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A LIFE WELL LIVED: REMEMBRANCES OF JUDGE A. LEON HIGGINBOTHAM JR.—HIS DAYS, HIS JURISPRUDENCE, AND HIS LEGACY

*Colleen L. Adams, Rubin M. Sinins, & Linda Y. Yueh**

I. INTRODUCTION

When Judge Higginbotham “retired,” he redefined the term, which usually means the cessation of work. The “Judge,” as he was affectionately known to us, retired after twenty-nine years on the federal bench¹ to become professor² at three schools³ at Harvard University; senior counsel⁴ at Paul, Weiss, Rifkind, Wharton &

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1. The Judge was Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit when he retired from the bench on March 5, 1993. He served 16 years on the appellate court and 13 years on the United States District Court for the Eastern District of Pennsylvania. At the time of his appointment to the district court by President Lyndon B. Johnson, the Judge was the youngest person to be appointed to the federal bench in the preceding thirty-odd years. He was thirty-five years old.

2. Judge Higginbotham was the Public Service Professor of Jurisprudence at the John F. Kennedy School of Government, Harvard University (the Kennedy School).

3. He taught at the Department of Afro-American Studies, Harvard Law School, and the Kennedy School.

4. The Judge served as counsel to Paul, Weiss, Rifkind, Wharton & Garri-

Garrison (Paul, Weiss); and commissioner on the United States Commission on Civil Rights (USCCR). During his spare time, the Judge relaxed from his untiring lifelong efforts to eradicate inequality by receiving the nation's highest civilian honor, the Presidential Medal of Freedom—retirement indeed.⁵ This Article cannot begin to do justice to the Judge's formidable legacy. We simply intend to share some of our views on the jurisprudence of Judge Higginbotham and our many fond memories of having had the privilege and pleasure of working with one of the greatest jurists, teachers, and men of our time.

II. A WELL-LIVED LIFE

It is virtually impossible to describe the exhilaration that accompanied working for the Judge. This enthusiasm remained even though we would often leave the office at the same late hour that the janitorial service was taking out the day's garbage.

At Harvard, the Judge ran two fully staffed offices and taught three courses in the same term for over one hundred students. The Judge had to limit the enrollment in his courses as his students consistently overfilled the assigned seminar rooms—one year, the course waiting list exceeded seventy persons. In addition, he kept a third office at Paul, Weiss in New York and maintained a fourth office in his home.⁶

There was never a dull moment when we worked as his research associates. One minute he would be conducting a research meeting

son after leaving the bench in 1993 and was named one of three senior counsel to the firm in 1998.

5. His wife, Professor Evelyn Brooks Higginbotham, also of Harvard University, is completing the Judge's autobiography, which details the many extraordinary events in his life.

6. The Judge was an expert in time management. On his ride from home to his office at the Kennedy School, the Judge, in the midst of heavy traffic, would dictate a speech on his cell phone to Carol Derby—his right-hand assistant at Paul, Weiss in New York. By the time the Judge arrived at his office—about 30 minutes later—a typed copy of the speech would be available for final editing. No, the Judge did not have a personal chauffeur. One of the authors would drive the car and listen in amazement as he dictated a speech in less than 30 minutes that was both eloquent and poignant. For the Judge, time was a valuable asset never to be wasted sitting in traffic.

on *Shades of Freedom*⁷ in Cambridge, and the next minute we were on a flight to Washington to prepare the Judge for his testimony before the Senate Judiciary Committee on affirmative action. We would simultaneously watch the Judge being questioned on C-SPAN while assisting in the preparation of his next United States Supreme Court⁸ brief on voting rights and editing one of his numerous law review articles going through publication.⁹ Seemingly concurrently, the Judge served as counsel to former South African President Nelson Mandela's Children's Fund, jointly hosted a conference at Harvard on the centennial of the *Plessy v. Ferguson*¹⁰ decision, sat on the Board of Directors of the *New York Times* and *National Geographic* (among others), represented the Congressional Black Caucus as special counsel, attended the monthly USCCR meetings on Fridays, and testified before the House of Representatives in the impeachment hearings of President William Jefferson Clinton.¹¹ The Judge would prepare for his classes, meet with students, run a research project on

7. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) [hereinafter *SHADES*].

8. The Judge, as was his nature, ensured that each of us and a number of students and colleagues were able to attend hearings at the United States Supreme Court with him as guests of the Court. When the Judge was a law student at Yale during the 1950s, one of his professors, John Frank, arranged for him to visit the United States Supreme Court to hear a case argued by Thurgood Marshall. The case was *Sweatt v. Painter*, 339 U.S. 629 (1950), and the issue was whether an African American could be admitted to the University of Texas Law School. The Judge often described this experience as "exhilarating." Specifically, the Judge said in an interview, "I can't think of anything more exhilarating for a young person than to hear Thurgood's measured, eloquent, effective argument. . . . For a young person, it just could not have been more dramatic." Mark Feeny, *Off the Bench but Still in the Arena: A Retired Federal Judge Continues His Pursuit of a "Mighty Cause,"* BOSTON GLOBE, May 21, 1995, at Focus 47. The Judge extended to us the kindness that was extended to him decades earlier.

