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## A Tribute to Judge A. Leon Higginbotham, Jr.: Farewell to a Giant

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# Tribute

## A Tribute to Judge A. Leon Higginbotham, Jr.: Farewell to a Giant\*

Richard W. Rose\*\*

This is but one of many tributes written to commemorate the passing of Judge A. Leon Higginbotham, Jr. who died on December 14, 1998.<sup>1</sup> Higginbotham was a retired Chief Judge of the United States Circuit Court of Appeals for the Third Circuit,<sup>2</sup> as well as a scholar, professor, historian, mentor, and friend. He was only thirty-five years old when President Lyndon B. Johnson appointed him as a United States District Court Judge for the Eastern District of Pennsylvania.<sup>3</sup> Thirteen years later President James E. Carter appointed him to the United States Circuit Court of Ap-

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\*\* Assistant United States Attorney, District of Rhode Island. A.A., Community College of Rhode Island, 1982; B.S., Rhode Island College, 1986; J.D., Northeastern University School of Law, 1990. This tribute reflects my personal views. While in law school, I served as an intern to then United States Circuit Court Judge A. Leon Higginbotham, Jr. (Third Circuit). I would like to thank three fine lawyers for their valuable critiques of earlier drafts of this tribute: Zechariah Chafee, Anthony C. DiGioia, and Robin E. Feder. I would also like to thank the Articles editors at the *Roger Williams University Law Review* for their superlative editing.

1. See Marc Schogol & Maida Odom, *A. Leon Higginbotham, 1928-1998: Legal Giant Who Fought Racism Dies*, Phila. Inquirer, Dec. 15, 1998, at A1.

2. See *id.*

3. See Ronald K. Noble, *A Tribute to a Scholar: A Wise Jurist, and a Role Model*, 142 U. Pa. L. Rev. 531, 531 (1993). See generally Toni M. Jackson & Helen J. Kim, *Judge A. Leon Higginbotham, Jr.: The Man, the Jurist, the Scholar*, 9 Law & Ineq. J. vii, viii-xiii (1991) (listing Judge Higginbotham's publications).

peals.<sup>4</sup> On March 5, 1993, Judge Higginbotham retired from the federal bench.

Judge Higginbotham had many roles off the bench. He was the first African-American and youngest person to serve as a Federal Trade Commissioner.<sup>5</sup> He taught at the law schools of Harvard University, New York University, Stanford, Yale, and the Universities of Hawaii, Michigan, and Pennsylvania.<sup>6</sup> He was awarded over seventy honorary degrees and received the nation's highest civilian honor: The Presidential Medal of Freedom.<sup>7</sup>

My perspective comes as one of the legion of lawyers for whom Judge Higginbotham served as a mentor, champion, and friend. As Harvard Law Professor Charles Ogletree has noted, Higginbotham served as a mentor and father figure to a generation of law professors and lawyers.<sup>8</sup>

Judge Higginbotham belongs to that small fraternity and sorority of Black lawyers who changed the social landscape of America, but never forgot their roots.<sup>9</sup> This list of luminaries includes Thurgood Marshall,<sup>10</sup> William H. Hastie,<sup>11</sup> Charles Hamil-

4. See Noble, *supra* note 3, at 531.

5. See Ronald K. Noble, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*, 72 N.Y.U. L. Rev. 664, 666 n.15 (1997) (book review).

6. See *id.*

7. See *id.*

8. See Schogol & Odom, *supra* note 1, at A30.

9. I use the word Black to describe Judge Higginbotham's ethnic heritage. The Judge himself used the words African-American, Black, and Negro interchangeably. See A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than The Free": Free Blacks in Colonial and Antebellum Virginia, 26 Harv. C.R.-C.L. L. Rev. 17, 17 n.4 (1991). I use a capital B to reflect a sense of self-identification and as an acknowledgment of the historical denouncement of Blacks including the eradication of ancestral names and the use of pejoratives in their place. See John Hope Franklin, *From Slavery To Freedom* 500-01 (4th ed. 1974).

Any student of racism in American courts should, as Judge Higginbotham often noted, examine the work of Professor Derrick A. Bell, Jr. See Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987); Derrick Bell, *Race, Racism and American Law* (3d ed. 1992); Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Cal. L. Rev. 165 (1973).

