

A. Leon Higginbotham Lecture
Philadelphia Bar Association
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Hon. Timothy K. Lewis

I was a college student in Boston in 1975, demonstrating against the violence visited upon black high school students trying to integrate South Boston High School. Gil-Scott Heron took notice of this in a poem. He wrote, “As Boston becomes Birmingham becomes Little Rock becomes Selma, becomes yesterday all over again . . .”

Today he might write, “As Ferguson becomes Charleston becomes Staten Island becomes Cleveland becomes Chicago becomes Baltimore, becomes yesterday all over again . . .”

And so, in this year of protest and confrontation, I’d like to talk about something that’s been very much on my mind: values and redemption, and our unending struggle to find both to save ourselves.

In his collection of essays on race, Clarence Page vents his frustration with our vacuous search for race-based identity. “I started out as a colored person,” he writes. “Then I was a Negro. After that, I became a black man. Later, I became an Afro-American. In a few years, I became an African American. And today, I am a person of color. Somehow, over the course of 50 years, I have advanced from being a ‘colored person’ to a ‘person of color’. Go figure.”

I empathize, but right now that strange trajectory seems petty next to the one reflected in signs.

Fifty years ago, they read “I Am Somebody”.

Today, they read “Hands Up – Don’t Shoot!”.

Today, they address an all too justifiable fear of death while neither resisting arrest nor posing an imminent threat. Even worse, in certain communities today children – *children* – are reduced to carrying signs proclaiming that their lives actually matter.

It is hyperbole to say nothing has changed over the course of 50 years except the wording on a sign. But we cannot escape the visceral connect between “I Am Somebody” and “Black Lives Matter”. Fifty years apart, both evince the same desperate plea simply to be respected and treated as a human being, even when being arrested. What we see today speaks directly to some of the ways we have failed too many for too long.

Sometimes we need such a sad commentary on our national values to return with renewed intensity to the “unfinished work” Lincoln referred to at Gettysburg. Because our work to form a more perfect Union is never finished.

We are, today, in black communities across this great Nation, hearing the echoes of a centuries old primal scream. It reverberates with urgency in the collective spirit of innocent and unarmed children and adults lying dead in the street, too often at the hands of those sworn to protect and serve.

We navigate treacherous waters. And it is going to take a revolutionary force, supported by thoughtful programs and policies – and people, to enable us to steer safely between what Reinhold Niebuhr called “the Scylla of anarchy and the Charybdis of tyranny”.

But we have been here many times before.

I was deeply moved 13 years ago as I attended a memorial service at the National Cathedral in Washington commemorating the anniversary of a ruthless attack on our country, out of which was born a new spirit; a spirit that sought to rise above petty differences to pay tribute to fundamental ideals upon which this Nation was founded. As I watched the colors paraded slowly, majestically down the aisle in the processional, to the haunting refrain of bagpipes, and as I listened to Bishop Desmond Tutu speak of legacies and hope and how we keep both alive, mine were not the only tears shed in that sacred place at that sacred moment.

And we grew stronger as a Nation, even as we continue, today, to reassess and refine our values in the wake of our response.

At this moment, and in a different context, I reflect again upon legacies, some from our profession: the relentless scholarship of Judge Higginbotham; the vision of Charles Hamilton Houston; the courage of Thurgood Marshall; the heart of Lou Pollack; the unparalleled commitment to human rights of my friend Jerry Shestak. But I also think of William Lloyd Garrison. Ida B. Wells. Sojourner Truth. Susan B. Anthony. Bayard Rustin. Harvey Milk. Rosa Parks. These are people who refused to bend to the prevailing unjust order. They dedicated their lives to challenging inequality.

Their spirit is embodied in the venerable and patriotic tradition of protest against injustice that is this country’s ever-luminous beacon. And their gaze, along with many others’, is fixed upon us – all of us – as we do what we must to ensure that their legacy remains intact, their spirit remains alive, and a tradition – and thus our common faith – becomes advanced yet again, not just by the hallowed words our Nation was founded upon, but by the very honorable work we do to give full meaning to them.

I commend to you David Brooks’ new book, *The Road to Character*. We, as a Nation, live on that road.

Brooks focuses on the lives of some interesting and accomplished people whom we regard highly. And he points out the one pattern that recurs in each of their lives: “they had to go down to go up. They had to address moral crisis, confrontation, and recovery . . . [t]hey had to do this to see their own nature . . . [t]hey had to humble themselves in self-awareness.” But then, as he points out, the beauty began.

