

# KEEP THE DREAM OF EQUAL JUSTICE ALIVE

## Yale Law School Commencement Address

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Prof. Carter has written, as he does, eloquently and elegantly, about the lack of a spiritual presence in our public life. To make a very small contribution to changing this, I would like to start with a prayer. I have selected one by Alan Paton, author of *Cry the Beloved Country*. It seems a fitting one to start a career in the law.

So I ask that each of you, whatever your religion, whatever your spiritual beliefs, in your own way, let us all unite our hearts and minds in prayer.

Lord, open my eyes that I may see the needs of others; open my ears that I may hear their cries; open my heart so that they need not be without succor; let me not be afraid to defend the weak because of the anger of the strong, nor afraid to defend the poor because of the anger of the rich.

Show me where love and hope and faith are needed, and use me to bring them to those places.

And so open my eyes and my ears that I may this coming day be able to do some work of peace for thee. Amen.

If you take this prayer to heart, if you say it every morning before you leave for work, if you live it, you will have a great and fulfilling life in the law.

I want to thank the class of 1999 for asking me to make a few remarks, for giving me this opportunity to make one final plea on behalf of the poor and marginalized, and to ask that they not be excluded from this legal system that you will soon be a part of as lawyers, teachers, and policy makers, and as journalists who will inform the American people about their legal system.

### I.

Graduation is a time for the expression of thanks to those who contributed so much to you being here—parents, spouses, lovers, friends, faculty. I know some of you want to express thanks to others: to the support staffs, the secretaries, administrative assistants, those in the library who helped you find that obscure source late one night, and the people in the computer office who helped you retrieve that lost file, the custodial workers, who set up the chairs before an event and take them down afterwards and have been indispensable to everything you have done here from classes to gatherings, and the others here who make the law school function on a day-to-day basis.

Would you like to express your thanks to these people?

I encourage you to do more. I encourage you to commit yourselves to appreciate those who will work with you during your careers as paralegals, assistants, secretaries and in other roles. I encourage you to commit yourselves to treat them with the utmost kindness; never to lose your temper, to throw things at them, or to abuse them in other ways. It's not necessary. It's not right. Everyone is entitled to be treated with dignity and respect and valued for what they do.

There are many offices in academia, in government, in the private sector, in public interest programs, in judges' chambers where these indispensable workers are not only not appreciated, but abused. They are underpaid for the amount of work they do, sexually exploited, denied health care and other benefits, and discarded for reasons that have nothing to do with work performance. You may be in a situation where you see these things.

For example, you may be in an office where the people who work long hours day after day are underpaid and denied benefits, while other people making hundreds of thousands of dollars a year, even more, are out playing golf. You will have the choice to remain silent or to speak out.

## II.

There is much that can be said in praise of our legal system, but of course I am not going to spend time on that. This is no time for complacency, to pat ourselves on the back. It is a time to assess the challenges, to contemplate for a moment how you might spend a meaningful life in the law and how you might make an important contribution to society.

During this past year, we celebrated the life and mourned the loss of a great graduate of this law school, A. Leon Higginbotham, Jr. At a time when so many in our society including, sadly, many prominent graduates of this law school advance their careers by shameless rank opportunism, by the abandonment of their principles and their friends when convenient, and the betrayal of their closest aids and supporters, Judge Higginbotham, like Thurgood Marshall, Charles Hamilton Houston, and so many others who were engaged in the struggle for equality in the courts, is an example of a true hero in the law.

Judge Higginbotham was the son of a father who was a laborer and a mother who was a domestic. He had thrust upon him at birth the enormous burdens that are imposed on African Americans the many vestiges of slavery, including the government-sponsored oppression and the intense and passionate hatred felt toward members of his race by so many. He accepted that burden with courage and dignity to become a great judge, a great lawyer, historian, teacher and mentor.