10. See Carl T. Rowan, *Dream Makers, Dream Breakers, The World of Justice Thurgood Marshall* (1993); see also Casby Harrison, III, *Thurgood Marshall: Legacy of a Civil Rights Advocate*, 41 R.I. B.J. 35 (Mar. 1993) (memorializing Marshall's life and career); A. Leon Higginbotham, Jr., *A Tribute To Justice Thurgood Marshall*, 105 Harv. L. Rev. 55 (1991) (discussing the significance of Marshall's achievements in the area of civil rights).

ton Houston,<sup>12</sup> William T. Coleman,<sup>13</sup> Nathaniel R. Jones,<sup>14</sup> Constance Baker Motley,<sup>15</sup> Spottswood Robinson, III,<sup>16</sup> and Damon J. Keith.<sup>17</sup> His appreciation of his roots, and his fostering of those who followed him have stirred my admiration for the late Judge.

This tribute gives only a cursory review of Judge Higginbotham's career. I anxiously await the full scholarly treatment that is his due. For three months in 1989 I served as a legal intern to Judge Higginbotham as part of the cooperative law curriculum at Northeastern University School of Law. I provided research assistance for two of Judge Higginbotham's legal articles.<sup>18</sup> My

11. William H. Hastie was America's first Black federal judge appointed to the United States Court of Appeals for the Third Circuit by President Truman on October 15, 1949. See Gilbert Ware, *William Hastie: Grace Under Pressure* 227 (1984) (citing *Truman Names First Negro to Appeals Court*, Chi. Trib., Oct. 16, 1949).

12. See Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (1983). Hamilton was, among other things, the first Black member of the Harvard Law Review. See Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 Stan. L. Rev. 161, 166 (1994).

13. William T. Coleman, Jr., was a magna cum laude graduate of Harvard Law School and law clerk to United States Supreme Court Justice Felix Frankfurter. See Higginbotham, *supra* note 10, at 61 n.36.

14. See generally A. Leon Higginbotham, Jr., *Dedication to the Honorable Nathaniel R. Jones*, 63 U. Cin. L. Rev. 1519 (1995) (honoring Jones' legacy and, notably, his efforts on behalf of human rights).

15. Constance Baker Motley was the first Black woman appointed to the federal bench. She was nominated by President Lyndon B. Johnson in 1966. She served as Chief Judge of the Southern District of New York from 1982 to 1986. She began her legal career as a member of the staff of the NAACP Legal Defense and Educational Fund, Inc. She argued ten cases before the United States Supreme Court and won nine of them. Her victories led to the admission of James Meredith to the University of Mississippi; Charlayne Hunter Gault and Hamilton Jones to the University of Georgia; Vivian Malone and James Hood to the University of Alabama; and Harvey Gantt to Clemson College. See William E. Hallerstein, *Foreword: Judge Constance Baker Motley*, 62 Brook. L. Rev. 529, 530 (1996) (outlining Judge Motley's career and collecting her Supreme Court cases); see also J. Clay Smith, Jr., *Black Women Lawyers: 125 Years at the Bar; 100 Years in the Legal Academy*, 40 How. L.J. 365 (1997) (discussing the progression of Black women lawyers in the American legal profession).

16. See Biographies, *The United States Court of Appeals for the District of Columbia Circuit, September 1993-August 1994*, 63 Geo. Wash. L. Rev. 917 (1995).

17. See Edward J. Littlejohn, *Tribute, Damon Jerome Keith: Lawyer - Judge - Humanitarian*, 42 Wayne L. Rev. 321 (1996).

18. See A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 Wash. U. L.Q. 673 (1989) [hereinafter Higginbotham, *Race*]; A. Leon Higginbotham, Jr., *Racism in*

contributions, admittedly minuscule, remain a highlight of my legal career. In large measure this tribute is a personal salute to the lessons of research and scholarship that Judge Higginbotham bestowed upon all those who entered his orbit, however, briefly. It also acknowledges his mentoring and friendship.<sup>19</sup>

