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BOOK REVIEW

SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS

By A. Leon Higginbotham, Jr.
Oxford University Press 1996 \$30.00

A Touchstone for the Legal Debate on Race for the 21st Century

Reviewed by José Felipé Anderson†

A. Leon Higginbotham, Jr. has had a great impact in shaping the law of the United States for the last four decades as a judge, scholar, and advocate.¹ Although much of his contribution has been deciding issues in the mainstream of American life during his judicial tenure, the heart of his contribution has been conspicuously race conscious.² Recently he has come to the attention of the

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1. Throughout this review I will use the title "Judge" when referring to the author who served for nearly thirty years on the Federal Bench: first on the United States District Court for the Eastern District of Pennsylvania, appointed by President John F. Kennedy, and then on the United States Court of Appeals for the Third Circuit from 1977 until his retirement. He became the Chief Judge of United States Court of Appeals for the Third Circuit in 1989. Currently, Judge Higginbotham is a member of the faculty at Harvard University's Kennedy School of Government and serves as the school's first Public Service Professor of Jurisprudence. His other activities include serving of counsel to the New York law firm Paul, Weiss, Rifkind, Wharton & Garrison, and sitting on the Board of Directors for both the New York Times Company and the United States Civil Rights Commission. See generally Lincoln Caplan, *Judging Leon Higginbotham: A Racial Conscience for America Is Back in the Ring* 82 A.B.A.J. 70-72 (Sept. 1996).
2. Even his earlier jurisprudence demonstrated an acute sensitivity to matters in-

broader public by his personally directed public challenges offered to United States Supreme Court Justice Clarence Thomas³ and Speaker of the House of Representatives Newt Gingrich.⁴

In his 1978 masterpiece, *In the Matter of Color*,⁵ Judge Higginbotham provided a penetrating account of the race-based legal systems of several states during the colonial period.⁶ That work was a de-

volving racial issues. For instance, in 1974 he issued an order enjoining a local union from intimidating blacks to drop discrimination suits against the union. Consequently, the union filed a motion to have Judge Higginbotham recuse himself from the case because of the union's allegation that he was racially biased. That request was rejected by the United States Court of Appeals for the Third Circuit. See GILBERT WARE, FROM THE BLACK BAR: VOICES FOR EQUAL JUSTICE 255-61 (1976).

3. In his famous "open letter" to Supreme Court Justice Clarence Thomas, published shortly after Justice Thomas was appointed to the Court, Judge Higginbotham offered advice to Justice Thomas about the importance of his appointment to African Americans in light of the legacy of his predecessor, Justice Thurgood Marshall. In that writing, Judge Higginbotham recounted the history of the African American legal struggle and cautioned Justice Thomas to remember the "fundamental problems of the disadvantaged, women, minorities, and the powerless." A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1026 (1992).
4. In yet another "open letter," Judge Higginbotham expressed numerous concerns regarding the Speaker Newt Gingrich's proposed "Contract with America," a group of legislative reforms believed by Judge Higginbotham to be harmful to minorities, the poor, and especially children. He wrote that "[t]he retrogression that your Contract has set loose will not only beat down the poor, it will, in time, engulf us all." A. Leon Higginbotham, *Dear Mr. Speaker: An Open Letter*, NAT'L L. J. June 5, 1995, at A19. For a detailed discussion of the proposal and rationale of the Contract with America, see NEWTON GINGRICH, TO RENEW AMERICA (1995).
5. 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 on many occasions as a reliable source of legal history of events during the colonial period. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 328-29 (1987) (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting); United States v. Long, 935 F.3d 1207, 1211 (1991); Commonwealth v. Rogers, 393 A.2d 876, 880 (Pa. 1978).
6. 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 (1977). Fashioning law for such a "peculiar institution" proved difficult; "representative assemblies in America and colonial officials in En-

tailed examination of concrete legal problems created by oppressive, race-conscious laws, particularly against the backdrop of slavery.⁷ What differentiates *In the Matter of Color* from other historical works on race written during the 1960s⁸ is its succinct discussion of a legal system that was based on oppression of minority groups through the control of the law. It is Judge Higginbotham's status as a legal "insider," whose daily labors involve working with the substance of legal decisions, that sets his commentary on the legal system apart from other knowledgeable observers.