I hope you had an opportunity to hear him speak while you were here, perhaps at the Arthur Liman Memorial Lecture last year or at the law journal banquet a few years ago. I hope you heard that beautiful, deep voice, telling wonderful stories of a remarkable life:

- about leaving Purdue after complaining in the midst of a very cold winter to the President of

the University about the complete lack of heat in the attic of a house where the black students lived, and being told by the President to either accept things as they were or leave; young Leon Higginbotham left;

- about coming to Yale law school in the fall of 1949, one of only three black students in his class;

- of being unable to find legal work in the summers of law school because no firm would hire him, and working summers in 110 degree temperatures behind a blazing hot asphalt machine from 7 in the morning to 3 in the afternoon, and then working the night shift at a New Haven brass mill;

- of his awe and inspiration watching, in the spring semester of his first year, Thurgood Marshall argue *Sweatt v. Painter* before the Supreme Court, the case that challenged the refusal of the University of Texas law school to admit African Americans.

Judge Higginbotham was fond of speaking about the ultimate judgement that would be rendered by the "high court of history." He cared passionately about equal justice. He pointed out that "the law and its instruments are shapers; they can be used to eliminate injustice or to sustain it." "The law," he once said, "masks an extraordinary amount of cruelty. You have to find ways to penetrate it." And we might honor his memory today by thinking for a moment of how much there is left to do to achieve equal justice in our courts.

#### A.

The Code of Hammurabi said that the purpose of the law is to protect the weak from the powerful. This notion was echoed by Justice Hugo Black, who saw the courts as havens of refuge for those who are weak, outnumbered, and unpopular. In 1956, Justice Black wrote in the case of *Griffin v. Illinois*, "There can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has."

If you expressed those sentiments to anyone with even with the most superficial knowledge of our justice system today, they would laugh. Law does not protect weak from strong. It is used by the strong to keep the weak in their place. And we all know that the kind of trial, the kind of justice indeed, whether one gets to court at all depends upon the amount of money he or she has.

We have never had equal justice in the courts, but it has always been a fundamental aspiration of our legal system and our society, a statement of the kind of legal system we want to have, and the kind of society we want to become.

Access to a lawyer is indispensable to having one's day in court. But today, most people in our society cannot afford a lawyer for a civil or a criminal matter. The American Bar Association recently released a survey that found that 68 per cent of the respondents disagreed with the statement, "It is affordable to bring a case to court." And I expect that most of the other 32 per cent have not checked

recently on the cost of a lawyer.

Legal services programs, funded by the federal government, and some states, made a start on delivering on the promise of equal justice. The Supreme Court, made a start toward equal justice over 35 years ago in *Gideon v. Wainwright*, holding that a poor person accused of a crime is entitled to a lawyer when his or her freedom is at stake.

But Congress has decided that various classes of people among them immigrants & prisoners are not entitled to representation by legal services lawyers. Congress also decided that poor people who do receive representation from legal services lawyers will be represented by lawyers who operate under restrictions that do not apply to lawyers representing anyone else. Lawyers with legal services programs operate under a whole host of restrictions. For example, they cannot challenge welfare regulations, they cannot bring class action suits.

Congress also eliminated funding for programs that were attempting to provide legal representation for the 3,500 men, women and children on death row at the stages of review where no lawyer is provided. And the promise of *Gideon* has never been realized. Courts have held that lawyers who are asleep, drunk, under the influence of drugs, or fail completely to investigate and defend their clients are sufficient "counsel" for purposes of the Sixth Amendment.

Denying lawyers denies people access to the legal system. What Congress has done is only one part of a disturbing trend to deny the poor any access to the courts by simply denying them lawyers.

In Louisiana, when corporations were accused of pollution, they didn't defend their actions. Instead, they got the Louisiana Supreme Court to prohibit the law school legal clinic from representing those affected by the pollution. They sought to avoid reaching the merits of the dispute by denying lawyers to those injured and thus deny them access to the courts. The Arizona legislature passed legislation prohibiting the clinic at the law school from representing prisoners.

Apparently there is a fear that if poor people get lawyers, the next thing they will want is justice.

A person rotting in jail, subject to degradation and abuse, denied medical care, subject to repeated rapes and mistreatment all violations of the Constitution under even the most restrictive view of it, except, perhaps for the view of Justices Thomas and Scalia<sup>1</sup> can go to court and obtain the protections of the constitution if he or she can afford a lawyer. But poor people who suffer these constitutional violations will continue to suffer them because they have no lawyer and no access to our legal system.