### I. THE EARLY YEARS

Judge Higginbotham's mother was a domestic and his father a laborer.<sup>20</sup> He had to remind a member of the United States House of Representatives Judiciary Committee of this fact a few weeks before his death.<sup>21</sup> Judge Higginbotham was testifying before the Congressional Committee against the impeachment of President William Jefferson Clinton.<sup>22</sup> Higginbotham opined: "Perjury has gradations' . . . '[i]f the President broke the 55 mph speed limit and said under oath he was going 49, that would not be an impeachable high crime. And neither is this.'"<sup>23</sup> Representative Robert Barr (R-Ga.) responded, "'I'd be depressed, but I realize there are two Americas out there' . . . '[t]here's a real America that doesn't buy the professor's talk about 'gradations.' Real Americans know that perjury amounts to impeachment.'"<sup>24</sup> Judge Higginbotham's response was resounding:

I am in profound dispute when you speak about the 'real America,' said Higginbotham. The 49 percent who voted for the president, were they not real Americans? Those who disagree with you about impeachment, are they not real Americans? Sir, my father was a laborer, my mother a domestic. I

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*American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. Rev. 479 (1990) [hereinafter Higginbotham, *Racism*].

19. On the personal side, I spent several summer weekends as a guest of Judge Higginbotham and his wife, Harvard Professor Dr. Evelyn Brooks Higginbotham, at their home on Martha's Vineyard. It was there that I gained valuable insight into Higginbotham the man. It was also there that I observed Judge Higginbotham as few others ever have: at leisure. He was an accomplished carpenter and here too, as a would-be apprentice, I proved myself to be unworthy.

20. See Samuel Hughes, *Summing Up Leon Higginbotham*, The Pa. Gazette, Feb. 1993, at 23.

21. See Bob Hohler, *Judiciary Panel's GOP Defying Party Leaders*, The Boston Globe, Dec. 6, 1998, at A19, available in 1998 WL 22237987.

22. See *id.*

23. Sandy Grady, *Going for a Voyage on the Flying Impeachman*, The Fort Worth Star-Telegram, Dec. 5, 1998, at 15, available in 1998 WL 14941812 (quoting A. Leon Higginbotham, Jr.).

24. *Id.* (quoting Rep. Robert Barr).

came up the hard way. Don't lecture me about the real America.<sup>25</sup>

This was vintage Higginbotham. He never forgot, and he never failed to remind others, from whence he came.

He enrolled at Purdue University in 1944 as a sixteen-year old freshman.<sup>26</sup> Judge Higginbotham began his college career intent on being an engineer.<sup>27</sup> His enrollment at Purdue University, however, was short-lived. He has told his story many times and it is often repeated.<sup>28</sup> In the preface to his first book, *In the Matter of Color*, he recounted his story:

In 1944, I was a 16-year-old freshman at Purdue University—one of twelve black civilian students . . . . We slept barracks-style in an unheated attic.

One night, as the temperature was close to zero, I felt that I could suffer the personal indignities and denigration no longer. The United States was more than two years into the Second World War, a war our government had promised would "make the world safe for democracy." . . .

The next morning, I went to the office of Edward Charles Elliot, president of Purdue University, and asked to see him. I was given an appointment.

. . . Forcefully, but nonetheless deferentially, I put forth my modest request: that the black students of Purdue be allowed to stay in some section of the state-owned dormitories; segregated, if necessary, but at least not humiliated.

. . . President Elliot, with directness and with no apparent qualms, answered, Higginbotham, the law doesn't require us to let colored students in the dorm, and you either accept things as they are or leave the University immediately."

. . . Shortly thereafter, I left Purdue University and transferred to Antioch College. Ultimately, I chose the law as my vocation, and in 1952 I graduated from Yale Law School.<sup>29</sup>

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25. *Id.*

26. See Hughes, *supra* note 20, at 19.

27. See *id.* at 23.

28. See *id.* He also told his story during a speech at Yale Law School. See *id.*

29. A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process*, *The Colonial Period* vii-ix (2d ed. 1978).

At Antioch College, Higginbotham was one of the two Black students.<sup>30</sup> The other was Coretta Scott, who would later marry the Reverend Dr. Martin Luther King, Jr.<sup>31</sup> It is ironic that Judge Higginbotham's indignity at Purdue had its genesis in segregated campus housing; a hurdle that is not yet overcome.<sup>32</sup> From these humble and humiliating beginnings, Judge Higginbotham rose to greatness. After graduating from law school, he began his meteoric rise in Philadelphia, Pennsylvania.<sup>33</sup>

He was turned down by a prominent Philadelphia law firm where, during his initial interview, the interviewer discovered he was wearing "black skin."<sup>34</sup> His first job was as a law clerk for Pennsylvania Supreme Court Justice Curtis Bok.<sup>35</sup> He was an Assistant District Attorney in Philadelphia and a partner in the law firm of Norris, Green, Harris, and Higginbotham.<sup>36</sup> He was appointed a Federal District Judge for the Eastern District of Pennsylvania in 1964—at the age of thirty-five.<sup>37</sup> Twenty-nine years later he retired from the United States Circuit Court of Appeals for the Third Circuit. His work during those three intervening decades helped shape the legal and academic dialogue regarding matters of race, law, and society. In broad, inelegant strokes, this is his Philadelphia story.

