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LOYOLA

LAW REVIEW

O F L O S A N G E L E S

A. LEON HIGGINBOTHAM JR.:
WHO WILL CARRY THE BATON?

F. MICHAEL HIGGINBOTHAM
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*F. Michael Higginbotham**

&

*José Felipé Anderson***

I. INTRODUCTION

It was a rainy November day during Thanksgiving weekend of 1997. The scene was the Washington, D.C., childhood home of Dr. Evelyn Brooks Higginbotham,¹ A. Leon Higginbotham Jr.'s beloved wife. Our assignment was to assist in the removal, packing, and transport of a few prized family heirlooms that were to be taken to their home in Newton, Massachusetts.

On the early morning drive into Washington, D.C., our conversation was mostly idle chit-chat. Little did we know that the circumstances of the day would lead to an amazing set of discussions, the importance of which we could never have imagined at the time. When we arrived, we were greeted by "the Judge,"² who had just finished his breakfast. As we entered, he smiled and gave a sigh of

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1. Professor of Afro-American studies and Divinity at Harvard University.

2. While he preferred to be called Leon, "the Judge" was used as a term of respect by those who worked for him and knew him well in recognition of his 30 years of service as a federal judge and the belief that he exemplified all that a judge should be: honest, fair, compassionate, and wise.

relief noting that we had just enough time to pack up the items, load the car, and safely get to the airport even in the midst of the heavy rainfall.

II. CONVERSATION WITH THE JUDGE

The Judge was pleasant but deliberate as he began discussing our task. During the course of the Judge's instructions, perhaps as a way of encouraging the swift completion of our duties, he proudly shared that his wife was quite a track star in high school. He explained that she was known not only for her sheer speed, but also for the precision of her passage of the baton during relay races.³

As the rain intensified and delay seemed inevitable, the Judge made a decision to take a later flight. Now visibly more relaxed, he began to reflect on his life and the current state of race relations. Perhaps still thinking about his wife's track and field exploits, he wondered out loud, "Who would carry the baton in the new millennium?" This time, however, the race to which he was referring was not on the field of athletic competition, but involved the comprehensive national civil rights agenda that began in the early 1960s.⁴

The conversation started with the frightening reality that old soldiers do die. The Judge queried, "Do you realize that within five

3. Track and field relay races involve teams of four persons and a baton. In order for a team to complete the race each runner must successfully pass the baton to the next runner after the completion of his or her portion of the race. If the baton is dropped at any point in the race it is often impossible for the offending team to win due to the additional time required to pick up the baton. Thus, successful relay teams are made up not only of fast runners but of those who can quickly and carefully pass the baton. *See* CARL LEWIS & JEFFREY MARX, *INSIDE TRACK: MY PROFESSIONAL LIFE IN AMATEUR TRACK AND FIELD* 144-52 (1990) (discussing how mishandling of a relay baton caused the United States Olympic team to be disqualified in 1988 in the 4 x 100 meter relay race).

4. Besides the Fourteenth Amendment of the United States Constitution and the Civil Rights Statutes of 1866, Congress passed several additional civil rights laws during the 1960s. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 1971); and the Fair Housing Act of 1968, Pub. L. No. 100-430, 120 Stat. 1636 (codified as 42 U.S.C. §§ 3601 to 3631). Also, various executive orders issued by United States presidents during the 1960s supported a comprehensive national civil rights agenda. *See, e.g.,* Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (1962) (barring overt segregation from federal housing programs by President Kennedy).

years, we of the civil rights old guard are all going to be dead or near dead?"⁵ He talked of his concern about the stagnation of the civil rights movement and how committed advocates seemed to be overburdened with the multitude of issues and distractions presented by current events. It is not that the Judge believed other social issues were not important; rather, his concern was that support for civil rights in general was fading and too little progress⁶ had been made since the early 1960s when he began his career in public service.⁷

By appointment of President Lyndon B. Johnson, Judge Higginbotham served as vice chairman of the National Commission on the Causes and Prevention of Violence. Chief Justices Warren, Burger, and Rehnquist appointed him to a variety of Judicial Conference

5. At his retirement press conference in 1991, the Dean of the civil rights old guard, the late Justice Thurgood Marshall, raised a similar concern. When asked why he was retiring, "Marshall barked incredulously in his baritone voice. . . 'I'm old. I'm getting old and coming apart.'" MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 4-5 (1992).