Judge Higginbotham's latest book, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (*Shades of Freedom*) is described by the author as the sequel to *In the Matter of Color*.⁹ While not as expansive or detailed as the earlier work, it still retains the same high quality focus on concrete legal decisions as the backdrop for diagnosing the problems presented by racism in the American legal system. Using concrete statistics and penetrating news accounts, *Shades of Freedom* strikes at the core of the current racial debate with a literary tone that might suggest to some readers that its author intends to convey the notion that "the more things change, the more they stay the same."¹⁰ For those who are uncom-

gland 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.

7. 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, "By 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 (3rd ed. 1992). There was certainly obvious contradiction "between recognition of individual rights demanded by white Americans and the suppression of those rights for blacks, free and slave, living in their midst." *Id.*
8. 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* (1966); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (1967); WINTHROP D. JORDAN, *WHITE OVER BLACK: ATTITUDES TOWARD THE NEGRO, 1550-1812* (1966); BENJAMIN QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* (1969).
9. See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* viii-ix (1996) [hereinafter *SHADES OF FREEDOM*].
10. 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 jus-

fortable with candid, racial dialogue stated in direct terms, this book will be an unsettling read. Even from its opening passages, the author 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.'" ¹¹

The primary discussion in the book attempts to establish how the law has caused slow movement in racial progress because of what the author describes as "presumptions of racial inferiority."¹² Judge Higginbotham describes: "[The] dominant perspective within this volume is the role of the American legal process in sustaining, perpetuating and legitimizing the precepts of inferiority."¹³ For those readers who desire to be intellectually challenged on contemporary racial issues, this fact-based chronicle of racism in the post-colonial¹⁴ legal system will provide a refreshing change from vague generalities about racial issues that have characterized other recent works on the subject.¹⁵

The book begins by listing six notorious examples of recent situations where African Americans were wrongly accused of perpetrating heinous crimes. These examples were characterized by two interesting features. First, these events came to the attention of most

tice 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, April 29, 1996, at 38; 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. 639 (1996) (discussing recent constitutional jurisprudence that makes creative attempts to desegregate public schools almost impossible).

11. SHADES OF FREEDOM, *supra* note 9, at xxiii.

12. *Id.*

13. *Id.* at xxv.

14. The focus of the book is primarily regarding the events following the Civil War. This was the period during which the law had to be reshaped after centuries of slavery.

15. Some recent books on the issue of race in America have taken different and sometimes controversial approaches to explaining the countries racial disparities. See RICHARD J. HERRNSTEIN & CHARLES MURRY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (attempting to explain, through quantitative methods, differences in intelligence testing results between racial groups); see also DINESH D'SOUZA, *THE END OF RACISM* 551 (1995) (arguing that America's obsession with race is fueled by the civil rights establishment's vested interest in perpetuating black dependency, and suggesting that "[t]he solution to the race problem is a public policy strictly indifferent to race").

Americans through the mass media.¹⁶ Second, each involved white people accusing an anonymous and non-existent black person of committing the crime.¹⁷ For most readers, these examples will have the effect of either making them receptive to the remainder of the author's message or eliciting a resistance to the message, perhaps causing some to close the book. Whatever reaction the opening examples prompt, one thing is certain: the recounting of those events jolts the reader to attention.

Particularly noteworthy was the 1994 accusation of Susan Smith, who claimed that an "armed black man perpetrated a carjacking, kidnapped her children who were in the vehicle, and left her on the side of the road."¹⁸ It was later discovered, after weeks of network news coverage regarding the abduction and the black man who was allegedly the culprit, that the story was a total fabrication. She was later arrested, tried, and convicted of the murder of her own children.¹⁹ The jury that convicted her, however, spared her from the death penalty.²⁰

Another shocking example offered by Judge Higginbotham is 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. Mrs. Stuart, who died from a gunshot wound to the abdomen, was in fact killed in an elaborate scheme devised by her husband and his brother.²¹ Judge Higginbotham reasons that these examples of false accusation confirm "the centuries old precept of inferiority in American Slavery jurisprudence."²² He further argues that the perception of inferiority that motivated these false accusations against blacks in the 1990s is not unrelated to the perception that legitimized slavery.