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1. See *Hudson v. McMillan*, 112 S.Ct. 995, 1004-11 (1992) (Thomas, J., dissenting) (expressing the view that the beating of a prisoner, who has his feet shackled and his hands cuffed behind his back, by two guards did not constitute a violation of the Eighth Amendment's prohibition of cruel and unusual punishment). See also A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect* 45 HASTINGS L.J. 1405, 1424-27 (1994) (criticizing Justice Thomas' dissent in *Hudson*).

A wrongfully convicted person with money can petition the courts for review of his or her conviction and sentence, and obtain release. But most poor people cannot obtain review of their cases without the help of a lawyer. Without lawyers they are left to languish in prison, even though they may have been unconstitutionally convicted and be entitled to release.

Sometimes a poor person stands alone at the bar of justice, as did Exzavious Gibson, a man condemned to death in Georgia, with an IQ in the 80s, who stood before a judge, bewildered, at the first hearing for review of his case. The judge asked him if he was ready to proceed. Gibson replied that he needed a lawyer. The judge explained that he was not entitled to a lawyer and asked whether he would like to "put up" any evidence he had. Gibson replied that he didn't know what to do; he needed a lawyer.

Nevertheless, the judge proceeded with the hearing. The state was represented by an assistant attorney general who specialized in capital habeas corpus cases. After his former attorney had been called as a witness against him, Gibson was asked if he wanted to cross examine. Again, Gibson asked for a lawyer. Again, the judge ignored his request. Gibson had no idea how to conduct a cross-examination.

Gibson tendered no evidence, examined no witnesses, and made no objections. The judge denied Gibson relief by signing an order prepared by the attorney general's office without making a single change. The Georgia Supreme Court upheld the denial of relief last February.

How can we claim to have equal justice - when lawyers are denied to those most in need of the protections of the law?

With enough money one can get an adequate defense. One example is provided by a repeat offender, the Royal Caribbean Cruise Lines, which engaged in a fleet-wide conspiracy of releasing oily waste in the oceans. The Cruise Line ultimately pleaded guilty to conspiracy and obstruction of justice, paid a fine and promised the dumping would never happen again. The very next month, it was caught doing the same thing again, discharging oily waste and creating false records to cover it up. It recently entered more guilty pleas to making false statements to the coast guard and paid another fine.

What interested me was not the corporate irresponsibility, the blatant violation of the promise that had been made, and the efforts to conceal violations of the law, but the legal representation that Royal Caribbean received. The Cruise Line was represented by two former Attorneys General of the United States, Elliott Richardson and Benjamin Civaletti, and two former Justice Department environmental chiefs. And that was only the top echelons of the legal team. Is there anyone here that doesn't think money had something to do with it? Could the case against Royal Caribbean really have been so complicated that they needed all that legal firepower?

Compare the representation that Royal Caribbean received with the representation provided to three men in Houston, Texas, Carl Johnson, Calvin Burdine, and George McFarland, who faced not a

fine, but the loss of their lives. All three were represented by lawyers who slept through their trials. The *Houston Chronicle* described one of the trials as follows:

Seated beside his client . . . defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the [case against his client, George McFarland].

When [the judge] finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

The 72-year old longtime Houston lawyer explained: "It's boring,"

This performance does not violate the Sixth Amendment right to counsel, the trial judge explained, because, while the Sixth Amendment guarantees the right to a lawyer, it does not guarantee that the lawyer has to be awake. This gives new meaning to what it means to be represented by the "dream team." And I suppose you could say that judge exemplified what it is to be a strict constructionalist. The convictions and death sentences in all three cases were upheld on appeal. Carl Johnson was put to death in 1995.

These are only three of most the pronounced examples of scandalous quality of legal representation provided poor people accused of crimes, people who supposedly are *guaranteed* a lawyer by the Constitution. What does it say about our commitment to equal justice, to the rule of law, when judges, courts and legislatures are engaged in the wholesale violation of the constitutional requirement, established in *Gideon*, to provide lawyers to poor people accused of crimes? This is not about whether one is for capital punishment or against it or whether one is tough on crime. This is simply about fairness, due process, equal justice.

In the criminal justice system today, it is often better to be rich and guilty than poor and innocent. And that is not equal justice.

## **B.**

We are falling far short of equal justice in including people of all races, backgrounds, in our court system. Judge Higginbotham warned us:

The impact of our heritage of slave laws will continue to make itself felt into the future. For there is a nexus between the brutal centuries of colonial slavery and the racial polarization and anxieties of today. The poisonous legacy of legalized

oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws had never existed.