6. The status of the black middle class is indicative of the lack of racial progress in America. By 1940, about 5.7% of black males and 6.6% of black females had entered middle class occupations, while 35.7% of whites held that status. See Bart Landry, *The Enduring Dilemma of Race in America*, in *AMERICA AT CENTURY'S END* 197 (Alan Wolfe ed., 1991). "On the eve of the civil rights movement, 1960, the effectiveness of discriminatory practices in the job market was apparent in the sizes of the black and white middle classes, which were now 13.4 and 44.1 percent of employed workers, respectively." *Id.* Progress during the last decade has slowed as the black middle class has been reduced and the black underclass has increased.

7. A. Leon Higginbotham Jr. was born the only child of A. Leon Higginbotham Sr. and Emma Douglas Higginbotham in Trenton, New Jersey. He graduated from Ewing Park High School in Trenton at the age of 16 and went on to Purdue University, but transferred to Antioch College in Ohio, from which he graduated in 1949. In 1952, he graduated at the top of his class from Yale Law School and was admitted to the Pennsylvania Bar in 1953.

After a successful private practice, Judge Higginbotham was appointed by President John F. Kennedy in 1962 to the Federal Trade Commission. In 1964, President Lyndon B. Johnson appointed him a federal district court judge, and in 1977, President James Carter appointed him to the court of appeals. He served as Chief Judge of the United States Court of Appeals for the Third Circuit from 1989 to 1991, and served as senior judge until his retirement in 1993.

During his judicial service, Judge Higginbotham also found time to teach at the law schools of Harvard, University of Michigan, New York University, University of Pennsylvania, Stanford, and Yale.

committees and other related responsibilities. Prior to his judicial appointment, he served as president of the Philadelphia Branch of the NAACP, as a commissioner of the Pennsylvania Human Relations Commission, and as a special deputy attorney general. In November 1995, he was appointed to the U.S. Commission on Civil Rights. He reminded us that those forces who would dismantle all that had been built by the civil rights old guard were busy at work with their destructive philosophy.⁸

The Judge observed that those persons who were willing to speak against traditional civil rights positions like integrated public education, affirmative action, and public assistance for the poor, could always find access to the mass television and print media in order to make their misguided points.⁹ This was particularly true for minorities who would speak against these traditional positions. The average citizen who has time only for the evening news and mainstream newspaper sees these frequent commentaries and tends to believe that there is much more disunity within the civil rights community and less consensus among its leaders than really exist.¹⁰

Another problem with the anti-civil rights commentary in the mass media is the lack of opportunity to refute it. There are relatively few commentary pieces by racial minorities in the opinion and

8. In an "open letter" to then Speaker of the House of Representatives, Newt Gingrich, Judge Higginbotham criticized the Republican-proposed "Contract with America." The Judge identified a series of legislative reforms that he believed were destructive to minorities, the poor, and especially children. He wrote that "[t]he retrogression that your contract has set loose will only beat down the poor, it will engulf us all." A. Leon Higginbotham Jr., *Dear Mr. Speaker: An Open Letter*, NAT'L L.J., June 5, 1995, at A19.

9. The Judge noted that television, magazines, and newspapers always seem to find space to print radical conservative points of view like those attempting to explain racial differences in genetic terms. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (attempting to justify differences in intelligence between racial groups through quantitative methods).

10. An example of this point is reflected in the commentary concerning Justice Clarence Thomas. While there appears to be little support for Thomas within the civil rights community, commentary suggests that the community is divided. See Joan Biskupic, *Shedding Silence, Justice Thomas Takes On Critics*, WASH. POST, Sept. 23, 1998, at A1; Editorial, *Justice Thomas Speaks*, WASH. POST, July 31, 1998, at A24; Rich Mkhondo, *The Judge Who Is Not Black Enough*, THE STAR, July 2, 1998, at 3.

editorial pages of major newspapers. The Judge believed that the role of the scholar publishing articles in journals, newspapers, and magazines was important and should be continued. He believed, however, that there was an immediate need to add new names and fresh perspectives to the frequent voices in the nation's commentary pages.¹¹

The Judge suggested that major newspapers and television networks get comfortable with the few well-established civil rights commentators like Carl Rowan,¹² Clarence Page,¹³ and Anthony Lewis.¹⁴ He reasoned that while these commentators have made significant contributions, other perspectives could add to the valuable dialogue. In addition, he spoke glowingly of the inroads that members of the Harvard Afro-American Studies Department were making to bring a greater legitimacy and larger audience to the sophisticated study of racial issues. Led by Henry Louis Gates Jr.,¹⁵ and housing such luminaries as Cornel West,¹⁶ William Julius Wilson,¹⁷ and

11. The Judge was well known for serving as a mentor to hosts of law clerks, research assistants, and students whom he encouraged to try and make an impact on the law through persistent, thoughtful, and constructive dialogue on the issue of civil rights.