16. African Americans have long complained that media coverage of events where they are involved is biased against them. Noted journalist Carl Rowan has written 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).

17. 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 "remains a fact of life, in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 558-59 (1979).

18. *SHADES OF FREEDOM*, *supra* note 9, at xxvi n.17.

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

20. See *id.*

21. See *SHADES OF FREEDOM*, *supra* note 9, at xxvi.

22. *Id.*

Such a dramatic assertion of racial bias, of course, should be approached with caution and supported by more than a collection of newspaper accounts. Indeed, Judge Higginbotham provides more, beginning with a cogent statistical analysis quantifying the present inequality suffered by the African American community. He notes:

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.²³

Judge Higginbotham's graphic introduction sets the foundation for the analytical framework he uses to examine the problem of race. He calls his principle theory "Ten precepts of American Slavery Jurisprudence."²⁴ He asserts that these precepts "represent the institutional values, standards, or assumptions for which there was broad acceptance, at least on the part of those who wrote and interpreted the laws."²⁵ Judge Higginbotham does not waiver on his posi-

23. *Id.* at xxix.

24. *See id.* at 3. In a keynote address given in 1996, Judge Higginbotham explained that in developing his thesis, he 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).

25. *SHADES OF FREEDOM*, *supra* note 9, at 5. The appendix of the book contains a summary of the ten precepts which he believes emerged from the institution of slavery:

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 financial interest, disregard the humanity of the slave except when it serves the master's interest, and deny the slaves the fruit of their labor.
3. Powerlessness: Keep blacks—whether slave or free—as powerless as possible so 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

tion that the precepts have a legal code-like quality. In fact, he emphasizes their pervasive yet unyielding influence on American legal doctrine.

In discussing the "precept of inferiority," Judge Higginbotham reminds readers of the fateful words of Chief Justice Roger Brooke Taney's²⁶ opinion in *Dred Scott v. Sanford*,²⁷ where he reasoned that

system of justice with lesser rights and protection and greater punishments. Utilize violence and the powers of government to assure the submissiveness of blacks.

4. Racial "Purity": Always preserve white male 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 non-white men. As to children who are products of interracial sexual relations, the freedom of enslavement of the black child is determined by the status of the mother.
5. Manumission and Free Blacks: Limit and discourage manumissions; minimize the number of free blacks in the state. Confine free blacks to a status as close to slavery as possible.
6. Family: Recognize no rights to 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 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 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, teach them that God who is white 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 participate in government.
10. By any means Possible: Support all measures, including the use of violence, that maximize the profitability of slavery and that legitimize racism. Oppose by the use of violence if necessary, all measures that advocate the abolition of slavery or the diminution of white supremacy.

Id. at 195-96.

26. Chief Justice Roger Taney of the State of Maryland served as Chief Justice of the United States from 1836 to 1864. "Taney brought infamy upon himself because he viewed the alleged inferiority of blacks as a maxim 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

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."²⁸

The *Dred Scott* opinion will be remembered as the legal decision which increased the tension that ultimately caused the Civil War.²⁹ Consistent with Judge Higginbotham's notion that inferiority of the negro was assumed by the majority of society in Taney's time, the *Dred Scott* opinion further made clear that the perceived inferiority of the negro was a given. Taney explained that the assumed inferiority of the negro 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 politics, which no one thought of disputing, or supposed to be open to dispute."³⁰ This view was unfortunately shared by other writers of the time,³¹ and it endured after the Civil War into the early 1900s.³²

Judge Higginbotham suggests that, as we enter the next millennium, "it might be argued that the belief that African Americans are of an 'inferior order' is an idea that some find difficult to abandon."³³ Although he recognizes that some people will challenge this precept, and many will find the suggestion that they harbor such feelings "downright insulting," he presses the point in order to attack the notion that the Civil War had a "cleansing effect on the sin of slavery."³⁴

COURT OF THE UNITED STATES 859 (1992).

