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This essay was written for a conference honoring my friend, the Honorable A. Leon Higginbotham, Jr.[1] I was grateful for the opportunity to reflect on Judge Higginbotham's sterling legacy as a jurist, scholar, and teacher.

The program description for the panel on which I participated, "Race, Values, and the Judiciary," implicitly suggested that *race matters* in the selection of judges. There are at least four debatable propositions latent in this suggestion. The first is that all black judges perceive their role in the same way; the second is that race routinely influences the decision making of black judges; the third is that, in their decision making, black judges are obliged to respond to the perceived needs of the black community at large; and the fourth is that the presence of blacks in the judiciary has changed our system of justice for the better. I subscribe only to the last proposition.

In thinking about these issues, I first turned to Judge Higginbotham's extraordinary 1974 opinion in *Commonwealth of Pennsylvania v. Local Union 542*.[2] This case arose from a claim of racial discrimination in employment in the construction industry. The defendants moved to have Judge Higginbotham disqualify himself for bias, because he had given a speech at the annual meeting of the Association for the Study of Afro-American Life and History. In his speech, Judge Higginbotham addressed the history of racial discrimination in America and its many injustices. He also endorsed civil rights, but he did not refer to the pending litigation or to any of the parties in the case before him. And there was nothing in his speech to suggest that he would not follow the law in carrying out his judicial duties.

In rejecting the defendants' claim, Judge Higginbotham issued a long, scholarly, powerful, and very timely opinion. There were very few blacks on the federal bench in 1974, and it is fairly clear to me that Judge Higginbotham was being "tested," just as many blacks were in those years when they ascended to positions of importance in professional endeavors.

Judge Higginbotham responded to the challenge in his own inimitable

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1. "Race, Values, and the American Legal Process," a scholarly working conference in honor of the legacy of the Honorable A. Leon Higginbotham, Jr., sponsored by the Black Law Students Association, Yale Law School, New Haven, Connecticut, February 22-24, 2002.

2. 388 F. Supp. 155 (E.D. Pa. 1974).

fashion and his opinion was a *tour de force*. It compelled—with irrefutable authority, grace, and conviction—that he be taken seriously, without regard to his race; it instructed would-be racists to "get off of our backs"; and it made it clear that no serious minority judge would be intimidated by a non-minority person seeking to play a "race card" in the judicial forum.

There are two very important points that Judge Higginbotham made in *Commonwealth of Pennsylvania* with which I totally agree. First, he noted that

> [A judge] must have neighbors, friends and acquaintances, business and social relations, and be a part of his day and generation. * * * [T]he ordinary results of such associations and the impressions they create in the mind of the judge are not the "personal bias or prejudice" to which the [judicial disqualification] statute refers.[3]

Not all judges would fully subscribe to this view. In 1982, I wrote an opinion in which I cited this passage from Judge Higginbotham's opinion.[4] In a separate opinion, my esteemed colleague, Judge Spottswood Robinson (who was also African American), argued that

> those who take on th[e] judicial role may no longer participate in the daily intercourse of life as freely as do others. They have a duty to the judicial system in which they have accepted membership fastidiously to safeguard their integrity—at the expense, if need be, of "neighbors, friends and acquaintances, business and social relations." . . . [A]nd one who is unwilling to make the sacrifice is unsuited to the office.[5]

I disagree with Judge Robinson's view, because I always have believed that if judges are to continue developing as people after joining the bench—and if they are to decide cases as well as they are able—they should maintain a diverse group of friends, travel widely, give speeches (that do not engage political disputes or improperly pertain to matters before the court), and seek out opportunities for the exchange of ideas. I believe that these things can be done easily without a judge infringing his or her responsibility to insure honest, fair, and thorough treatment of the cases before the court, and also without any "appearance of impropriety." Yet, my view is not "right" and Judge Robinson's view is not "wrong." We simply saw things differently. And we did not betray our racial heritage in embracing our respective views.

The second important matter covered by Judge Higginbotham in *Commonwealth of Pennsylvania* concerns the "role of judges." His main point, that racial affinity does not disqualify a person from serving as a judge, is straightforward. However, his thesis rests on two powerfully important precepts that are worth repeating:

> [First,] there is a dramatic difference between the role which legislator[s], politicians, and elected officials play in our society, one which is far closer to the cutting

3. 388 F. Supp. at 159 (quoting *United States v. Gilboy*, 162 F. Supp. 384, 400 (M.D. Pa. 1958)).
4. *PATCO v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982).
5. *Id.* at 599 (quoting *Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 159 (E.D. Pa. 1974)).

> edge of policy development, and the role which could be tolerated or expected from a federal judge. I willingly accept those limitations; they are inherent in the judicial process. I am aware that Judge Higginbotham is not Senator Higginbotham, or Mayor Higginbotham, or Governor Higginbotham, but I also know that Judge Higginbotham should not have to disparage blacks in order to placate whites who otherwise would be fearful of his impartiality.
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> [Second, it is obvious that] black judges should not decide legal issues on the basis of race. . . . The outcome of . . . case[s] will be directed by what the evidence shows, not by the race of the litigants.[6]

Judge Higginbotham is equally clear that the outcome of cases should not be directed by the race of the judge. At one point in his opinion, he says, "of course I will . . . follow any mandate of the Supreme Court, or any applicable federal law" in rendering judicial decisions.[7] And he makes it clear that this is so without regard to whether the result favors members of his own race.