9. See *SHADES*, *supra* note 7, at 207, for a list of articles published by Judge Higginbotham as of 1996.

10. 163 U.S. 537 (1896) (upholding segregated railway cars and creating the pernicious "separate but equal" doctrine).

11. See *Hearing Before the House Judiciary Committee on the Consequences of Perjury and Related Offenses* (Dec. 1, 1998), available in 1998 WL 831268 (F.D.C.H) [hereinafter *Hearing on Perjury*] (testimony of Judge A. Leon Higginbotham Jr.).

affirmative action staffed by a dozen research assistants, hold book signings for his critically acclaimed treatise on *Race and the American Legal Process*,¹² receive over sixty honorary degrees, appear on the *Today* show, give over a hundred speeches annually,¹³ publish opinion editorials in numerous newspapers, and argue major cases for Paul, Weiss clients.¹⁴ It seemed to us that this was all just a day's work in the life of Judge Higginbotham.

III. THE JURISPRUDENCE OF JUSTICE, RACE, AND EQUALITY

It is not possible in this tribute to effectively describe the Judge's tremendous impact on American jurisprudence.¹⁵ The Judge wrote about issues which were broad in scope and awesome in depth.¹⁶ Because we cannot describe all of his work, we chose three major areas that commanded the Judge's attention after he retired from the bench.¹⁷ These included the congressional voting rights cases, the jurisprudence of race, and affirmative action.¹⁸

12. The treatise is comprised of two books: A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978) [hereinafter *MATTER OF COLOR*], and *SHADES*, *supra* note 7.

13. His calendar for speeches was so overloaded that universities desiring the Judge to serve as the commencement speaker had to put in a request at least two years in advance of the engagement.

14. Although two of the authors later worked at Paul, Weiss and the third author later worked for a federal agency, it was as if we never left our jobs as his research associates at Harvard whenever the Judge asked for assistance with a project. The consensus of those who worked with the Judge was that we were willingly lifetime employees and he would kindly describe us as his extended family.

15. It is a certainty that there will be substantial focus on the Judge's judicial and scholarly influence in the upcoming years. See, for example, the articles in this Symposium by Professor F. Michael Higginbotham and others.

16. See generally Ronald K. Noble, *A Tribute to a Scholar, a Wise Jurist, and a Role Model*, 142 U. PA. L. REV. 531 (1993) (former law clerk reviews a portion of the Judge's judicial and scholarly legacy).

17. A fourth area of concern was Justice Clarence Thomas. See, e.g., A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405 (1994); A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); A. Leon Higginbotham, Jr., *Thomas Must Stand on His Record, Not on His Attendance*, DETROIT FREE PRESS, June 5, 1998, at Editorial 11A.

18. He also continued to work closely on the legal issues involving South Africa. See, e.g., A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial*

A. Justice in Voting

In his first year after leaving the bench, the Judge spent a year in North Carolina¹⁹ working on a series of cases, beginning with *Shaw v. Reno*,²⁰ that changed the jurisprudential landscape of voting rights. In *Shaw*, white voters challenged the creation of two minority-majority districts in North Carolina which had enabled the first African Americans to be elected to Congress from North Carolina since Reconstruction.²¹ White voters challenging these districts claimed that the segregation of voters into districts by race violated their constitutional right to participate in a color-blind electoral process.²²

Judge Higginbotham sought to differ. In response to a flurry of legal challenges to the creation of minority-majority districts in southern states,²³ the Judge worked tirelessly to preserve

Systems: The American Experience and the South African Challenge, 42 DUKE L.J. 1028 (1993).

19. While in North Carolina, the Judge, along with his wife, Evelyn B. Higginbotham, was a Fellow with the National Humanities Center. He taught a course on Contemporary Legal Issues at North Carolina Central University School of Law. The Judge invited each of the law schools in the local area to identify students to work with him on contemporary legal issues. One of the authors of this Article was fortunate to be one of two students selected from the University of North Carolina at Chapel Hill School of Law to work with the Judge on a series of research projects, including analyzing significant United States Supreme Court decisions in the areas of voting rights, civil rights, and criminal law.

20. 509 U.S. 630 (1993).

21. In 1992, North Carolinians elected Eva Clayton and Mel Watt, two African Americans, to the House of Representatives of the United States Congress. Prior to 1992, no African Americans had been elected to Congress from North Carolina since 1901. *See id.* at 659 (White, J., dissenting).

22. *See id.* at 641-42.

23. *See* *Bush v. Vera*, 517 U.S. 952 (1996) (affirming a lower court decision striking down Texas's 18th, 29th, and 30th Congressional Districts); *Miller v. Johnson*, 515 U.S. 900 (1995) (affirming the district court's decision to strike down Georgia's 11th Congressional District represented by Rep. Cynthia McKinney); *United States v. Hays*, 515 U.S. 737 (1995) (dismissed for lack of standing on appeal from a lower court's ruling that Louisiana's re-districting scheme was unconstitutional); *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994); *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993). The challenges originally arose in the South but later spread to places such as Chicago. *See, e.g., Shaw v. Hunt*, 517 U.S. 899 (1996) (reversing the lower court's decision and ruling that North Carolina's 12th Congressional District is unconstitutional); *Diaz v.*

minority-majority districts as an efficient mechanism to ensure the effective and equal voice of African Americans in the electoral process. The Judge recognized that creating legislative districts in which the majority of the population consisted of racial minorities enhanced the voting strength of racial minorities and more effectively enabled them to select the candidate of their choice. As a result of the creation of minority-majority legislative districts, Congress has become more of a representative democracy with African American congresspersons "at the table" as active participants in determining the public policy of the nation.