## II. HIGGINBOTHAM: THE JUDGE; SCHOLAR; MENTOR AND FRIEND

### A. *The Judge*

While much deserved acclaim has come to Judge Higginbotham for his scholarly pursuits—he was first and foremost, a judge. When he was nominated to the United States Circuit Court of Appeals, he was unanimously rated "exceptionally well qualified" by

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30. See Hughes, *supra* note 20, at 23.

31. See *id.*

32. In 1999, the poorest student housing at the University of Rhode Island is located in a section of campus called the "Ghetto." Indeed, University officials admit to its existence and its decrepit condition. See David Andrew Stoler, *The Ghetto Goes to College: Is There De Facto Segregation at URI?*, Providence Phoenix, Feb. 5, 1999, at 9 (intimating that the "Ghetto" houses the majority of minority students who live on campus).

33. See Hughes, *supra* note 20, at 20.

34. *Id.*

35. See *id.*

36. See *id.*

37. See *id.*

the American Bar Association (ABA).<sup>38</sup> Former Supreme Court Justice William J. Brennan, Jr. has described Judge Higginbotham's opinions as "special."<sup>39</sup>

There is so much that is special about Judge Higginbotham's opinions: their exposition is clear—often eloquent; their tone is measured; their legal analysis is meticulous and thorough. The thoroughness bespeaks several admirable qualities: a mastery of doctrine, an awareness of subtleties, a belief in law's capacities to solve problems, and a desire to place legal results in context.<sup>40</sup>

In his three decades on the bench, Judge Higginbotham wrote over 650 opinions covering the gamut of legal issues.<sup>41</sup> His most memorable case was *Commonwealth v. Local Union 542, International Union of Operating Engineers*.<sup>42</sup>

It was a class action employment discrimination suit against a local of the International Union of Operating Engineers.<sup>43</sup> As Judge Higginbotham recalled it:

[M]en, some of whom had come back from Vietnam, had been beaten up in union headquarters seeking a job. One person's skull had been fractured, and he was in the hospital. And they came in asking for relief. It was a case which had violence against American citizens solely because they wanted a job. I guess that, at a gut level, seeing the fear of the men who testified about the violence that they had been subjected to—that was a memorable case.<sup>44</sup>

Incredibly, Judge Higginbotham participated in the case from 1971 through 1980. He continued to oversee the case by designation even after he was appointed to the Circuit Court of Appeals.<sup>45</sup> A

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38. *Id.* at 19. Compare Judge Higginbotham's ABA rating with that of Clarence Thomas when he was nominated to the Supreme Court. Thomas was rated "qualified," a minimum passing grade. Two members of the ABA Standing Committee on Federal Judiciary rated him "not qualified," and one member abstained. Terri Jennings Peretti, *Restoring the Balance of Power: The Struggle for Control of the Supreme Court*, 20 *Hastings Const. L.Q.* 69, 83 n.57 (1992). Justice Thomas' ABA rating was lower than any previously confirmed nominee. *See id.* at 83.

39. Anthony A. Lyle, *Benchmarks*, Pa. Gazette, Feb. 1993, at 2.

40. *Id.*

41. *See Noble, supra* note 3, at 532.

42. 488 F. Supp. 988 (E.D. Pa. 1980), *cited in* Lyle, *supra* note 39, at 2.

43. *See Commonwealth v. Local Union No. 542, Int'l Union of Operating Eng'rs*, 347 F. Supp. 268, 272 (E.D. Pa. 1972).

