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A. Leon Higginbotham: Master of All Trades

Eleanor Holmes Norton*

The achievements of Judge A. Leon Higginbotham originate from complicated sources—strong character, daunting energy, rare intelligence, and a mixture of other personal characteristics too complicated to fully define or understand, much less disaggregate. Of the characteristics that explain the man, two stand out: Judge Higginbotham's intellectual curiosity and energy and his passion for racial justice.

A lifetime of intellectual discovery has taken Leon Higginbotham into unchartered territory, beyond his breakthroughs into the front ranks of law practice and official law. Higginbotham's distinctive opinions would be more than enough to satisfy most judges, content to be counted among the comfortably prominent in their communities and among the conscientiously respectable in their profession. Leon Higginbotham wanted more.

Higginbotham's career on the bench began in 1964 at the zenith of the civil rights movement. I was fresh out of law school, but I had no intention of graduating from the civil rights movement. The judge seemed a counterpoint to the times, a black man sanctioned by the establishment with a federal judgeship. His precocious journey to the federal bench at 36 seemed only to reinforce the point.

Higginbotham was about the age of Martin Luther King, Jr., and not much older than many of the young people then pressing the civil rights movement to new frontiers. His admiration and respect for the movement and for equal rights was as clear as his distance from the movement. I was skeptical of the ground he seemed to hold, astride what seemed irreconcilable places in the society. Full of the militancy and posturing of the movement students of my generation, I often pressed him to show himself, to stand unequivocally on the ground I occupied. The judge did more than merely absorb and tolerate this foolishness. Genuinely curi-

* Congresswoman Eleanor Holmes Norton, who represents the District of Columbia, was Judge Higginbotham's first full-time law clerk. She is a former chair of the Equal Employment Opportunity Commission and a former professor of law at Georgetown University Law Center.

ous, a natural if utterly friendly socratic teacher, he encouraged rather than chastised me. He both teased me and took me seriously. What I did not foresee was that quite apart from the important contributions he would make to the law, Higginbotham would find a way, conspicuously, to leave his mark on racial change in this country.

The skepticism of establishment figures that many of the young people in the movement cultivated had a purpose. Our mocking skepticism was our way of shaking off decades of black apathy, defeatism, equivocation, and even collaboration. Remember, the early sixties were for people, who, as yet, did not call themselves "black," a word that still carried pejorative connotations. In the lifetime of the students of the movement, there had not been a movement of any kind; for their parents, action outside of the courts to crystallize racial grievances had not occurred. If it took the dramatic defiance of sit-ins and demonstrations to make whites understand the oppression of government-enforced racial segregation, direct action also proved necessary to forge the racial solidarity that led to the defeat of official inequality. The civil rights movement created in many the mentality, if not the fact, of revolution, with those who supported and those who opposed the status quo sharply defined. During the movement years of the 1960s there was a presumption that blacks such as Leon, blessed by the established order, were outside the territory that had been defined to facilitate a more intensified struggle. This presumption was necessarily rebuttable, of course, because the movement's declared purpose was to open the establishment—so that judges, legislators, professionals, business people, and every other calling virtually closed to blacks would be pried open.

This, of course, is the contradiction that has been inherent in efforts to rid this country of institutional and personal racism since the Civil War. The overthrow of slavery was a revolutionary act. The Civil War shattered an entire social system and eliminated slavery, the central basis for the economy of the confederacy. The resulting constitutional amendments and legal provisions were intended to complete the job of dismantling slavery and racial discrimination. The revolutionary impulse, however, lost its force after Reconstruction. Ever since the post-reconstruction counter-revolution, the black struggle for equality has been an essentially moderate movement. In a country where African-Americans have been a small minority, court and other law-related challenges have been the major vehicles of redress.[1]

1. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (housing discrimination);

Thus, two traditions are associated with racial change in the United States—the revolutionary civil war tradition and the moderate twentieth century tradition. Higginbotham, however, became a federal judge during a unique period of non-violent defiance that succeeded the years when court cases served as the major mode of protest against discrimination. *Brown v. Board of Education*[2] separates two distinctive twentieth century periods—the pre-*Brown* era dominated by lawyers and courtroom strategies and the post-*Brown* era of the 1960s, when non-violent demonstrations[3] dramatically moved issues of discrimination, where they could no longer be avoided by the American people.

Brown was as close as a court case is likely to come to having revolutionary effect.[4] The case overturned the *sine qua non* of racial segregation by destroying the legal doctrine that had been the foundation for both a regional and a national social system that has had defining economic and cultural force. Ultimately *Brown's* revolutionary effect is evident in a reach far broader than that of the Civil War and its body of amendments and law. The decision and the 1960s movement that followed upset not only racist but sexist doctrine and moved national attitudes, habits and law that had produced unequal treatment also for other people of color, poor people, disabled people, those whose religion differs from majority preferences, and others.