I completely agree with Judge Higginbotham's view that the race of a judge should not determine his or her judgments. There is no "race card" to be played in judicial deliberations. I recognize that there are ideological differences among judges. We often come from very different backgrounds and, before taking the bench, we develop political views that can be quite different. In my experience, however, judges normally adhere to the conviction that "principled decision making" is essential to the credibility and success of the judicial function. We decide cases on the basis of the law, not on the basis of our personal preferences. As a result, the legal system is largely coherent and predictable—which is a good thing.

The judicial system is neither airtight nor static, however. My time on the bench indicates that from five to ten percent of our cases can be categorized as "very hard." In such cases, careful research and reflection fail to yield conclusive answers. And when there is no clear "right" answer to a case, it is more likely (although not inevitable) that decision making may be influenced by a judge's personal views.

Because a judge's personal views may come into play in "very hard" cases, it can be argued that race may at times have a predictable impact on judicial decision making. But this argument holds water only if it is true that all black judges think alike on all legal issues, *i.e.*, that race is a proxy for ideology. Such a suggestion is quite wrong, in my view. Think about the political and ideological positions of black legal scholars here at Yale and at other major law schools—the range of views is staggering, as well it should be. There is no good reason for all black legal scholars or judges to think alike on all issues. And there is no overriding "black perspective" on which black judges rely in their decision making. Indeed, I am not even sure how to conceptualize a "black perspective" in thinking about, say, a rate-making case on appeal from

6. 388 F. Supp. at 180.
7. *Id.* at 171.

the Federal Energy Regulatory Commission, or an appeal in a Freedom of Information Act case, or a challenge to regulations promulgated by the Environmental Protection Agency, or an appeal from a final order of the SEC in a securities fraud case. These are the types of cases that I hear and decide every day.

This is not to say that there are not some cases—particularly those in areas involving equal opportunity and discrimination, standing, and criminal law—in which black judges may sometimes bring a unique vision to the judicial deliberative process. Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to these areas of the law. Of course, not all blacks have the same exposure to these problems, in part because class, not merely race, affects one's exposure. And not all blacks share the same views on the solutions to the problems. But, just as most of my Jewish colleagues have more than a fleeting understanding of anti-Semitism, the Holocaust, and issues surrounding Israel and Palestine, most blacks have more than a fleeting understanding of the effects of racial discrimination.

But even when black judges bring a different perspective to the judicial function, that perspective should rarely change the outcome of a judicial decision. The reason is that we are bound to follow the law, not our personal ideological preferences in decision making, and, for the most part, that is what we do.

I have found that intelligence, open-mindedness, fairness, diligence, integrity, common sense, and a commitment to the rule of law matter most in assessing a judge. And I do not think that any one group has a monopoly on these qualities. In my experience, open-minded judges come in all shades. *Nevertheless, I do not doubt for a second that there must be racial diversity on our nation's courts in order to ensure both the quality and legitimacy of judicial decision making.* There are three reasons for this.

First, we purport to live in an open, democratic society, and we subscribe to the principle that all people are created equal. Moreover, as a national ideal, we positively prohibit discrimination based on race. It is therefore imperative that blacks in American society have a full and fair opportunity to participate in our systems of governance, including our courts, lest the promise of equality ring hollow.

Second, black judges, like black law professors, continue to serve as important role models. Shortly after I started teaching at the University of Michigan Law School in 1970, I met with the Black Law Students Association to gain a sense of how the students viewed my role. Paraphrased, here is what the students told me:

> We do not need you on any picket lines. We need you to be a role model. We want you to be as good as any professor in the law school. We want students to subscribe

> to your classes in the same numbers as they do other classes. If you are respected, we will be respected.

The message was simple but profound. As a critical mass of minority students entered law school, the need for diverse role models was magnified for *all* members of the academic community. When non-minority students were not exposed to outstanding minority teachers, they too easily harbored distorted views of minority students as intellectually deficient. Likewise, some nonminority faculty had confused views of minority students, because they had had no occasion to work with minority peers of equal standing in the profession. And many minority students may have felt that, in the absence of outstanding minority faculty members, they lacked the role models necessary to overcome some of the burdens of racial polarization.

The same principles operate in the judiciary. The strong presence of black judges has a powerful impact on how non-minority judges, lawyers, and litigants view minority persons, and it also serves as an inspiration for minorities who aspire to positions in the legal profession.

Finally, racial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process. I do not mean to suggest that black judges should serve in a "representational" role, seeking to enforce some mythical black perspective. Indeed, I reject this view, for all judges are obliged to enforce the law no matter what their perspectives on matters of race. Nonetheless, "being black" in America connotes something. America is not a fully integrated society, either economically or spiritually, so blacks in America continue to be seen and treated differently than persons who are not black, and many blacks continue to feel differently about their place in society than do many nonminorities.

I do not know how to quantify these racial differences; but I am convinced that they exist and should be given voice in our judicial deliberations. If I sometimes bring unique perspectives to judicial problems—perspectives that are mine in whole or in part because I am black—that is a good thing. It is good because it is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them. And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion. It provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles. A deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law.

A more diverse judiciary also reminds judges that all perspectives inescapably admit of partiality. With this understanding, judges are less likely to

fall prey to the temptations that trouble scholars and members of the public who believe that judicial decision making is mostly a product of personal ideology.

It is therefore clear to me that, although there is no "race card" to be played in judicial deliberations, the presence of blacks in the judiciary changes our system of justice for the better.