12. Carl Rowan is a syndicated columnist who authored several books, including a biography of Justice Thurgood Marshall. See CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993).

13. Clarence Page, a Pulitzer Prize-winning columnist for the *Chicago Tribune* and a regular commentator on the nationally syndicated television show, *The MacLaughlin Group*, is one of only a few blacks whose commentary receives national attention. In 1996, he published his book, *Showing My Color: Impolite Essays on Race and Identity*.

14. Anthony Lewis, a veteran reporter covering the Supreme Court for the *New York Times* and currently a columnist, has become nationally known through his frequent commentary and his books, including the classic, *Gideon's Trumpet*, and his latest publication, *Make No Law*.

15. Professor Gates is the author of numerous books, including the award-winning *The Signifying Monkey: A Theory of Afro-American Literary Criticism*. He is also the recipient of several awards, including a MacArthur Foundation "genius grant" in 1981.

16. Professor West elevated and broadened the dialogue on racial issues by exposing their intellectual study to a wider audience. Several of his books have been best sellers. See, e.g., CORNEL WEST, *KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA* (1993) (discussing racial subordination and its relationship to the larger crisis in our society); CORNEL WEST, *RACE MATTERS* (1993).

Evelyn Brooks Higginbotham,¹⁸ the Judge believed that major strides could be made because of the power and heightened visibility provided by Harvard's position in the intellectual community.¹⁹ Still, the Judge noted that no matter how visible the national commentators might get or how illustrious Harvard and its faculty might be, these scholars were only a handful, and Harvard was but one place with a finite number of people. He lamented that such a group could only do so much while reminding us that there were thousands of newspapers, magazines, and television and radio stations affecting the attitude of millions of Americans everyday.

The Judge reasoned that what was required to make a real impact was the constant push to be heard by an ever-increasing number of voices. He explained that although the number of racial minorities in the academic community was still sorely under-represented both at the college and law school levels,²⁰ there were still outstanding scholars of color in every part of the country teaching at schools of every size and type. These lesser-known scholars have produced outstanding work but have not gotten adequate exposure. The Judge believed these thinkers were the key to keeping the civil rights agenda squarely before the public. He envisioned that they needed to be vociferous and constant voices in their respective corners of the world, constantly pushing to make their positions known to the local media, even if their attempts were frequently rejected.

This "squeaky wheel gets the grease" theory was not simply a suggested approach but an imperative survival technique. The Judge explained that "if our voices fade to silence it will be extremely difficult to revive them. One by one, our traditional civil rights issues

17. Professor Wilson is the author of numerous books and articles, including the award-winning books *The Declining Significance of Race* and *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy*.

18. Professor Evelyn Brooks Higginbotham is the author of the groundbreaking book *Righteous Discontent: The Women's Movement in the Black Baptist Church, 1880-1920*. Presently, she is completing a biography on the Judge.

19. Many consider Harvard University to be the finest institution of higher education in the world. It has the largest endowment of any university.

20. See generally DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994) (discussing Professor Bell's battle to have a woman of color added to the Harvard Law School faculty).

will drop from both local and national radar screens.²¹ Such a development would be a real American tragedy.”

Much of the Judge's scholarship focused on the real American tragedy of racial discrimination. In his 1978 masterpiece, *In the Matter of Color*,²² he provided a penetrating account of the racial discrimination that existed when the Constitution was created.²³ This work was rich in historical detail and in the analysis of cases and statutes.²⁴ What set *In the Matter of Color* apart from other historical

21. A 1988 *Newsweek* article observed that “[t]he old civil-rights networks of academics, community-service workers, government officials and foundation people have fallen apart.” David Gelman et al., *Black and White in America*, NEWSWEEK, Mar. 7, 1988, at 21. Another commentator more recently remarked that as “more than one black scholar has pointed out, the black family survived centuries of slavery and a century of so-called separate but equal treatment.” DARIEN A. MCWHIRTER, *THE END OF AFFIRMATIVE ACTION: WHERE DO WE GO FROM HERE* 79 (1996). “But it did not survive the urban ghettos, which became a fact of life for too many African Americans in the 1970s and 1980s.” *Id.*

22. A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978). The book has been cited by federal and state courts as a reliable source of legal history during the colonial period. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 328-29 (1987) (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting); *United States v. Long*, 935 F.2d 1207, 1211 (11th Cir. 1991); *Commonwealth v. Rogers*, 393 A.2d 876, 880 (Pa. Super. Ct. 1978).