As special counsel to the Congressional Black Caucus, the Judge assisted in preparing amicus briefs²⁴ in response to these challenges. The Judge convened several strategic planning sessions of prominent legal scholars, social scientists, practitioners, and congressional representatives from across the nation to share their powerful insight and expertise on the issues.²⁵ As we listened to the

Silver, 978 F. Supp. 96 (E.D.N.Y. 1997) (striking down New York's 12th Congressional District and providing the legislature until July 30, 1997, to draw new districts); Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997) (striking down Virginia's 3d Congressional District); King v. State Bd. of Elections, 979 F. Supp. 582 (N.D. Ill. 1996) (upholding the constitutionality of Illinois' 4th Congressional District represented by Rep. Luis Gutierrez), *vacated and remanded* for further consideration in light of Bush v. Vera, 517 U.S. 952 (1996)); Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996) (striking down Florida's 3d Congressional District represented by Rep. Corrine Brown); Johnson v. Mortham, 915 F. Supp. 1529 (N.D. Fla. 1995) (granting partial summary judgment and holding that the review of the 3d District was subject to strict scrutiny) (In May 1996, the Florida state legislature redrew the 3rd District to have a 42% black voting age population and Congresswoman Brown was re-elected in the redrawn district in 1996.); DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994) (granting summary judgment and rejecting a constitutional challenge to California's court-drawn legislative and congressional redistricting plans), *aff'd in part*, 515 U.S. 1170 (1995).

24. In these briefs, the Judge thoroughly researched and documented the history of racially polarized voting, the marginalization of the political power and interests of African Americans in North Carolina, and the necessity of the creation of majority-minority districts to ensure the effective and equal voice of African Americans in the political process.

25. Participants in the strategic planning sessions on congressional redistricting included many prominent individuals, such as distinguished historian Dr. John Hope Franklin, renowned social scientist Dr. David Bositis, and acclaimed civil rights scholar Mary Frances Berry, to name a few. For a complete listing of participants see *Shaw v. Reno*, 509 U.S. at 633.

perspectives of these various individuals on the congressional redistricting cases and their impact on minority political empowerment, it became clear that we were participating in perhaps the most important civil rights cases to be decided by the United States Supreme Court in this decade.

The opportunity to work with the Judge on this project was an extraordinary experience. We were too young to participate personally in the civil rights struggle of the 1960s, but we worked with the Judge to preserve minority political empowerment, one of the most important civil rights issues of our time. We were aware that the political gains by minorities were achieved primarily through the struggle of those who came before us. However, working so closely with the Judge and observing first-hand the courage and commitment to racial equality that he exhibited on a daily basis helped us to connect emotionally with his philosophy: If you do not stand for something, you will fall for anything. The Judge stood up for minority political empowerment.

The Judge taught us, by his words and deeds, about the responsibility that each of us has to provide a shoulder on which the next generation can stand. The Judge, in turn, provided that shoulder for us day in and day out. "Each one teach one" was a philosophy that the Judge expected us to incorporate in our daily lives. The Judge single-handedly trained an army of lawyers—many who are in prominent positions throughout our government and the private sector—to stand up for justice, raise their voices, and help make America a better nation for generations to come. He never let us forget that justice denied anywhere is justice denied everywhere. His dedication and commitment to racial equality through his words and deeds will be forever embedded in the corridors of history.

The United States Supreme Court, in a series of five-to-four decisions,²⁶ held that race could not be a dominant factor in drawing district lines and invalidated the minority-majority districts at issue in these cases. Lying at the heart of the challenge was a duality

26. See *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); and *United States v. Hays*, 515 U.S. 737 (1995) (holding that minority-majority districts that ignored traditional districting principles are racially gerrymandered and not narrowly tailored to further a compelling government interest).

standard that the Judge had posited as one of the key driving forces in understanding race in American jurisprudence.²⁷ For example, Justice Clarence Thomas in a concurrence in *Bush v. Vera* said that if "a majority-minority district is created 'because of,' and not merely 'in spite of,' racial demographics . . . [t]he resulting redistricting must be viewed as a racial gerrymander."²⁸ The invocation of a colorblind jurisprudence harkening back to Justice Harlan's famous dissent in *Plessy v. Ferguson*²⁹ was yet another version of the duality standard. Somehow a racial gerrymander is worse than a political gerrymander, the resolution of which is to place African Americans in a lesser position in the political arena and out of the negotiations that are at the heart of the pull and haul of politics.