And so, it's about values: how we find them, how we lose them and how we find them, and perhaps ourselves, again.

At times in my life I have lost track of my values. It's a painful and difficult place to be. But as Brooks notes, "Sometimes, in order to find yourself, you have to lose yourself." That is true, and when it happens we learn, again, that there is nothing, and I mean nothing, which truly introduces us to ourselves like adversity. There is no doubt that a good person can become even better and stronger through having been, in the words of Robert Frost, "acquainted with the night."

But this is not new. It was known to Aeschylus 2500 years ago when he wrote *The Agamemnon*: "He who learns must suffer, and even in our sleep, pain that cannot forget falls drop by drop upon the heart until, in our own despair, and against our will, comes wisdom to us through the awful Grace of God."

Of course, we don't need Aeschylus to teach us that all of this transcends the individual. All of this is also true of our Nation, which also loses its values from time to time, and has been since its founding. We continue to trudge the road to character. The eternal question is how much suffering must we cause and endure before, perhaps against our will, comes wisdom to us?

As we address this question, we must remember that it is still true, as Frederick Douglass said, that power concedes nothing without a demand. That demand might come overtly, or in a graceful act of dignity and courage. Or it might be presented in soaring rhetoric that offers a new moral grounding, redirects our national conscience and sustains us as we go forward.

We are gathered in the eternal shadow of the birthplace of our Nation's promise of equality. Fifty-two years ago, in the searing heat of late August, a visionary stood before the country, itself sweltering in the embers of inequality, and in the most patriotic speech since Lincoln's, offered his dream of that promise's redemption. This was to become, as Senator Kennedy later called it, "the Civil Rights movement's aria."

"I Have a Dream" was an optimistic oration, but it was honest. It has been noted that it "acknowledged the desperate circumstances that made it necessary." But it also projected a hope that influenced change from southern Mississippi to South Africa; from Berlin to Beijing. It was a nod to all that is sacred in American political and social culture. But to fully appreciate its text, one has to understand its historical context. Because 1963, the year before Leon Higginbotham became a judge, was a pivotal year in the development of what Brooks refers to as our "moral ecology".

The year began with newly inaugurated Alabama Governor George Wallace, standing on the steps of the state capitol, infamously declaring, "Segregation now, segregation tomorrow, segregation forever!" Not long after, Bull Connor turned his fire hoses and dogs on young students who were peacefully demonstrating against the social conditions of blacks throughout the South.

Much like today, the country was outraged because of the wide embrace of a new technology – television – that allowed millions of Americans to bear moral witness to the brutality of racism. This was followed by President Kennedy’s address to the nation in which he called for civil rights legislation. And in the 10 week period following President Kennedy’s address, there were 750 demonstrations in over 180 cities, resulting in nearly 15,000 arrests. John Lewis writes in his biography, “There were bombings, beatings and killings happening almost weekly. A march would be met with violence, which would cause another march that would be met with more violence, and on and on. That was the pattern.”

Later that year, Wallace stood in a doorway to block black students from going to college. This was followed by the murders of four little black girls who were bombed to death in a church in Birmingham during Sunday school. Soon after that, Medgar Evers was shot in the back as he returned home from his NAACP office in Mississippi. He died in his wife’s arms, in front of their young daughters. And of course, in November the President himself would be assassinated in Dallas.

We have experienced a difficult year, but that was just a smattering of the chaos and violence during an 11 month span in 1963. These were dark and difficult times. But Dr. King would not allow the darkness or the hardship to deter his vision, and we must not today. “We have come to this hallowed spot to remind America of the fierce urgency of now,” he said that day. “This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism.”

That admonition, along with the many individual acts of courage performed by lawyers and judges and civil rights workers and legislators, inspired a more enlightened understanding of our values and the work we needed to do to advance them. We had long been “acquainted with the night”, we were ready to change and good people, black and white, were no longer afraid to do what was necessary. The Civil Rights Act, the Voting Rights Act, the War on Poverty, and so much of the development of our character can be traced to that history, to that year, to that adversity, and to that moment of self-confrontation.

We had navigated between the Scylla and the Charybdis. In our own despair, we had found wisdom.

In 2008, another black man would seize upon “the fierce urgency of now” and wrap his campaign for President of the United States around it. But today, that urgency is compounded. And it is a tragic irony unbecoming the historic significance of his election that our first black president presides over a nation where so many are carrying signs imploring that black lives matter.