44. Lyle, *supra* note 39, at 2 (quoting A. Leon Higginbotham, Jr.).

45. *See Local 542, Int'l Union of Operating Eng'rs*, 488 F. Supp. at 989-91.



review of the many opinions the Judge wrote during the course of the case leads to several observations.<sup>46</sup>

First, even when unfairly and perhaps disingenuously challenged, Judge Higginbotham responded generously. For instance, the defendant moved sharply for the Judge's recusal, arguing: 1) it was a case brought under the Civil Rights Act of 1964; 2) the judge was Black; 3) he had criticized Supreme Court decisions addressing racial discrimination; 4) he believed the Supreme Court would not be a catalyst for improving race relations in America; 5) he was a leader in the civil rights movement; and 6) he was a celebrity within the Black community.<sup>47</sup> The Judge responded gently but conclusively: "This research has convinced me that defendant's position, *though rich in good faith*, is devoid of merit."<sup>48</sup> Higginbotham's response illuminates a second point about his style.

Judge Higginbotham's response typified his erudition. He responded with a twenty-seven page opinion rich in American law and history.<sup>49</sup> He used footnotes as mini-scripts. The points made during the course of the text, necessarily followed as conclusions based on the quantum of data used to support each premise. One can only imagine the defense counsels' reaction to such a stunning rebuke.

Finally, the case highlights some of the Judge's attributes, as observed by Justice Brennan, "a mastery of doctrine, . . . subtleties, . . . law's capacity to solve problems, and a desire to place legal results in context."<sup>50</sup> In the final paragraph of the final decision in *Commonwealth v. Local 542*, Judge Higginbotham wrote: "As I close my responsibilities on this case, I extend my best wishes to all of the parties. I trust that in the future they can be as effective in settling this case as they have been vigorous in litigating it."<sup>51</sup>

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46. See *id.* at 994-95 n.5 (collecting cases).

47. See *Commonwealth v. Local Union 542*, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 157-58 (E.D. Pa. 1974).

48. *Id.* at 160 (emphasis added); see also A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftmanship*, 100 Harv. L. Rev. 795 (1987) (honoring Harvard's contribution to American jurisprudence before questioning its historical commitment to poor people, the powerless, and the dispossessed).

49. See *Local 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. at 155.

50. Lyle, *supra* note 39, at 2 (quoting William J. Brennan, Jr., *Tribute to Judge A. Leon Higginbotham, Jr.*, 9 Law & Ineq. J. 383 (1991)).

51. *Local 542, Int'l Union of Operating Eng'rs*, 488 F. Supp. at 994.

Being an excellent judge, however, does not completely define Judge Higginbotham. He was also a distinguished scholar.

### B. *The Scholar*

Judge Higginbotham wrote two books: *In the Matter of Color—Race and the American Legal Process*<sup>52</sup> and *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*.<sup>53</sup> In addition, he has published sixty-seven scholarly articles.<sup>54</sup> In *In the Matter of Color*, Judge Higginbotham analyzed jurisprudence in six colonies—Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania—and traced the evolution of slavery law through legislative acts and judicial opinions.<sup>55</sup> It meticulously “document[ed] the vacillation of the courts, the state legislatures, and even honest public servants in trying to decide whether blacks were people, and if so, whether they were a species apart from white humans, the difference justifying separate and different treatment.”<sup>56</sup> As Higginbotham noted in his introduction: “No people were ever yet found who were better than their laws, though many have been known to be worse.”<sup>57</sup>

*In the Matter of Color* won several awards including the American Bar Association Silver Gavel Award; the National Bar Association Literary Award; the Frederick Douglas Award, National Conference of Black Journalists; the Book Award, National Conference of Black Lawyers; and the Charles Houston Medallion of Merit, Washington Bar Association.<sup>58</sup>

Judge Higginbotham followed up his first book with *Shades of Freedom*, which “surveys chronologically the history of slavery and

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52. Higginbotham, *supra* note 29.

53. A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (1996).

54. *See id.* at 207-11.

55. *See* 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, 1695 (1996).

56. Higginbotham, *supra* note 29, at 7.

57. *Id.* (quoting William Goodell, *The American Slave Code in Theory and Practice* 17 (photo. reprint 1969) (1853)).