Democrats and Republicans, incumbents and functional incumbents, all have the option of negotiating and drawing district lines to maximize their chances for reelection, but African Americans and other minorities do not. In other words, the United States Supreme Court will allow Republicans and Democrats to draw districting configurations that will maximize their voting strength and allow incumbents to draw misshapen lines to ensure their reelection rather than allow a historically disadvantaged minority to have the opportunity to elect a representative of their choice. It seems as if it has been forgotten that the Voting Rights Act,³⁰ and the "covered" jurisdictions that are under its Section 5 supervision, have had long histories of racial discrimination and are therefore subject to preclearance.³¹

This was not the result of arbitrary governmental intervention into the lives of a utopian colorblind society. These were remedial actions taken in states that had a demonstrable pattern of racial bloc voting that continues to exclude African Americans and other

27. See, e.g., SHADES, *supra* note 7; A. LEON HIGGINBOTHAM, JR. ET AL., *The O.J. Simpson Trial: Who Was Improperly "Playing the Race Card"?*, in *BIRTH OF A NATION'HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE* (Toni Morrison & Claudia Brodsky Lacour eds., 1997).

28. *Bush*, 517 U.S. at 1001 (Thomas, J., concurring).

29. 163 U.S. 537 (1896).

30. 42 U.S.C. § 1973 (1994).

31. Under preclearance and the supervision of the U.S. Department of Justice, the voter registration of African Americans in North Carolina increased from 39.1% to 50.9% between 1960 and 1982. See SHADES, *supra* note 7, at 179.

minorities. In a passage in *Shades of Freedom* that encapsulates this notion, Judge Higginbotham quoted an eloquent dissent by Justice White in *Shaw*. Justice White noted that even under North Carolina's new redistricting plan, "whites remain a voting majority in a disproportionate number of congressional districts."³² He stated that it was "both a fiction and a departure from settled equal protection principles" for the majority to void a redistricting plan whereby North Carolina "sent its *first* black representatives since Reconstruction to the United States Congress."³³

While we lost the battle, we did not lose the war because, in the words of Frederick Douglass, "If there is no struggle there is no progress."³⁴ Despite this setback, the Judge maintained his powerful optimism and continued to forge ahead to advocate, in his teachings and writings, for minority political empowerment.³⁵

This experience fueled our passion for knowledge and change, taught us about critical thinking, legal analysis, and most importantly, armed us with the power and enthusiasm to turn the Judge's dream of racial equality and justice for all into reality. In the words of Langston Hughes: "Hold fast to dreams, For if dreams die, Life is a broken-winged bird, That cannot fly"³⁶ The Judge showed the world how to soar.

B. Race and the American Legal Process

We had a once-in-a-lifetime opportunity to work with the Judge while he completed the second volume of his *Race and the American*

32. *Shaw*, 509 U.S. at 659 (White, J., dissenting).

33. *Id.*

34. 2 PHILIP S. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850-1860, at 437 (1950).

35. See, e.g., A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994); Cleo Fields & A. Leon Higginbotham, Jr., *The Supreme Court's Rejection of Pluralism*, BOSTON SUNDAY GLOBE, June 30, 1996, at 69; A. Leon Higginbotham, Jr. & Aderson B. Francois, *The Supreme Court's Blind-ers*, BOSTON SUNDAY GLOBE, July 9, 1995, at 63; A. Leon Higginbotham, Jr. & Aderson B. Francois, *The Supreme Court's Retrograde Ruling on Race*, PHILADELPHIA INQUIRER, July 9, 1995, at E5.

36. Langston Hughes, *Dreams*, in THE COLLECTED POEMS OF LANGSTON HUGHES 32 (Arnold Rampersad ed., 1994).

Legal Process series, *Shades of Freedom*.³⁷ *Shades of Freedom* was, simply put, Judge Higginbotham's masterpiece on race in the American legal process. In this volume, the Judge analyzed and explained the negative impact race had had on African Americans from their first appearance on the American continent in 1619 to the present. He unabashedly critiqued those judicial decisions which contributed to the oppression of African Americans throughout American history. The analysis wove together opinions on topics from voting to housing to criminal rights.

The central framework of *Shades of Freedom* is the Ten Precepts of American Slavery Jurisprudence.³⁸ After having read every

37. See SHADES, *supra* note 7. It followed his seminal publication and first volume of *The Race and the American Legal Process* series, IN THE MATTER OF COLOR, published in 1978, which won numerous national and international awards, including the Silver Gavel Award of the American Bar Association. See MATTER OF COLOR, *supra* note 12. It is often noted that the Judge's work pioneered the recognition of the centrality of slavery law in American jurisprudence. A third volume of this series is forthcoming.

38. See SHADES, *supra* note 7, at 5-6 & Appendix. Judge Higginbotham delineates the Ten Precepts of American Slavery Jurisprudence that governed the behavior of white slaveholders and lingers in our collective unconsciousness today with respect to race. The precepts are as follows:

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 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. 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 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.

5. *Manumission and Free Blacks*: Limit and discourage manumis-

published appellate case and statute related to race from 1630 to 1865,³⁹ Judge Higginbotham argued that, with respect to African Americans, the analytic underpinnings of the American judicial system are founded on a duality standard. This unspoken standard by which we judge blacks differently from whites governs much of the disparities in treatment that exist in the judicial system and elsewhere. The Judge would often say that the "interstitial spaces" of the law are where the "prejudices which judges share with their fellow-men"⁴⁰ come into view.