By occupation and experience, Higginbotham was not of the movement generation. Nor did it seem likely that a man who had chosen to become a federal judge sitting in the North would find a place in the work of the civil rights movement. Unlike the lawyers, the demonstrators, the lobbyists, and the legislators of the period, judges lacked the power of initiative. To bring about

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Shuttlesworth v. City of Birmingham, 394 U.S. 147 (V) (1963) (civil rights protests); Burns v. Wilson, 346 U.S. 137 (1953) (*habeas corpus*); Green v. County School Bd. of New Kent County (II), 391 U.S. 430 (1968) (school desegregation); Griggs v. Duke Power Co, 401 U.S. 424 (1971) (employment discrimination).

2. 374 U.S. 483 (1954).

3. Spontaneous black riots in cities throughout the country brought similar attention to issues of poverty and urban neglect. Although the riots for the most part were not deliberate protest strategies, they had a similar effect in point up serious problems in poor African-American communities. These civil disturbances more closely resembled the revolutionary than the moderate tradition of protest.

Although court cases have been the most continuously successful mode of challenge to discrimination, nonviolent direct action galvanized the most significant legislation since reconstruction in a few short years during the 1960s. *Cf.* Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a *et seq.*, 2000a *et seq.* (1982); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982); Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1982).

4. In requiring desegregation of public schools with "all deliberate speed," however, the Court apparently foresaw and even intended to make its decision more palatable and less revolutionary.

change, courts must have an appropriate vehicle and must follow the existing law. This is true even of the Supreme Court, the most powerful court in the world, whose potential to effect events is the equal to that of the President and the Congress.[5]

Yet, Higginbotham has left a body of decisions that have had a significant effect on race law; some of them are discussed in this volume.[6] Title VII of the 1964 Civil Rights Act,[7] in particular, proved a probing detector of race and sex discrimination. Higginbotham and other judges sitting in jurisdictions throughout the country were offered thousands of cases that called forth remedies and resulted in important doctrines that effect not only blacks but other unempowered people.

Higginbotham's importance, however, does not rest on his judicial contributions alone. His unique life's work has been his fruitful probing of the facts, the effects and the meaning of legal slavery. It is a singular contribution.

Significant as Higginbotham's judicial work was, it left him unfinished. A man of prodigious energy, he could not be contained within the strict boundaries of his profession. The search for a worthy challenge set his agile mind in search of intellectual soil more fertile than judges usually find in the cases that come before them. Higginbotham found what professional historians had overlooked in a sombre treasure buried deep in the sea of time. The court decisions and other documents spelling out the detail of legally enforced slavery unfold in Higginbotham's first volume. He has taken senior status on the bench to complete the work which has gradually displaced the law as his first intellectual love.

Higginbotham's personal triumph is even more impressive. He has accomplished what the movement itself is still struggling to resolve—to maintain the posture of challenge while at the same time embracing the best of American opportunities and values.[8] Challenge surely is still required. Of African-Americans, 31.9% live at the poverty rate—compared to 10.7% of whites. These proportions reflect historic retardation that emanates originally from the slave status laws and the decisions Higginbotham has docu-

5. Reynolds v. Sims, 377 U.S. 533 (1964), is an example of the profound effects of a single court decision.

6. Higginbotham's contributions to equality are not limited to race, however as the variety of contributions to this symposium makes clear.

7. 42 U.S.C. §§ 2000a *et seq.*

8. A vigorous Black entrepreneureal class has formed, for example, and now vies for a place in American capitalism. Even this role, however, has been achieved in part through challenge. Legislation that requires outreach to minority-owned and female-owned businesses as a corrective for discrimination has been an important catalyst.

mented. These disparities would not exist today if slavery had not existed and yielded Jim Crow. As a result blacks were bypassed by the opportunities of the Industrial Revolution that eliminated the ignorance and poverty of millions of white immigrants.

At the same time, the civil rights revolution of the 1960s led millions of blacks to pursue successfully what was impossible for their parents. Higginbotham, the son of a laborer and a domestic, has achieved what his parents could not have dreamed for themselves. He has done more, however. Judge Higginbotham has achieved what the civil rights movement has not fully confronted. Positioned in the territory of the status quo, he succeeded in doing for equality what the law allowed. At the same time, Higginbotham was driven by his own intellectual curiosity and energy to find a hidden archaeological treasure that is allowing him to probe the origins of a racial past we must face if we are to free ourselves from it. A sitting judge with more than enough on his judicial plate, Higginbotham moonlighted as a historian and mastered that profession as well.

Higginbotham's professional versatility is the outgrowth of remarkable intellectual and personal drive that would not let him rest. A sitting judge when the civil rights movement peaked, he could not be part of that movement. However, Higginbotham's extraordinary reconciliation of his chosen roles—the judge sitting for his country, the man challenging its version of history—is a victory that has eluded the movement.