23. During the colonial period, the institution of slavery developed rapidly, creating a need for a system of rules to govern all of its circumstances. “As slavery rapidly entrenched itself in the plantation colonies during the early years of the eighteenth century, it forced the colonists to come to grips with novel problems which arose from the very nature of the institution.” WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 103-04 (1968). Fashioning law for such a “peculiar institution” proved difficult because “representative assemblies in America and colonial officials in England were trying to stuff a new kind of property into old legal pigeonholes and were frequently unable to achieve a very good fit.” *Id.* at 104.

24. The history of the United States and conflicting public attitudes about slavery made conflict over the continuing validity of the institution almost inevitable. As Professor Derrick Bell explained, “[b]y 1776, when the American colonies were ready in the name of individual rights to rebel against English domination, slavery had been established for more than a century. The Revolutionary period thus revealed an increase in the general ambivalence of the white majority as to the status of blacks.” DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 26 (3d ed. 1992). There was certainly obvious contradiction “between the recognition of individual rights demanded by white Americans

works on race²⁵ was its detailed statute and case law discussion. While the Judge explained that his first book brought a great deal of attention to the issues that he believed were important and did so in a way that law review articles could not, he warned that writing comprehensive books was very time-consuming, requiring long periods of uninterrupted concentration that he rarely enjoyed with his busy schedule.²⁶ It was this schedule, he explained, that had delayed the publication of his most recent book, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*.²⁷

Shades of Freedom documented how United States law was used to create and embrace notions of racial inferiority.²⁸ Using concrete statistics and penetrating news accounts, *Shades of Freedom* strikes at the core of the current debate over whether racism is a thing of the past or continues to thrive by demonstrating that "the more things change, the more they stay the same."²⁹ For those who

for themselves and the suppression of those rights for blacks, free and slave, living in their midst." *Id.*

25. During the peak of the civil rights movement of the 1960s, a number of outstanding books on black history were published. *See, e.g.*, LERONE BENNETT JR., *BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA* (1962); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* (3d ed. 1967); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); BENJAMIN QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* (3d ed. 1987).

26. After serving 30 years as a federal judge, he retired in 1993. At the time of his death on December 14, 1998, he had an active professional life serving as Public Service Professor of Jurisprudence at Harvard, Of Counsel at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, and Commissioner at the United States Commission on Civil Rights.

27. A. LEON HIGGINBOTHAM JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* viii-ix (1996).

28. *See id.*

29. The question of whether America has made substantial progress toward achieving racial harmony has been the subject of much discussion. Recently, the debate has raged over whether efforts to achieve racial harmony and justice through integration have failed despite the legal evolution from slavery to legally mandated racial equality for African Americans. *See* James S. Kunen, *The End of Integration*, *TIME*, Apr. 29, 1996, at 39-45; *see also* José Felipé Anderson, *Perspective on Missouri v. Jenkins: Abandoning the Unfinished Business of Public School Desegregation "With all Deliberate Speed"*, 39 *How. L.J.* 693 (1996) (discussing recent constitutional jurisprudence that makes creative attempts to desegregate public schools almost impossible).

are uncomfortable with candid racial dialogue stated in direct terms, *Shades of Freedom* will be an unsettling read. Even from its opening passages, the Judge confronts the painful legal history of racism in America. He writes that insofar as the law was concerned, "Negroes were not differentiated from 'sheep, horses, cattle,' or 'mares.'"³⁰

The book describes how the legal system prevented the progress of racial minorities because of the law's embrace of presumptions of racial inferiority.³¹ According to the Judge, "[t]he dominant perspective within this volume is the role of the American legal process in substantiating, perpetuating, and legitimizing the precept of inferiority."³² *Shades of Freedom* challenges its readers not to ignore the realities of the historical and statistical perspective.³³ It provides a refreshing change from vague generalities about racial issues that have characterized other recent works attempting to survey the racial landscape.³⁴

30. HIGGINBOTHAM JR., *supra* note 27, at xxiii. One insightful scholar has argued that

the most consistent theme of American history involves white Americans' treatment of the black. . . . His exploitation has been an essential element in the country's rise to world power. It provided the South with marketable capital; it made possible whites' conquest and domination of the wilderness and its resources—which was the precondition of industrial organization—and it provided necessary labor to develop the economy.