Of these precepts, the Judge believed that the precept of inferiority was the most illustrative, and *Shades of Freedom* focused on this "first among equals" concept of the Ten Precepts. The examples of the duality standard and its basis in the perceived inferiority of blacks are numerous and range from criminal justice to equality in housing to voting rights, as the Judge eloquently covered in the book.

sion; 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 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, 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 to 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.

SHADES, *supra* note 7, at 195-96.

39. *See id.* at 3.

40. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

At the time of the publication of the book, the one notable area at the forefront of the Judge's concerns was the current manifestations of racial inferiority. The precept of inferiority appears to be so ingrained in the collective conscious of America's past that to this day, there are incidents that belie rational explanation. A man in Massachusetts shot his pregnant wife and himself in their car and claimed that a black man did it at a stop sign. The police then spent many hours searching for a black man until his brother confessed that they had fabricated the story and were the culprits.⁴¹ Undoubtedly, there are many other examples in addition to the six that are cited in *Shades of Freedom*.⁴² The Judge raised these cases to point out the continuing relevance of the Ten Precepts of American Slavery Jurisprudence, particularly that the precept of inferiority—as in the belief that if a white man or woman claims that a black man did it, he or she will initially receive the presumption of truth—still persists in America today.

Finally, on many occasions, the Judge sat with us and patiently explained how a particular judge had made the wrong decision and why and how the court could have reached a different conclusion. The Judge consistently mentioned the choices judges have and commented that each judge must decide which values are most important. These were lessons in critical analysis we will never forget.

Shades of Freedom shall undoubtedly remain the definitive work on the intersection of race and American jurisprudence for generations to come. The Judge's meticulously researched and documented work will set the standard for all scholars. While some individuals may take issue with the Judge's conclusions, no one would doubt his conviction or brilliance. He will forever remain a giant as a scholar on race and the American legal process, as well as one of our leading jurists, counselors, and statesmen.⁴³

41. See SHADES, *supra* note 7, at xxvii.

42. See *id.* at xxv-xxvii.

43. Paul Simon, former senator from Illinois, wrote on the back cover of the hard copy version of *Shades of Freedom* the following: "There are two giants of the bench that did not make it to the Supreme Court: Learned Hand and A. Leon Higginbotham, Jr."

C. Substantive Equality and Affirmative Action

Finally, the Judge was deeply involved in the recent legal and legislative challenges that threatened the very existence of affirmative action programs and, along with it, the hope for substantive equality for millions of minorities and women who continue to suffer from discrimination and fundamental socioeconomic inequality.

In 1996, voters in California⁴⁴ passed the popular initiative, Proposition 209,⁴⁵ which banned affirmative action in every aspect of state government.⁴⁶ That same year, the Fifth Circuit decided *Hopwood v. Texas*,⁴⁷ which overturned the affirmative action component

44. Another state that later passed a similar initiative was Washington, but the same measure was defeated in Houston, Texas. The wording of these popular referenda was very important. In California and Washington the term used was "special preferences," while in Houston the words "affirmative action" were used. See Tom Brune, *Poll: I-200 Passage Was Call for Reform*, SEATTLE TIMES, Nov. 4, 1998, at A1; Gregory Rodriguez, *Too Many Places at the Table: Civil Rights Movement Has Stood to Victimization Contest*, HOUS. CHRON., Mar. 21, 1999, at 1; Glenn Sheller, *Affirmative Action Votes Turn on Words*, COLUMBUS DISPATCH, Mar. 4, 1999, at 11A.

45. Proposition 209 was challenged in federal court, and a district court imposed an injunction prohibiting its enforcement, but the Ninth Circuit reversed on appeal. See *Coalition of Economic Equity*, 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963 (1997). The Ninth Circuit has also denied a rehearing *en banc*, and the litigants have indicated that they are prepared to appeal the decision to the United States Supreme Court.

46. Adding to the tremendous setbacks in the legal and state initiatives arenas, a bill had been introduced in the United States Congress that would prohibit affirmative action programs and policies in all federal programs. Representative Charles Canady and Senator Mitch McConnell introduced House Bill 1909, ironically entitled the "Civil Rights Act of 1997." According to an analysis by the National Asian Pacific American Legal Consortium (NAPALC), the bill, as presently constituted, could block federal efforts to provide remedies for proven discrimination and eliminate governmental efforts to break the "glass ceiling" for women and minorities. NAPALC believes that House Bill 1909 could block federal fair employment enforcement agencies from considering statistical information when evaluating employment practices. The bill could even block targeted recruiting efforts designed to encourage minorities and women to apply for jobs and contracts in accordance with their ability and would likely prohibit such activities as advertising to ethnic press and recruitment efforts aimed at previously excluded groups.