27. 60 U.S. (19 How.) 393, 407 (1857).

28. SHADES OF FREEDOM, *supra* note 9, at 7.

29. 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 7, at 25-26.

30. *Dred Scott*, 60 U.S. (19 How.) at 407.

31. 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 (1963).

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

33. SHADES OF FREEDOM, *supra* note 9, at 7.

34. *Id.* at 29.

Further, he identifies what appears to be another goal of this provocative book—debunking the assumption held by most whites that there is no race problem at all. He concludes that the majority of White Americans believe “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.”³⁵ This “self absolving denial,” he maintains, makes it “nearly impossible to have an honest discussion about what used to be called the ‘negro problem.’”³⁶

It is also in the midst of his discussion of inferiority that he makes one of his most interesting points. Although he identifies the legal system as the primary culprit in the historical enforcement of the principles of inferiority, he notes that the legal system did not create the inferiority that it supports.³⁷ He comments 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.”³⁸ Thus, “when the law abolished state enforced racial segregation, it still did not eliminate the precept [of inferiority].”³⁹

What makes this point particularly interesting is that if the law did not create the precept, but merely assists in supporting it, then that may well explain why it is difficult to remove discrimination from our law by creating new or different laws. Thus, due to the precept of inferiority, the effects of dormant, or even unconscious, racism emerge through the application of law, but cannot be traced to the law itself. This may explain the many statistical,⁴⁰ economic,⁴¹ and educational⁴² disparities that are often attributed to racism by blacks and dismissed as mere coincidence by some whites.⁴³ Judge

35. *Id.* at 7.

36. *Id.* at 8.

37. *See id.* at 9.

38. *Id.*

39. *Id.*

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

41. *See supra* note 23 and accompanying text.

42. *See BELL supra* note 7, at 611 (discussing the lower quality of education in predominantly black schools).

43. *See supra* notes 34-36 and accompanying text.

Higginbotham describes his precept of inferiority as having developed in four historical stages, which are divided over time following the post-colonial period.

The first period, which spanned from 1619 to 1662, presumed inferiority without making it a formal part of the legal process. At this time, "the law did not succeed in articulating a clear rationale of, or in rigid enforcement for, the precept."⁴⁴ In the second stage, lasting from 1662 to the 1830s, the legal process "carefully defined and, when necessary, ruthlessly enforced a precept which before then it had taken for granted."⁴⁵ From the 1830s to the post-Civil War period, "the legal process defended and protected from attacks the crumbling institution of slavery."⁴⁶ It was at this stage that the Supreme Court's disastrous decision in *Dred Scott v. Sandford* contributed to the outbreak of the Civil War.⁴⁷ The final stage began at the reconstruction period⁴⁸ and, according to Judge Higginbotham, "attempted unsuccessfully to break free from the legacy of the precept of Black inferiority."⁴⁹ He explains that it was at this stage "when the nation generally seemed unable or unwilling to totally erase the vestiges of slavery despite the significant constitutional amendments."⁵⁰

In chapter three, discussing the first stage, which he calls "The Ancestry of Inferiority," Judge Higginbotham focuses on the original status of African Americans as indentured servants until their first sale in the Colony of Virginia in 1619.⁵¹ Here, he relates the relationship between colonial religion and the precept of inferiority by pointing out that slave status sometimes depended on whether the negro had accepted Christianity.⁵²

44. SHADES OF FREEDOM, *supra* note 9, at 15.

45. *Id.*

46. *Id.*

47. *See id.* at 16.

48. For an outstanding review of the reconstruction period, see ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION (1990).

49. SHADES OF FREEDOM, *supra* note 9, at 16.

50. *Id.* As one scholar has insightfully noted, "[t]he Civil War had been settled by force of arms, but the legitimacy of this Northern domination had not been resolved, even by 1954. . . . [I]n 1877 when the northern occupying troops were withdrawn from southern soil the understanding [was] that the white South, would be free to impose subordinate status on blacks." ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 19 (1992).