ROSE L.H. FINKENSTAEDT, *FACE-TO-FACE: BLACKS IN AMERICA: WHITE PERCEPTIONS AND BLACK REALITIES* 18 (1994).

31. See HIGGINBOTHAM JR., *supra* note 27, at xxiii.

32. *Id.* at xxv.

33. The focus of the book concerns events occurring after the Civil War during Reconstruction when the laws were being reshaped to reflect the end of slavery.

34. Some recent books on the issue of race in America have taken different, sometimes controversial, approaches to explaining the country's current racial disparities. See generally HERRNSTEIN & MURRAY, *supra* note 9 (attempting to explain, through quantitative methods, differences in intelligence testing results between different racial groups). See also DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 551 (1995) (arguing that America's obsession with race is fueled by the civil rights establishment's vested interest in perpetuating black dependency and suggests that "[t]he solution to the race problem is a public policy that is strictly indifferent to race"); STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997) (arguing that affirmative action has failed and is counterproductive).

The book begins with the clever device of listing several notorious examples of recent situations where blacks were wrongly accused of perpetrating heinous crimes. The examples were characterized by two interesting features. First, they came to the attention of most Americans through the mass media.³⁵ Second, each involved white people accusing an anonymous and nonexistent black person of committing the crime.³⁶

Particularly noteworthy among the examples was the 1994 accusation of Susan Smith, who claimed that an "armed black man perpetrated a car-jacking, kidnapped her children who were in the vehicle, and left her [injured] on the side of the road."³⁷ It was later discovered, after weeks of network news coverage regarding the abduction and the search for the alleged black perpetrator, that the story was a total fabrication. Smith was later arrested, tried, and convicted of the murder of her own children.³⁸

Another shocking example offered by the Judge was the case of Charles Stuart, who claimed his pregnant wife had been assaulted in her vehicle and killed by a black man attempting to steal her cash and jewelry. In fact, Mr. Stuart was the prime suspect in the killing of Mrs. Stuart, who died from a gunshot wound to the abdomen, in an elaborate scheme devised by Mr. Stuart and his brother to collect life insurance benefits.³⁹

The Judge found that these examples of false accusation confirmed "the centuries-old precept of inferiority."⁴⁰ As a result of this finding, he reasoned that "[t]he perception of inferiority that

35. Blacks have long complained that media coverage of events in which they are involved is biased against them. Veteran journalist Carl Rowan wrote that during the period immediately after World War II, "[t]he white daily newspapers carried almost nothing about blacks except for an item about someone stealing a chicken or being accused of rape or robbery." CARL T. ROWAN, *BREAKING BARRIERS, A MEMOIR* 65 (1991).

36. The perception that there is a lack of fairness for blacks in the criminal justice system has also been a pervasive problem. Even the Supreme Court has acknowledged that racial discrimination "remain[s] a fact of life, in the administration of justice. . . ." *Rose v. Mitchell*, 443 U.S. 545, 558 (1979).

37. HIGGINBOTHAM JR., *supra* note 27, at xxvi.

38. See Tom Morganthau et al., *Condemned to Life*, *NEWSWEEK*, Aug. 7, 1995, at 19.

39. See HIGGINBOTHAM JR., *supra* note 27, at xxvii.

40. *Id.*

motivated these false accusations against blacks in the 1990s is not unrelated to the perception that legitimized slavery."⁴¹

The Judge concluded that the use of race in these cases was neither incidental nor accidental. He supported his conclusion with a cogent statistical analysis quantifying the present inequality suffered by blacks as compared to their white counterparts. He noted:

In 1993, 28.9 percent of African-American households earned under \$10,000 per year, while 12.2 percent of white households earned under \$10,000 annually. Disparities are, perhaps, the most striking when we witness the plight of America's children. In 1989, almost half (46.1 percent) of all African-American children lived in poverty, compared with 17.8 percent of white children. In 1993, in contrast, 1.9 percent of African-American households earned over \$100,000 annually, as did 6.3 percent of white households.⁴²

The Judge argued that these economic differences were merely a result of continuing racial discrimination, a discrimination that manifested itself in different forms but nevertheless was based on the same underlying assumptions. He called his principal theory the "Ten Precepts of American Slavery Jurisprudence."⁴³ He asserted that these precepts "represent the institutionalized values, standards, or assumptions for which there was a broad acceptance, at least on the part of those who wrote and interpreted the laws."⁴⁴

41. *Id.*

42. *Id.* at xxix.