47. 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) (holding that the University of Texas at Austin School of Law's affirmative action admissions policy was unconstitutional and that diversity cannot be a compelling state interest sufficient to justify the use of race in admissions decisions).

of the University of Texas at Austin School of Law's admissions program.⁴⁸ The immediate and tragic result was that the most prestigious public law schools in Texas and California⁴⁹ experienced an immediate reduction in the number of minority students in their entering classes.⁵⁰ In addition, in the area of employment, the Third Circuit⁵¹ in *Taxman v. Board of Education of the Township of Piscataway*⁵² struck down an affirmative action program which permitted the consideration of race in employment decisions for staffing the school's faculty. The parties⁵³ settled this case before the United

48. See A. Leon Higginbotham, Jr., *Breaking Thurgood Marshall's Promise*, N.Y. TIMES, Jan. 18, 1998, § 6 (Magazine), at 28 [hereinafter *Marshall's Promise*].

49. The University of Texas at Austin, the University of California at Berkeley, and the University of California at Los Angeles law schools are among the top five public law schools in the United States and the top twenty overall. The incoming class at the University of Texas at Austin School of Law dropped to 4 black and 26 Mexican American students out of an entering class of 500 students from 31 black and 42 Mexican American students in the previous year's class. The University of California at Berkeley's minority admissions dropped from 20 black and 28 Hispanic students to, at most, 1 black and 18 Hispanic students for its entering class totaling 270. The only black student planning to attend the law school at Berkeley was admitted in 1997 and deferred his enrollment. UCLA Law School dropped from having 19 black and 45 Hispanic students to 10 black and 41 Hispanic students in its entering class in the immediate aftermath of Proposition 209. See Peter Applebome, *Minority Law School Enrollment Plunges in California and Texas*, N.Y. TIMES, Jun. 28, 1997, at A1.

50. The *New York Times* reported that even Ward Connerly, an African American who is one of the prime architects of the repeal of affirmative action programs, remarked that these figures were shocking and that "[i]t's a bucket of cold water in the face." *Id.*

51. The Third Circuit held that when two teachers are deemed to have equal qualifications, racial considerations constitute a legitimate interest in making a layoff decision. This decision struck a hard blow against the use of affirmative remedies for existing racial inequities. As it came from the Third Circuit, the Judge held particular misgivings.

52. 91 F.3d 1547, 1564 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, and *cert. dismissed*, 522 U.S. 1010 (1997).

53. This case had quite an unusual case history. For example, the Justice Department changed sides during the litigation. For a more complete picture of the peculiar history of the case, see generally, Brett Pulley, *A Reverse Discrimination Suit Upends Two Teachers' Lives*, N.Y. TIMES, Aug. 3, 1997, at A1, and Linda Greenhouse, *A Case on Race Puts Justice O'Connor in a Familiar Pivotal Role*, N.Y. TIMES, Aug. 4, 1997, at A1. The case was finally settled thanks to funds raised by a number of prominent civil rights organiza-

States Supreme Court had a chance to hear it and left the future of affirmative action uncertain.⁵⁴

Many people in the civil rights and larger community turned to the Judge for leadership and he generously involved us in the legal and policy fronts of these often-contentious issues. We were in consultation on the *Hopwood* case with the attorneys representing the State of Texas and the University of Texas at Austin School of Law. Our involvement would have extended to the highest court; however, the United States Supreme Court denied certiorari on the grounds that the issue was moot because the University of Texas at Austin School of Law had changed the structure of its admissions program prior to the appeal to the United States Supreme Court. On the legislative front, the Judge testified before the Senate Judiciary Committee on affirmative action. Finally, numerous entities and policy-makers⁵⁵ consulted the Judge, on many other levels, on how best to proceed with rectifying the current inequities in the most basic areas of life with the need to balance the interests of those potential non-beneficiaries.⁵⁶

tions.

54. Affirmative action had come under increasing attack after *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (striking down a federal affirmative action program by applying strict scrutiny to a minority set-aside program in contracting, overruling the intermediate scrutiny standard for the federal government reaffirmed less than five years earlier in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)). The future of affirmative action and the jurisprudence regarding it are at best unclear. There is only one race-related case scheduled for the United States Supreme Court's 1999-2000 Term. The case examines the constitutionality of a law permitting only those persons of Hawaiian ancestry to vote for state officials who administer a land trust for the sole benefit of those persons. See *Rice v. Cayetano*, 963 F. Supp. 1547 (D. Haw. 1997), *cert. granted*, 119 S.Ct. 1248 (1999) (finding that the policy of allowing only native Hawaiians to vote in the election for trustees of Office of Hawaiian Affairs meets constitutional standards).

55. President Clinton launched a major initiative in a speech he delivered at the University of California at San Diego. The President also created a panel to study race relations, led by the distinguished historian John Hope Franklin. See Alison Mitchell, *Defending Affirmative Action, Clinton Urges Debate on Race*, N.Y. TIMES, June 15, 1997, at A1; *Opening a Conversation on Race*, N.Y. TIMES, June 16, 1997, at A14.

56. The Clinton administration recently undertook an ambitious industry-by-industry review of affirmative action in contracting with approximately \$200 billion in expenditures. The government is examining whether there are discrepancies between the number of qualified businesses and the dollar value

As with his other scholarship, the Judge was at the forefront of critical analysis when it came to affirmative action. He noted a lack of a comprehensive analysis of the issues surrounding affirmative action. While much of the debate had been centered around political positions, there was a significant lack of information regarding the dramatic impact of affirmative action on those least privileged in society—especially in the crucial areas of education and employment—and the historical evolution of the concept and diverse types of programs that fall within the rubric of affirmative action. The Judge sought to fill this void by introducing the type of concrete data and balanced analysis that he hoped would make the debate an informed and conscientious one.⁵⁷ The Judge believed that a comprehensive review of affirmative action was the only way to move the nation toward making the debate an insightful and thought-provoking discourse.