51. *See* SHADES OF FREEDOM, *supra* note 9, at 19.

52. *See id.* at 18-24.

Judge Higginbotham describes the second stage in chapter three, calling it the "Ideology of Inferiority." It was in this period when the legislative process reinforced the precept of inferiority. This stage is characterized as the "most active"⁵³ because legislatures, "in far more rigorous fashion than did the courts, enact the fundamental components of the precept of black inferiority and erased all traces of ambivalence."⁵⁴ Judge Higginbotham identifies a "shift from isolated judicial opinions to more comprehensive legislative enactments regarding the precept of black inferiority."⁵⁵ This time period represented the season of the notorious slave codes. Judge Higginbotham points out, in gripping detail, their effect on the life of blacks:

From 1705 until the end of legalized slavery in 1865, the slave statutes were compiled into codes that varied in their breadth and scope. The codes were both substantive and procedural. The substantive statutes defined the parameters of slavery, regulating the behavior of slaves and regulating the behavior of free people who interacted with slaves. Procedurally, they set up a separate judicial system for slaves, defined their punishment for various crimes, and turned them into a commodity in the economic system. No aspect of lives of slaves or free African Americans was too sacred or mundane not to be regulated by the codes. From the time slaves were born until their death, the codes directly or indirectly regulated where they lived, and how they worked, what God they worshiped, to whom they were "married," with whom they had children and whether or not they were able to raise them, what sort of clothes they wore, and what kind of food they ate.⁵⁶

Some of these codes provided lenient punishment for masters who killed slaves, presuming that a master could not have intended to "destroy his own estate."⁵⁷ One 1705 Virginia law would have treated such a killing as an "accident" as if it had "never happened."⁵⁸

53. *Id.* at 29.

54. *Id.*

55. *Id.* at 29-30.

56. *Id.* at 30.

57. *Id.*

58. *Id.*

Judge Higginbotham also discusses in detail the host of "black codes" that dictated that any percentage of black blood or the African status of a child's mother would determine one's racial status and ability to obtain freedom from slavery under the law.⁵⁹ Such rules guaranteed that slaves would not gain their freedom by marrying whites and prohibited whites from marrying "bond or free" blacks,⁶⁰ thereby reinforcing the notion of inferiority.

In his third stage, described in chapter five, which he calls the "Politics of Inferiority," he explains the evolution of the abolitionist movement and its effects on the ending of slavery. That movement, stimulated by the writings of James Otis,⁶¹ Harriet Beecher Stowe,⁶² and Frederick Douglass,⁶³ set the tone for the movement which would alter the course of the nation.

Judge Higginbotham, however, criticizes some aspects of the abolitionist movement for its sometimes patronizing assumptions that reinforced the precepts of inferiority. He explains:

[A]bundant good intentions aside, the abolitionist view of African Americans served to sustain the precept of inferiority. . . . The fact of the matter is that African Americans were no more saints than they were demons. . . . They deserved to be free not because they were good and gentle, or because they were 'innocent,' but because they were human.⁶⁴

He observes that "[a]bolitionists' perception of African Americans as saintly savages, however benign, was but a mirror image of the slaveholders' perception of African Americans as demonic work-horses."⁶⁵ He concludes this discussion by pointing out that despite erroneous perceptions by the abolitionists, many of them, "at great risk to their reputations and lives, mounted a relentless attack against slavery."⁶⁶

In this same chapter, Judge Higginbotham returns to his discussion of *Dred Scott v. Sanford* and its implications for the post-Civil

59. *See id.* at 30-36.

60. *See id.* at 44.

61. *See id.* at 53-54.

62. *See id.* at 54-55.

63. *See id.* at 55-59.

64. *Id.* at 60.