Early death, crime, unemployment, drop-out and incarceration rates in black communities throughout the country have skyrocketed. Racial profiling and other more extreme police abuses are documented again and again each week. The common factors are undeniable: these people are poor, and they are black. One of the fundamental pillars on which this nation was founded was the acceptance of black inferiority, and despite all the happy nonsense to the contrary, whether through unconscious bias, a backlash to changing demographics, or flat-out racism, that

pillar still stands in some of our offices and institutions. The election of our first black president didn't end any of this.

Nor were we helped, in my view, when 8 years ago the Chief Justice of the United States, in reference to programs designed to redress some of this, told us that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race". This was a profound distortion and a determined misuse of American history and present-day reality. Courts should not resort to blind formalisms that convert the wise, flexible, thoughtful application of the law to some perverse algebra that takes place outside the realm of reality. I would like to believe we are better than that. Perhaps the Chief might wish to spend a little more time in the hood before offering his pronouncements on how to end discrimination.

So, what might our active moral witness yield in 2015? How can we contribute in this urgent moment?

The first thing we need to remember is that the law is about values, and sometimes these values become misplaced.

We can advocate for much needed, meaningful criminal justice reform, beginning with sentencing reform but including the right to counsel, prosecutorial overreach, prison reform, and a horrendously failed war on drugs. These affect the status and well-being of many of the people carrying those signs, and whether we agree with them or not, at least we can recognize their humanity and understand their plight and write an op-ed or a letter to a Senator or a member of Congress. Use your voice.

And while you're at it, write about the Paycheck Fairness Act, which has been reintroduced and is now pending, to ensure that women workers are not shortchanged, and to promote fair and stable family incomes. White women make 78 cents for every dollar men make, black women make 64 cents, and it's even worse for Latinas. Pay discrimination is real, it's dehumanizing, and it has to stop.

Support the End Racial Profiling Act, which has been re-introduced. We need that. Racial profiling robs people's dignity and is a hindrance to effective law enforcement.

Pressure our Senators to enact asset forfeiture reform. These warrantless abuses have to stop.

Tell civic and political leaders that if they want your firm's money and support, or your vote, they need to join a national call to action for a summer youth employment program, if not this year then next. Our response to the massive bank crisis was the TARP. But inner cities, including here in Philadelphia, still have 15, 20 and up to 40% unemployment, and they need infrastructure repair. How can we rebuild Baghdad and Kandahar, but not Chicago and Baltimore and West Philadelphia?

Advocate for police reform. Mayors, Police Chiefs, Prosecutors need to take a close look at themselves and ask if they honestly have the capacity to discipline police officers. We can't continue to have the police investigating themselves. Chicago just paid over \$5 million to victims who were tortured to extract confessions, and it was systemic and racially motivated and

affected over 100 black men. But it took way too long because of police investigating themselves. There are too many mechanisms in place for abuse.

Like many of you, I am leaving here to return to my office to bill time. But I'll also spend a little time on a pro bono matter. Pro bono work is not something you do out of the goodness of your heart; it's a debt you are repaying for the privilege of being a lawyer, and you should pay until it hurts. And firms that can afford it should increase their minimum requirements for this work. There's plenty to do, and good things will come your way for doing it.

And, of course, we must address our own massive failure at achieving pluralism and diversity within our own ranks and at our own firms. We are the least diverse profession in the nation, and that is shameful. We deprive ourselves, our values, our economic growth and our clients by failing to recognize that "multiculturalism, or pluralism without walls, is the present and the future."

These are some of the many professional, political and institutional things we can do. As individuals, as lawyers and as a Nation, we are splendidly talented and deeply flawed. But as long as we struggle against our own weaknesses and join together to do so on behalf of our country and our profession, we will find our redemption again and again. That's humbling, and it's also our unfinished work. Because in this ongoing struggle to define our national identity, which is the hallmark of a free people in a constitutional democracy, each of us counts, in the words of James Weldon Johnson, as a hope that the present has brought us.

And I believe that Leon Higginbotham, looking down upon us from Perfection as we pursue this endeavor, might summon the necessary revolutionary force I referred to earlier, the single most powerful force known to humankind, by quoting two of the greatest songwriters of the 20th century. And then, in his mellifluous resonance, he might ask us to remember this:

"And in the end, the Love you take, is equal to the Love you make."