He noted that the old models of affirmative action are based implicitly on a notion of compensation.⁵⁸ Compensatory justice is proposed to be designed to benefit those groups who have historically suffered from bias. However, the price that the current generation has to pay creates a class of “innocent victims.”⁵⁹ The Judge struggled with this notion, as do those of us who believe ardently in the premise of affirmative action. We found the *Taxman*⁶⁰ case to be unique in that a court determined that an employer’s affirmative action plan to promote racial diversity violated the remedial

of government contracts awarded to those businesses. Evidence of significant discrepancies may be viewed as discrimination. This approach is in response to the *Adarand* decision and is tailored to meet the stringent requirements imposed by that decision. See John M. Broder, *U.S. Readies Rules over Preferences Aiding Minorities*, N.Y. TIMES, May 6, 1997, at A1.

57. The Judge did not dwell generally on hypotheticals. See generally *Hearing on the Issue of Affirmative Action*, 104th Cong. (1995) (statement of A. Leon Higginbotham, Jr.).

58. See Erin E. Byrnes, Note, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using A Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 544-47 (1999).

59. See *Fullilove v. Klutznick*, 448 U.S. 448, 484-85 (1980) (setting forth the “innocent parties” doctrine).

60. A distinguishing feature of the case parallels *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), in that the Court there was reluctant to accept the validity of affirmative action considerations in layoff decisions.

antidiscrimination mandate of Title VII.⁶¹ As a general matter, it is unusual to find that the only factor that will tip the balance is race or gender. Therefore, the Judge believed that the jurisprudence of race cannot be based on a hypothetical finding.⁶² Rather, an analysis of affirmative action can and must consider the history of America.

African Americans must be afforded equal protection of the laws. Because African Americans had been denied that protection for countless generations, over hundreds of years, being treated as inferior, it was necessary to ensure not only a formal provision, but also a substantive grant of equal protection. Particularly given the invidious nature of the evolving racism that has plagued this country,⁶³ African Americans needed to be given the same substantive opportunity to compete on a level playing field. The Judge argued that affirmative action programs employ benign classifications—the very means through which minorities have been discriminated against—to combat residual discrimination.⁶⁴ Thus, benign classifications of race have, until recently, been given a less rigorous level of scrutiny by the Court.⁶⁵ The continued need for affirmative action justified this level of scrutiny.

With the decision in *Adarand Constructors, Inc. v. Peña*⁶⁶ applying strict scrutiny to even benign racial classifications, the Judge felt that we would be well-admonished by the words of the late Justice Marshall. Justice Marshall protested that the United States

61. See *Taxman*, 91 F.3d at 1550.

62. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Justice Powell described race as a “plus,” implicitly noting that absolute equality is likely to be a hypothetical rather than a reality. See *id.* at 317.

63. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (arguing racism is a permanent component of American life); DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (1992) (discussing the role law has played in subordinating African American rights); SHADES, *supra* note 7 (a history of race and the American legal process).

64. The Judge conducted a comprehensive research project on affirmative action that was generously supported by a team of philanthropic foundations and to which he dedicated a great deal of his effort in his final years. The supporting institutions included The Carnegie Corporation of New York, The Ford Foundation, The MacArthur Foundation, The Mellon Foundation, The Mott Foundation, and The Rockefeller Foundation.

65. See *supra* note 54.

66. 515 U.S. 200 (1995).

Supreme Court's decision to subject all racial distinctions, whether benign or invidious, to the same heightened level of scrutiny would result in the dismantling of all affirmative action programs. In *City of Richmond v. Croson*,⁶⁷ he wrote this famous statement:

Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional "strict scrutiny"—scrutiny that is strict in theory, but fatal in fact.⁶⁸

Since the decision in *Croson*, the percentage of minority contractors in Richmond, Virginia, decreased from thirty-five percent to one percent.⁶⁹ Moreover, with the decisions of *Croson* and *Adarand* subjecting all levels of governmentally imposed affirmative action plans to the same strict level of scrutiny, it remains to be seen whether the trajectory of the lower courts, which have struck down most affirmative action plans, will abate. We fear that the words of Justice Marshall's admonition will become true.

The Judge spent the last years of his life striving in these and many other ways to preserve the "life" of racial justice in America.⁷⁰ As he stated in one of his articles shortly before his passing, "I sometimes feel as if I am watching [racial] justice die."⁷¹

IV. REMEMBRANCE

Within this whirlwind of the Judge's activities, we must note—and hope one day to emulate—Judge Higginbotham's gracious and kind spirit. When the Judge was undergoing his third of successive open heart surgeries, or while he was drafting a speech in the cab on

67. 488 U.S. 469 (1989).

68. *Id.* at 552 (Marshall, J., dissenting) (citing *Fullilove v. Klutznick*, 448 U.S. at 519).