58. *See* Noble, *supra* note 5, at 665 n.9. For a thoughtful review of *In the Matter of Color*, see Robert J. Cottrol & Raymond T. Diamond, Book Review, 56 *Tul. L. Rev.* 1107 (1982).

racism in the United States."<sup>59</sup> It also creates what Professor Ronald K. Noble has called "groundbreaking jurisprudential framework, distilled to the 'Ten Precepts of American Slavery Jurisprudence.'"<sup>60</sup> The Ten Precepts are: (1) inferiority;<sup>61</sup> (2) property;<sup>62</sup> (3) powerlessness;<sup>63</sup> (4) racial "purity";<sup>64</sup> (5) manumission and free blacks;<sup>65</sup> (6) family;<sup>66</sup> (7) education and culture;<sup>67</sup> (8) religion;<sup>68</sup> (9) liberty—resistance;<sup>69</sup> and (10) by any means possible.<sup>70</sup>

59. Noble, *supra* note 5, at 668.

60. *Id.* at 669.

61. "**Inferiority:** Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of blacks."

Higginbotham, *supra* note 53, at 195.

62. "**Property:** Define the slave as the master's property, maximize the master's economic interest, disregard the humanity of the slave except when it serves the master's interest, and deny slaves the fruits of their labor."

*Id.*

63. "**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. Utilize violence and the powers of government to assure the submissiveness of blacks.

*Id.*

64. "**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 non-white men. As 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.

*Id.*

65. "**Manumission and Free Blacks:** Limit and discourage manumission; minimize the number of free blacks in the state. Confine free blacks to a status as close to slavery as possible."

*Id.*

66. "**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."

*Id.* at 196 (footnote omitted).

67. "**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."

*Id.*

68. "**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 regard the slave who obeys the

The Ten Precepts provide a "theoretical framework" that "analyze the intersection of race and the law."<sup>71</sup> Judge Higginbotham called the Ten Precepts, "the Shadow Constitution."<sup>72</sup> A set of ever present beliefs designed to maintain the subjugation of Black people in American Society.<sup>73</sup>

Judge Higginbotham described the precepts as follows:

Ultimately, I concluded that for those Americans in power, there were several basic premises, goals, and implicit agreements concerning the institution of slavery that at once defined the nature of American slavery and directed how it should be administered. Sometimes, these premises and goals were articulated precisely in statutes, judicial opinions, and executive orders. At other times, it appears that there was an implicit agreement on these principles. But, whether or not articulated as formal rules of law, I have identified a general consensus concerning principles or premises that led to the legitimization and perpetuation of slavery and of racism in America during the colonial and antebellum periods.<sup>74</sup>

Unfortunately, the continuation of the Judge's "Race and the American Legal Process Series" has ended with the Judge's untimely death. Its follow-up will be left to other scholars. In addition to his two books, Judge Higginbotham authored law review articles on a range of subjects. A sampling gives the reader a primer on the essential Higginbotham.<sup>75</sup>

commands of his master here on earth. Use religion to justify the slave's status on earth.

*Id.*

69. "**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."

*Id.*

70. "**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.*

71. Noble, *supra* note 5, at 671.

72. Higginbotham, *supra* note 53, at 6.

73. See Noble, *supra* note 5, at 671.

74. Higginbotham, *supra* note 55, at 1696.

75. See generally Brief for the Congressional Black Caucus as Amicus Curiae in Support of Appellants, *United States v. Hays*, 115 S. Ct. 658 (1994) (Nos. 94-

Finally, while an excellent judge and noted scholar, Higginbotham will be remembered most reverently as a mentor and friend.

### C. *Mentor and Friend*

For all of Higginbotham's achievements as a judge and scholar, his greatest contribution was as a mentor and friend. Many of his former law clerks have gone on to distinguish themselves in their own right. These lawyers include: the Honorable Congresswoman Eleanor Holmes Norton;<sup>76</sup> the Honorable Edward S.G. Dennis, Jr., former United States Attorney for the Eastern District of Pennsylvania and Assistant Attorney General, Criminal Division, United States Department of Justice;<sup>77</sup> Professor Ronald K. Noble, New York University School of Law, former Assistant Secretary of the Treasury for Enforcement, United States Department of Treasury;<sup>78</sup> Gilbert Casellas, General Counsel of the United States Air Force;<sup>79</sup> and Philadelphia City Solicitor Stephanie Franklin-Suber.<sup>80</sup> Their relationship with Judge Higginbotham no doubt nurtured their success—I know his nurturing has contributed to my own modest success.

He often remarked that the most important attribute for a young lawyer, particularly a Black one, was to maintain one's personal integrity. He also taught by example that courage, hard work, and personal convictions are indispensable character traits.