43. *Id.* at 3. In a keynote address given in 1996, Judge Higginbotham explained that in developing his thesis, he had attempted to "categorize a list of premises or precepts that, taken together, could explain the whole institution of colonial and antebellum slavery" and directed how it should be administered. A. Leon Higginbotham Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1696 (1996) [hereinafter Higginbotham Jr., *Ten Precepts*].

44. HIGGINBOTHAM JR., *supra* note 27, at 5. The Ten Precepts of Slavery are:

1. INFERIORITY: Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of blacks.
2. PROPERTY: Define the slave as the master's property, maximize the master's economic interest, disregard the humanity of the slave

The Judge did not waiver on his position that the precepts were embraced by American law. For example, in discussing the “precept of inferiority,” he reminded readers of the fateful words of Chief

except when it serves the master’s interest, and deny slaves the fruits of their labor.

3. **POWERLESSNESS:** Keep blacks—whether slave or free—as powerless as possible so that they will be submissive and dependent in every respect, not only to the master, but to whites in general. Limit blacks’ accessibility to the courts and subject blacks to an inferior system of justice with lesser rights and protections and greater punishments than for whites. Utilize violence and the powers of government to assure the submissiveness of blacks.

4. **RACIAL “PURITY”:** Always preserve white male sexual dominance. Draw an arbitrary racial line and preserve white racial purity as thus defined. Tolerate sexual relations between white men and black women; punish severely relations between white women and nonwhite men. With respect to children who are products of interracial sexual relations, the freedom or enslavement of the black child is determined by the status of the mother.

5. **MANUMISSION AND FREE BLACKS:** Limit and discourage manumission in order to minimize the number of free blacks in the state. Confine free blacks to a status as close as possible to slavery.

6. **FAMILY:** Recognize no rights of the black family; destroy the unity of the black family; deny slaves the right of marriage; demean and degrade black women, black men, black parents, and black children; and then condemn them for their conduct and state of mind.

7. **EDUCATION AND CULTURE:** Deny blacks any education, deny them knowledge of their culture, and make it a crime to teach those who are slaves how to read or to write.

8. **RELIGION:** Recognize no rights of slaves to define and practice their own religion, to choose their own religious leaders, or to worship with other blacks. Encourage them to adopt the religion of the white master and teach them that God is white and will reward the slave who obeys the commands of his master here on earth. Use religion to justify the slave’s status on earth.

9. **LIBERTY—RESISTANCE:** Limit blacks’ opportunity to resist, bear arms, rebel, or flee; curtail their freedom of movement, freedom of association, and freedom of expression. Deny blacks the right to vote and to participate in government.

10. **BY ANY MEANS POSSIBLE:** Support all measures, including the use of violence, which maximize the profitability of slavery and which legitimize racism. Oppose, by the use of violence if necessary, all measures that advocate the abolition of slavery or the diminution of white supremacy.

Higginbotham Jr., *Ten Precepts*, *supra* note 43, at 1697-98 (citations omitted).

Justice Roger Brooke Taney's⁴⁵ opinion in *Dred Scott v. Sanford*,⁴⁶ where he reasoned that blacks, "being[] of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his [own] benefit."⁴⁷

The *Dred Scott* opinion will be remembered as the legal decision that paved the way for the Civil War.⁴⁸ It will also be remembered, however, as the case that most clearly demonstrates that many white Americans embraced the notion of black inferiority. Justice Taney explained that the assumed inferiority of blacks at the time the country was founded was "fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute."⁴⁹ This view was shared by other writers of the time⁵⁰ and endured after the Civil War into the early 1900s.⁵¹

The Judge suggested that the belief that "Blacks are of an 'inferior order' is an idea that some find difficult to abandon."⁵² Although he recognized that many people would challenge this precept and even more would find the suggestion that they harbor such

45. Taney served as Chief Justice of the United States Supreme Court from 1836-1864. "Taney brought infamy upon himself because he viewed the alleged inferiority of blacks as an axiom of both law and the Constitution, a legal discrimination that he saw sanctioned even in the Declaration of Independence." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 859 (Kermit L. Hall ed., 1992).

46. 60 U.S. 393 (1857).

47. *Id.* at 407.