Throughout his life he reminded us that our history of slavery and legalized oppression has left us without African American judges, lawyers and law professors. But despite the efforts of Judge Higginbotham, Thurgood Marshall and many others, our legal system remains the institution least affected by the civil rights movement, and here too, we are going backward, not forward.

It is well established that an African American is more likely than a white person to be stopped by police, to be arrested, to be put in chokehold, to be denied bail, to be convicted, and to be sentenced to harsher penalty.

The *Atlanta Constitution* conducted a study of every sentencing since 1990 in Georgia where the Confederate battle flag is still displayed in courtrooms, a flag adopted as the state flag by Georgia's legislature to show its defiance to *Brown v. Board of Education*. The *Constitution* found that a white person is 30 to 60 percent more likely than blacks to get probation instead of jail time. This was true among people with similar prior criminal records. That has something to do with a judiciary that includes very few African American judges.

In our two of our largest and most diverse states, California and Texas, we are moving toward a legal system that is even less representative than the one we have now. In Texas, 12 percent of the population is black, but only 3.4 percent of the lawyers are black. Twenty-five percent of the population is Hispanic, but only five percent of the state's lawyers are Hispanic.

The Texas Supreme Court, which handles civil matters, has a plaque outside its courtroom with the Confederate flag and a quote from Robert E. Lee. It has never had a black member. It has one Hispanic judge among its nine judges. The Texas Court of Criminal Appeals, located in the same building, has a plaque beside its courtroom saying that the building is dedicated to Texans who served the Confederacy. That court has no African American or Hispanic judge among its nine members.

Of all the courts in Texas — appellate, trial, and statutory — only eight percent of the judges are Hispanic and only three percent are African American.

And there is every reason, as Judge Higginbotham repeatedly pointed out, that there will be even less representation of racial minorities in the future. Since the United States Court of Appeals for the Fifth Circuit decided *Hopwood v. University of Texas*, there has been a drastic decline in African Americans and Hispanics at Texas law schools.

Last fall, the University of Texas law school had only 8 black and 30 Hispanic students in its first-year class of 455. The year before, there were only 4 blacks in a class of 468. Similarly, in California, after passage of Proposition 209, the number of African Americans entering Boalt Hall dropped to one last year and nine this year, down from 20 in 1996. The UCLA law school has so few black law students that the *Black Law Journal* moved from UCLA to Columbia Law School.

Someone wrote in an article in the *New York Times Magazine* a couple of weeks ago, and others have said, that it doesn't matter that African Americans cannot get in Boalt Hall or UCLA. They can go to Riverside. When I read that I was reminded of Judge Higginbotham's description of Thurgood Marshall's argument in *Sweatt v. Painter*. The question was put to Marshall, why do blacks need to go to the University of Texas law school? Why can't they go to their own law school or some other law school?

Thurgood Marshall responding by pointed out the number of members of the Texas legislature who were graduates of the University of Texas Law School, the governors, senators, and representatives in Congress that had gone to the University of Texas Law School, and then, looking at Justice Tom Clark, pointed out that even a member of the United States Supreme Court was a graduate of the University of Texas law school.

The point that Justice Marshall made then is equally valid today, as everyone in this graduating class knows that attendance at certain law schools, participation on law journals, and serving as judicial law clerk opens doors and provides opportunities that might not otherwise be there. That is one reason there is so much concern that the current members of the U.S. Supreme Court have had only seven African American law clerks out of a total of 428.

This underrepresentation of African Americans, Hispanics and other racial groups in the legal profession and on the bench should concern all of us. Non-Hispanic white people will be less than 50 percent of the populations of Texas and California in a few years, and our country is becoming more diverse. *Hopwood* is being urged in other courts. The proponents of Proposition 209 are advocating its objectives throughout the country.

Is it not in everyone's interest for courts to reflect the population? Are our courts ever going to be seen as credible and legitimate, are their decisions going to be respected, if whole segments of the population are excluded from participating?

We know pluralism helps courts in making decisions. Look at the tributes to Justice Marshall by Justices O'Connor and Justice Kennedy.<sup>2</sup> It was clear that conversations with Justice Marshall exposed them to a world they did not even know existed.