65. *Id.*

66. *Id.*

War period.⁶⁷ He describes the case as having codified into law, at the highest level of the American legal process, the precept of black inferiority.⁶⁸ He focuses not only on Taney's sinister opinion, but also Abraham Lincoln's ideas about segregation. He reminds us of Lincoln's words that declared a "natural disgust in the minds of nearly all white people at the idea of indiscriminate amalgamation of the white and black races."⁶⁹

Chapter six presents an explanation of the early constitutional writings which fueled the slavery debate when the Constitution was being formed.⁷⁰ He points out the obvious omission of the word "slavery" from the Constitution. The reason that "[t]he founding father's refused to use the word 'slavery' in the Constitution of 1787 reveals that they did not want to acknowledge to the world their legitimization of the precept of inferiority."⁷¹ Judge Higginbotham explains that the founding fathers "were concerned that the documents would not blatantly reveal their sanctioning of an institution the morality of which was increasingly being questioned throughout the world."⁷² He notes that while the Constitution avoided direct references to slavery, provisions referring to it in other ways were included in many other places in the document.⁷³

He notes that despite popular perception, the Emancipation Proclamation did not have the legal effect of completely eliminating slavery. It only freed "slaves within any State or part of a State where people were 'in rebellion against the United States.'"⁷⁴ In a later chapter, Judge Higginbotham examines the post-Civil War period until the turn of the century when "African Americans were killed, mutilated and oppressed for exercising their rights . . . [and] [t]he courts wore blinders to the realities of the south."⁷⁵ He cites the legislative hostility which led Congress to loosen its control of the South and dismantle reconstruction.

He attributes a large part of the blame for this dismantling to a political deal during the presidential election of President Ruther-

67. *See id.* at 61-67.

68. *See id.* at 67.

69. *Id.*

70. *See id.* at 69.

71. *Id.* at 68.

72. *Id.*

73. *Id.* at 69.

74. *Id.* at 73.

75. *Id.* at 91.

ford B. Hayes.⁷⁶ For example, state legislative hostility to the newly freed slaves is illustrated by the shocking statement by the chairman of the Kansas State Republican Committee, who said that the election of Hayes would end federal intervention to protect slaves. The chairman commented, "[a]s matters look to me now, I think the policy of the new administration will be conciliate the white man of the South. Carpetbaggers to the rear, and niggers take care of yourselves."⁷⁷

Chapter eight recounts the Supreme Court cases discussing public accommodations, with particular emphasis on the *Civil Rights Cases of 1883*.⁷⁸ Chapter nine continues the public accommodations focus, discussing how the Court further legitimized inferiority in *Plessy v. Ferguson*, which, according to Judge Higginbotham, "was even more devastating than . . . *Dred Scott*."⁷⁹ This is because *Plessy* was decided "[a]fter the Constitution had declared with specificity that African Americans were citizens of the United States."⁸⁰

Chapter ten moves from the public accommodations area to discussing housing discrimination following the turn of the century. He reviews the early technique of residential housing discrimination, which came to be known as the "Baltimore Idea."⁸¹ Under this plan, many major cities "authorized a comprehensive ghettoization program for their major urban areas."⁸² A 1911 Baltimore ordinance called for "preserving the peace, preventing conflict and ill feeling between white and colored races in Baltimore City, and promoting the general welfare of the city by providing for . . . separate blocks by black and white people for residences, churches and schools."⁸³ Judge Higginbotham posits that the law was based on the notion that "African Americans [are] inferior beings[,] . . . not capable of taking care of property."⁸⁴ Because these laws were adopted for several decades before such restrictions were held unconstitutional, it may well have been too late to reverse a permanent trend in housing segregation. "By 1948, when *Shelley v. Kraemer* established the il-

76. *See id.* at 93.

77. *Id.*

78. *See id.* at 94-107.

79. *Id.* at 108.

80. *Id.*

81. *See id.* at 120.

82. *Id.*

83. *Id.* at 121; *see also* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 310 (1983).