48. Professor Derrick Bell points out that "the very excessiveness of the decision's language likely spurred those opposed to slavery to redouble their efforts to abolish [slavery]." BELL, *supra* note 24, at 25-26.

49. *Dred Scott*, 60 U.S. at 407.

50. For an interesting collection of pro-slavery writings produced in the decades prior to the Civil War, see SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH (Eric L. McKittrick ed., 1963).

51. After the Civil War, attitudes about racial inferiority were sometimes presented as being supported by dubious scientific research. See 1 HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 5-6 (1978) (summarizing research at the turn of the century alleging that black inferiority was a hereditary characteristic).

52. HIGGINBOTHAM JR., *supra* note 27, at 7.

feelings “downright insulting,”⁵³ he pressed the point in order to attack the notion that the Civil War had a cleansing effect on the sin of slavery.⁵⁴ He expressed grave concerns about the assumption held by many whites that there is no race problem at all that involves their participation. He concluded that the majority of white Americans believe⁵⁵ “that they personally have nothing whatever to do with slavery, segregation, or racial oppression because neither they nor—as far as they know—their ancestors ever enslaved anyone, ever burned a cross in the night in front of anyone’s house, or ever denied anyone a seat at the front of the bus.”⁵⁶ This “self absolving denial,” he maintained, made it “nearly impossible to have an honest discussion about what used to be called ‘the Negro Problem.’”⁵⁷

It is at this stage in *Shades of Freedom* that the Judge made his most powerful points. Although he identified the legal system as the primary culprit in the historical enforcement of the principle of inferiority, he noted that the legal system did not create the inferiority that it supported.⁵⁸ He explained that “[f]rom the time the Africans first disembarked here in America, the colonists [presumably without the benefit of any law] were prepared to regard them as inferior.”⁵⁹ Thus, “when the law abolished state-enforced racial segregation, it still did not eliminate the precept [of inferiority].”⁶⁰

This explains why it is so difficult to remove racial oppression from our society even though *de jure* segregation and discrimination have been eliminated in the law. The Judge believed that the reason why so many statistical,⁶¹ economic,⁶² and educational⁶³ disparities

53. *Id.*

54. *See id.* at 29.

55. This belief was articulated by Justice Scalia. *See* Antonin Scalia, *The Disease As Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147, 152.

56. HIGGINBOTHAM JR., *supra* note 27, at 7.

57. *Id.* at 7-8.

58. *See id.* at 9.

59. *Id.*

60. *Id.*

61. Blacks have been over-represented in the criminal justice system compared to their relative numbers in the population. *See* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 461 (1985).

62. *See supra* note 6 and accompanying text.

63. *See* BELL, *supra* note 24, at 611 (discussing the lower quality of education in predominantly black schools).

are attributed to racism by most blacks and dismissed as mere coincidence by many whites is because the effects of dormant or even unconscious racism emerge through the application of law, but cannot be directly traced to the law itself.⁶⁴

Jeffrey Rosen, a conservative columnist, writing in late 1996 for the *New Republic*, characterized the historical arguments made in *Shades of Freedom* as "crude."⁶⁵ Rosen maintained that the Judge was "wrong to believe that the racism of the Reconstruction Republicans was formally enshrined in the American Constitution" and "that most whites in the Reconstruction era were unwilling to live alongside African-Americans as equal citizens."⁶⁶ The history the book identifies, however, is the best response to Rosen's critique. If the Constitution and the states had adequately protected blacks, why has history demonstrated so strongly their need for legal protection? If whites were so willing to have blacks live side by side with them after Reconstruction, why was the legislative and judicial movement advancing segregation so widespread, and why were so many whites resistant to integration?⁶⁷

While no stranger to criticism from conservatives⁶⁸ and never hesitant to refute their constant attacks,⁶⁹ the Judge's primary concern was to continue the progress begun by the civil rights movement. He recognized that the civil rights tradition that he was fighting to preserve was much more important than his own popularity. Personal attacks, no matter how unfounded, would not dissuade him

64. See *supra* notes 32-34 and accompanying text.

65. Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27-28.

66. *Id.* at 30 (internal quotations omitted).

67. Progress toward actual legal reform in desegregating housing by the Congress, the Executive, or the Supreme Court did not even occur until the 1960s. See HOWARD ZINN, *POST WAR AMERICA, 1945-1971* (1973).

68. See Al Knight, *New Racial Stereotypes Are Replacing the Old*, DENV. POST, Aug. 2, 1998, at G3; Rosen, *supra* note 65, at 28; Tony Snow, *Thomas-phobes Are Unremitting; Clarence Thomas Is Hate Target*, CINCINNATI ENQUIRER, June 22, 1998, at A6.