In too many communities in our country, the police are seen not as protectors, but as an army of occupation; courts are seen not as institutions to be revered, as institutions that protect rights, but as oppressors - that lock up the young black men for excessive periods of time.

There will be a reckoning during your careers. If we continue in the direction we are going now denying lawyers to those who most need them, perpetuating the exclusion of African Americans

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2. See Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1994).

and other racial minorities from positions in the legal system, there will come a time it will be necessary to sandblast the words "Equal Justice Under Law" off the Supreme Court building. It may become so obvious that we have to admit that our courts are like the skyboxes at the stadiums, built with taxpayer money, but a luxury only for the wealthy. It may be necessary to tell the American people, the courts are for Royal Caribbean Cruise Lines, for Charles Keating, for Phillip Morris. But for those with no money? Sorry, no justice for you.

Perhaps during your career at the bar, we will take down the scales of justice that you see at so many courthouses and law firms and replace them with decals that read "The American Express Card is welcome here."

### III.

It is your job to see this does not happen. You now become the trustees of justice. It is a sacred trust. And you cannot escape these issues.

As a corporate lawyer, you may make hundreds of thousands of dollars a year, even over a million a year, you can be isolated from the problems of society so that you never see them, never hear about them, but your security and your ability to help your clients will eventually be threatened if the American people see the court as only for the rich and powerful.

As a law professor, you can develop the greatest, most perfect theories about how the law should be applied, produce the most outstanding scholarly articles, but it means nothing if the courts have no integrity, if the kind of justice a person gets depends upon the amount of money she or she has.

As a policy maker, you may develop the best policy ever conceived anywhere, but it will mean nothing if there is no rule of law, if the courts lack credibility and legitimacy.

You can be the fairest and most ethical prosecutor that ever prosecuted a case, but the adversary system will not work if the poor are represented by lawyers paid token amounts and denied the resources need to investigate cases and prepare defenses.

And if you do nothing, you will be taking a position. Silence and indifference contribute immensely to the injustices that exist and the trend toward a less representative legal system that is not available to those most in need of its protections.

Justice will not come until those who are not hurt are just as indignant as those who are.

Many of you came to this law school with dreams - to make the world a better place. Your dreams may be the only hope for equal justice for many in our society. The legislatures are unwilling to pay for it; the courts are unwilling to order it. But as you step out of this law school, your dreams run into the reality that one needs to make a living, the reality that we live in a society obsessed with money, power and approval of those in power.

Judge Higginbotham would remind you that high court of history will look at more than how much money you made, how much power you gained, how much acceptance you realized.

I started out my career in the law representing poor people in the coal fields of Appalachia. There was a nurse there who treated and comforted the sick. Most of her patients did not have doctors because too many members of the medical profession, like members of the legal profession, were somewhere else in the pursuit of money. A doctor from the university medical center would come by from time to time to deal with the most serious cases.

After one visit, being enormously impressed by the work of the nurse, he said to her, you should go to a great teaching hospital, where you could live in a nice house instead of that shack back in the hollow, in a city where you enjoy culture and socialize with interesting people. God knows you deserve it. And the nurse replied, "Well, if God knows, that's good enough for me."

She had learned a lesson we do not learn in law school; in this one or any other. But it is a valuable lesson, and if you learn it, if you continue to dream the dreams that brought you here, some of you will find that law is a calling like the ministry, like teaching in elementary school, like caring for the health of sick people in Appalachia. You will be very fortunate indeed to find a life in the law that is fulfilling and meaningful as you as Oliver Wendell Holmes said wear your heart out in pursuit of the unattainable.

I hope that, whatever path you take in your lives that follow this ceremony today, when you look back, 50 years from now, on your life, you will see that you opened your eyes and your heart to the needs of others, that you were not afraid to stand up for the weak and the poor, and that you continued to live the dreams that brought you here, and particularly the most fundamental dream of our society and our legal system, described so beautifully by the great poet Langston Hughes:

There's a dream in the land.  
With its back against the wall.  
By muddled names and strange  
Sometimes this 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>3</sup>

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3. Langston Hughes, *Dream of Freedom*, in GOOD MORNING REVOLUTION: UNCOLLECTED WRITING OF SOCIAL PROTEST BY LANGSTON HUGHES 170 (Faith Berry, ed., 1992).