July 21, 1773 was whether the slaves in the province of Massachusetts were subject to the "law of nature" and its concomitant freedoms.<sup>29</sup> One student vigorously argued that slavery violated the law of nature and expressed dismay that "those, who are so readily disposed to urge the principles of natural equality in defense of their own liberties should, with so little reluctance, continue to exert a power, by the operation of which they are so flagrantly contradicted."<sup>30</sup> His opponent argued that slavery was totally sanctioned by the nature of things because "the state of society" for "the greatest good of the whole" required that "some men exercise authority and impose discipline and that *others accept subordination*. Just as men were purportedly subordinate to God, and children to parents, so ought slaves . . . be subordinate to masters."<sup>31</sup> Two hundred and one years later, each of you here are dealing with the remnants of that unfinished debate, and the positions you take will determine whether slavery's theory of subordination will be translated into a sophisticated twentieth century subordination where Blacks, women and other minorities must still suffer the consequence of centuries of neglect, prejudice and discrimination. Will any of you be the twentieth century equivalent of those eighteenth century pro-slavery advocates: Will you, with erudition, scholarship and suaveness, de-emphasize and subordinate improving options for minorities to what again would be called "the greatest good" for all others? This is a question which each generation must ask.

There may be some who cannot even be moved by a Harvard debater when he takes the side of justice, and if no one else has been able to reach you, let me suggest to you the words of William Shakespeare:

. . . He hath disgraced me . . . scorned my nation . . . cooled my friends . . . heated mine enemies, and what's his reasons? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same desires, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us shall we not revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why revenge. The villainy you teach me I will execute, and it shall go hard but I will better the instructions.<sup>32</sup>

These words were not written by Black Panthers or radicals. These are the words of William Shakespeare, who understood as well as anyone else the emotions which shape mankind. If we tolerate wrong, if we perpetuate it, should we not expect, in Shakespeare's words, "villainy" in response? Should we not expect those whom we wrong not merely to respond with "villainy", but to better the instruction?

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29. Houghton, *A Forensic Dispute on the Legality of Enslaving the Africans* at Houghton Library, 3-4.

30. *Id.* at 4-5.

31. *Id.* at 7-17.

32. W. Shakespeare, *Merchant of Venice*, Act III, Scene I.

Universities have a primary responsibility not merely to send out messages to mankind on how others should deal with morality and justice, but they have no obligation to do justice themselves. A university which will not employ many blue collar Blacks in its power plants or women in its middle management or enroll many Chicanos as matriculants should be reluctant to advise the White House or to condemn any state government. A university which does not make a major persistent effort to reflect this pluralistic society in its departments, among its faculty and in its student body fails to recognize that universities should serve not only as critics but also as models.

The universities can be on the cutting edge of this democracy; they can exemplify the forward thrust of a Lord Mansfield, or a Justice John Harlan, or they can function like the cynical pragmatists who argue that we are no worse than the others, so why pressure us? If in the early 1900's the major universities had taken the responsible actions which some are now taking (because of government decree) perhaps those alumni who have become public officials would more frequently demonstrate greater sensitivity to the causes of racial justice and equality of treatment for women and other minorities. Maybe there has been too much contemplation of Aristotle and too little implementation of Frederick Douglass. Faculties can use their sophistication to make the process as difficult as possible. Where others have used violence they can use the sophistry of unlimited delay and debates, and an analysis of power teaches us that injustice is not always enforced with clubs or by pickets who mouth racial epithets. In the white collar crafts the injustice can be just as pernicious and just as pervasive if one speaks with egalitarian rhetoric and simultaneously delays its implementation. Just as we have found in the legal profession that at times we have been aided most by critics outside our profession, maybe you as administrators will have to be the major catalysts, and not rest solely on the oars of faculty debate and parliamentary decisions. For centuries, little, if anything, was done in the racial field. In the last decade there has been some real progress, but the greatest threat today, I submit, will come from those who have been willing to tolerate centuries of injustice but now suggest that a decade of effort is enough. This short-sighted view is a villainy in itself. Let me close with a poem written on the tenth anniversary of the *Brown* decision by Langston Hughes. For, like Lord Mansfield, and Frederick Douglass, and Justice John Harlan, Hughes had a dream for a better America. I ask you to be a part of it. Hughes said:

There is a dream in the land  
With its back against the wall,  
By muddled names and strange  
Sometimes the dream is called.

There are those who claim  
This dream for theirs alone—  
A sin for which, we know,  
They must atone.

Unless shared in common  
Like sunlight and like air,

The dream will die for lack  
Of substance anywhere.

The dream knows no frontier or tongue  
The dream no class or race,  
The dream cannot be kept secure  
In any one locked place.

This dream today embattled,  
With its back against the wall-  
To save the dream for one  
It must be saved for all.<sup>33</sup>

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33. L. Hughes, *Harlem 1951* from *International Library of Negro Life and History* 158.