69. See A. Leon Higginbotham Jr., *Blacks Remember Other Contracts Put Out on Them*, PHILA. INQUIRER, May 11, 1995, at A19; A. Leon Higginbotham Jr., *Breaking Thurgood Marshall's Promise*, N.Y. TIMES MAG., Jan. 18, 1998, at 28; A. Leon Higginbotham Jr., *The Case of the Missing Black Judges*, N.Y. TIMES, July 29, 1992, at A21.

from this focus. The Judge expressed specific concerns about several recent decisions of federal circuit courts of appeals that attacked traditional civil rights doctrine. He spoke of the Fifth Circuit's affirmative action decisions⁷⁰ and the Fourth Circuit's approaches to accused criminals' procedural rights⁷¹ that represented what he called a "substantial threat to what I thought was well settled legal doctrine."

The Judge suggested that some legal scholars needed to get together and "do the difficult work of reviewing every reported civil rights decision of the Circuit Courts and attack those decisions which would serve as precedent to turn back the civil rights clock." He lamented that he did not have time to do it himself, saying that such an effort done properly would require thousands of hours by many diligent academics. He considered such an effort, however, to be the single most important scholarly project one could imagine.

As the rain began to subside and the sun peaked through the clouds, the Judge concluded the conversations of the day with the hope that sometime soon he could sponsor a conference in order to discuss some of these ideas with the many supporters of civil rights throughout the country. He thought that such a gathering could be the touchstone for new strategies and initiatives to create equal opportunity in the new millennium. He imagined a conference similar to the legendary Niagra Project, which served as a catalyst for the important work of the National Association for the Advancement of Colored People.⁷²

70. In 1996 the United States Court of Appeals for the Fifth Circuit held that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny." *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996).

71. See Neil A. Lewis, *A Court Becoming a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1 (describing the Fourth Circuit as "by far the most restrictive appeals court in the nation granting new hearings in death penalty cases, according to statistical studies"). Recently, the Fourth Circuit issued an opinion which directly challenged the validity of the Supreme Court's precedent in *Miranda v. Arizona*, 384 U.S. 436 (1966), which provided that criminal defendants be advised of their rights upon arrest. See *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

72. Founded in 1910, the NAACP is the oldest and largest civil rights organization in the country. Its current chief executive officer, Kweisi Mfume, was selected in 1996 by a committee chaired by the Judge. The organization was started when a distinguished group of blacks and whites convened a con-

As he finished loading the car, the Judge's final thought of the day was about the importance of helping others. He said that minority academics must be mindful of those coming along and should provide them an opportunity to participate in ventures that give them a voice. The Judge was well known for traveling with a host of mentees, assistants, and law clerks, demonstrating the power of his life through example rather than mere talk. He made it clear that to help others was not merely an opportunity, it was a responsibility.

III. CONCLUSION

On December 3, 1998, the Judge made his last public appearance testifying before the House Judiciary Committee considering the impeachment of President William Jefferson Clinton. His powerful and scholarly testimony before the committee helped to convince many members of Congress that the impeachment of Clinton was unsupported by constitutional provisions, inconsistent with legal history, and politically divisive.

As the testimony concluded, the C-SPAN programming continued to show the hearing room as telephone callers made comments about the proceedings. The silent pictures of the hearing room spoke volumes about the Judge's character. While the program host entertained callers, the picture in the hearing room showed a number of congresspersons and staffers requesting photographs with the Judge, to which he happily obliged. With his broad smile and while leaning on the long cane that he used to assist in his travel since undergoing three life-threatening operations just two years earlier, the Judge chatted attentively with his admirers, treating each as if he were greeting an old friend.

As he demonstrated one last time during the impeachment proceeding, as he had done so many times throughout his professional career, the Judge carried the civil rights baton; constantly advancing it forward and carefully protecting it for the next carriers. His

ference on the Canadian side of Niagara Falls in early 1905 to discuss ways to reduce racial discrimination in the United States. A location in Canada was chosen to avoid racial segregation laws in the United States. See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 318-20 (8th ed. 1988).

message was always put in the most positive light, "While much had been accomplished, even more remained to be done."

While the race for equal justice continues, the Judge has finished his portion of the event. But as we remember his life and celebrate his accomplishments, we must not forget his most important question: "Who will carry the baton?"