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558, 94-627), reprinted in 38 How. L.J. 665 (1995) (arguing minority-majority districting is necessary to full integration of the American political landscape); Higginbotham, *supra* note 48 (encouraging law students to develop a social conscience); A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. Pa. L. Rev. 1005 (1991) [hereinafter Higginbotham, *Open Letter*] (reminding Justice Thomas that the fundamental problems of traditionally disadvantaged groups still persist throughout America today); Higginbotham, *supra* note 10 (honoring Justice Marshall and cautioning against the erosion of his legacy by recent legal developments); Higginbotham, *Race*, *supra* note 18 (providing a historical context to *Shelley v. Kraemer*, 334 U.S. 1 (1948)); Higginbotham, *Racism*, *supra* note 18 (focusing on racism in the South African and American courts); A. Leon Higginbotham, Jr., *The Relevance of Slavery: Race and the American Legal Process*, 54 Notre Dame L. Rev. 171 (1978) (advocating as a nation we need to do more to provide equal opportunities for all).

76. See Edye Elalia, *Clarence Thomas Blasted at Rainbow/PUSH Event*, N.Y. Amsterdam News, Aug. 26, 1998, at 3, available in 1998 WL 11456806.

77. See Noble, *supra* note 3, at 538 (quoting Higginbotham's former law clerks in testament).

78. See *id.* at 531 n.†.

79. See *id.* at 536.

80. See Schogol & Odom, *supra* note 1, at A30.

In the summer before his death, Judge Higginbotham traveled to New York to attend the Rainbow/PUSH 27th Annual Convention where he received the Thurgood Marshall Award.<sup>81</sup> There he commented on United States Supreme Court Justice Clarence Thomas and Higginbotham's vision of Thomas' responsibilities.<sup>82</sup>

He stated, "[o]ur greatest dilemma is the enigma of some of those persons who are now successful and have overcome formidable barriers, who act now as if they made it solely on their own."<sup>83</sup> He lamented, "I do not place a special obligation upon Justice Thomas simply because he is Black. Rather, I place a special obligation upon him because he has been the beneficiary of the struggle."<sup>84</sup> Higginbotham noted that in Thomas' seven years on the Supreme Court he had hired only one Black law clerk, out of a total of twenty-nine.<sup>85</sup>

It is best to close this tribute with a quote in the Higginbotham style. Perhaps on that summer day in New York, still active in the struggle, Judge Higginbotham unwittingly etched his epitaph and captured the essence of his life when he said:

The legacy, which James Baldwin called 'that darkness of degradation', every one of us . . . must do something to correct . . . . We must make justice and equality more real for those who are still partially in the chains of deprivation, powerlessness and poverty, and we must pass on better opportunities to those who will come after us.<sup>86</sup>

Judge Higginbotham survived, and rose above racism and poverty to achieve legal and scholarly excellence. He fostered a world of opportunities for those around him and asked for little in return.

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81. See Elalia, *supra* note 76, at 3.

82. See *id.* It caused Judge Higginbotham great pain to see Justice Thomas appointed to the Supreme Court. Judge Higginbotham chronicled his opposition in a thoughtful and provocative open letter to the Supreme Court jurist. See Higginbotham, *Open Letter*, *supra* note 75; see also A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 *Hastings L.J.* 1405 (1994) (discussing the reasons why he wrote *An Open Letter To Justice Clarence Thomas From A Federal Judicial Colleague*, and the resulting public response). Judge Higginbotham was not the only Thomas opponent. See, e.g., Trevor W. Coleman, *Doubting Thomas: Some of Clarence Thomas' Former Supporters Feel Betrayed*, *Emerge*, Nov. 1993, at 39, 41 (discussing how Thomas' views on civil rights actually stifled the progress of Blacks).

83. Elalia, *supra* note 76, at 3 (quoting A. Leon Higginbotham, Jr.).

84. *Id.* (quoting A. Leon Higginbotham, Jr.).

85. See *id.*

86. *Id.* (quoting A. Leon Higginbotham, Jr.).

This was his greatest contribution. In the end, perhaps the biggest reason he remained at odds with Clarence Thomas was because Higginbotham perceived Thomas as lacking a commitment to this nurturing process. His loss has left a leadership vacuum in the struggle to "pass on better opportunities." May his wisdom and deeds inspire us all to do better.