84. SHADES OF FREEDOM, *supra* note 9, at 122.

legality of restrictive covenants, the great 'black metropolises' of the United States had already been formed with the sanction of prior cases."⁸⁵

Judge Higginbotham spends a good deal of time discussing the forgotten history of segregation in the nation's courthouse hearing rooms, bathrooms, and cafeterias in chapter eleven. He also reveals the history of unsettling discriminatory remarks that have too often been used in America's courtrooms.⁸⁶ He concludes that the segregation in courthouses sent a powerful signal to all participants "that legitimated, reinforced, and perpetuated the segregation that was a way of life in the post-*Plessy* South and helped to justify the ideology of racism underlying its existence and enforcement."⁸⁷

In the final two chapters, Judge Higginbotham examines voting rights in two contexts. The first is historical, discussing the civil rights jurisprudence of the Supreme Court headed by Chief Justice Charles Evans Hughes between 1930-1941 and what he describes as the Court's lack of "will" to address the South's pervasive and increasingly sophisticated means of denying African Americans the right to vote.⁸⁸ In the second, Judge Higginbotham discusses the problems presented by the precepts of inferiority in modern day elections. He states that the "[d]enial of the right to participate effectively in the political process has been the most effective mechanism to enforce the precept of inferiority."⁸⁹ Judge Higginbotham strongly suggests that the greatest challenge following the denial of voter participation is the current trend of "racial polarization" that has occurred in recent political campaigns. Such campaigns have "fermented fear among white voters of candidates who may forward the interests of African American citizens."⁹⁰

The book has not been without its critics. Jeffery Rosen, writing in late 1996 for *The New Republic*, characterized its historical arguments as "crude."⁹¹ Rosen maintains that Judge Higginbotham "is wrong to believe that the racism of the Reconstruction Republicans was formally enshrined in the American Constitution, as he is

85. *Id.* at 125.

86. *See id.* at 127-51.

87. *Id.* at 132.

88. *See id.* at 168.

89. *Id.* at 169.

90. *Id.* at 182.

91. *See* Jeffery Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, American Law and the Triumph of Color Over Justice*, *THE NEW REPUBLIC*, Dec. 9, 1996, at 27.

wrong to believe that 'most whites' in the reconstruction era were unwilling to live alongside African Americans as equal citizens.'⁹²

However, the history the book provides is the best retort to Rosen's critique. If the Constitution had 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 great?⁹³ Clearly, the need to maintain African Americans as an inferior class of citizens appears to be at least a plausible explanation.

It seems to me that those who engage in meaningful debate over racial issues into the next century would better serve that debate by examining the historical context of specific statutes and cases that have had a significant racial impact to determine if some common fundamental flaws in our legal or social system can be established. Judge Higginbotham has succeeded in accomplishing this task. The examples of law and conduct that he cites are intended to force interested observers to directly confront our past, however "crude" that past might be. Perhaps we have yet to learn the most basic lessons of our past because we have not accepted the uncomfortable reality that many of the assumptions that nurtured a segregated nation over a century ago still exist.

The book, to be sure, is not intended to be a comprehensive explanation of how each "precept of inferiority" operates.⁹⁴ It is, however, an accurate account of how the desire to create inferiority, supported by custom, endorsed by law, and neglected by meaningful reform, has brought the racial climate in this country to its current sad state.⁹⁵ *Shades of Freedom* provides a poignant chronicle of that past so that those who would ignore history and the stunning

92. *Id.*

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

94. Indeed, Judge Higginbotham explains that his book "is not intended to be an encyclopedia covering all racial legal incidents of the last few centuries—to do that would require many volumes[;] . . . the more comprehensive details of the twentieth-century will be the grist for later volumes and other authors." *SHADES OF FREEDOM*, *supra* note 9, at ix.

95. See Peter E. Edelman, *Toward a Comprehensive Anti-Poverty Strategy: Getting Beyond the Silver Bullet*, 81 *GEO. L.J.* 1697, 1698 (1993) (reviewing statistics and circumstances demonstrating that racial minorities are still the overwhelming victims of crime, poverty, and drug abuse and arguing that those problems are "closely intertwined with issues of discrimination").

impact of racial discrimination will be required to establish why race does not matter.