69. See Mary Frances Berry, *Affirmative Action: Political Opportunities Exploit Racial Fears*, EMERGE, May 1995, at 23.

70. See Higginbotham, *Marshall's Promise*, *supra* note 48.

71. *Id.*; see also F. Michael Higginbotham & Linda Y. Yueh, *Judge Higginbotham Will Be Sorely Missed*, NAT'L L.J., Dec. 28, 1998, at A26 (quoting this passage and discussing the Judge's hopes and worries for America at the time of his passing).

his way to deliver it—with an estimated time of arrival of five minutes—his first thought was always to inquire how *you* were doing.⁷² He also had a wonderful sense of humor. When the Judge entered the final phase of completing *Shades of Freedom*, he noted how most authors give praise to their assistants and then take all the potential blame and mistakes for themselves.⁷³ The Judge, however, believed that young people should learn early the lessons of personal responsibility and that any mistakes were most certainly “collective.”⁷⁴ In the acknowledgments section of *Shades of Freedom*, it is clear that we were not “let . . . off the hook.”⁷⁵

The Judge was overgenerous with credit and even more so with his introductions. Whenever he would introduce each of us in public at a function where many persons in attendance almost certainly had curriculum vitae exceeding ten pages, the Judge would introduce us with such vigor that it became absolutely clear during the course of it that our faces became flushed, our posture began to slope, and our demeanor would belie the fact that the Judge may have just slightly exaggerated our expertise. We were most certainly not the leading experts on Title VII; the Russian, Japanese, and Slovakian languages; or the harpsichord, and we were not the reason that the Judge was featured in a NBC special with Tom Brokaw.⁷⁶ To the Judge, however, ensuring that every person around him received full—and oftentimes too much—credit was something he did automatically and

72. No matter how busy the Judge was, he took time to inquire about how we were doing. One of the authors will always remember when the Judge took time from his hectic schedule to take her to the hospital for surgery and made sure she was okay until her family arrived from out-of-town. It was moments like this when the Judge let us know that he was more than “the Judge,” but that he was a great mentor and a friend who was truly concerned about our well-being.

73. See SHADES, *supra* note 7, at xv.

74. See *id.*

75. See *id.*

76. One author’s younger sister was joyous when the Judge not only invited her along to one of his appearances on MSNBC at Rockefeller Center, but told her that she was the reason that he had been invited to be interviewed on air. This same sister also enjoyed the Judge’s hospitality on numerous occasions as he usually took us out for delightful meals after a long day’s work.

without reservation.⁷⁷ We can only hope that we may strive one day to become the persons that he saw us to be.

Finally, a perhaps little-known fact about the Judge was that he was a fantastic cook. He could barbecue chicken as well as anyone in Texas—one of the authors who is from the Lone Star State can attest to this fact. When we would go to the Judge's home, the Judge's lovely and brilliant wife, Evelyn, would generously indulge our disruptive presence week after week in their beautiful and warm home.⁷⁸ It was there that we knew that we would work for more hours than may at first be considered humanly possible. Then we would work some more.⁷⁹ However, at the end of the day, and many times in between, although we worked hard, we ate well. The Judge would always make sure that we had enough cake⁸⁰ to go with each bite of ice cream and that each starving student had more than enough to take back to the dorms. Some, we recall, took a bit more than that. We did not go hungry at the office, either. The Judge would always save room for dessert. His preference was for a delicious cappuccino-chip cookie that used to be served in a café in Harvard Square.

77. One of the authors was pleasantly surprised when the Judge, in the middle of a speech he was delivering to a university audience, asked her elderly mother—whom he had not met before—to stand up and be recognized. Her mother beamed with pride as a man of the Judge's prominence acknowledged her before an audience of over 200 people.

78. The Judge's generosity extended to his home. Each year, he and his wife would invite one of their students to live with them in their spacious house. One of the authors of this Article lived with the Higginbothams for almost a year. The Higginbothams not only welcomed her into their home, but treated her as a member of the extended Higginbotham family.

79. Although our hours were often late and the work was stressful, the Judge always had our well-being in mind. He consistently drove one of the authors home each night after a long working session and dropped her off at her door on the banks of the Charles.

80. One of the authors will never forget how he surprised her with a birthday cake in the middle of a working session at his house and how he unfailingly phoned on her birthday each year and was even the first to call to congratulate her on passing the Bar—from his car phone, of course, while en route to the airport. The Judge traveled so much that he was given lifetime membership in many elite frequent flyer and hotel programs!

V. CONCLUSION: THE LEGACY OF JUDGE HIGGINBOTHAM

This was the Judge in “retirement.” When those of us who cared about him asked him to slow down from his untiring efforts to combat injustice, he would quote a statement by one of his heroes, Charles Hamilton Houston.⁸¹ This, we submit, is as reflective of the Judge as any words can describe. Houston said, “I would rather die on my feet, than live on my knees.”⁸²

We miss him every day; we always will. The Judge’s work has undoubtedly allowed each of us to live tall. He loved America, despite its past, gave everything to its present, and held great hopes for its future. His was a life well lived in every sense, and we are a better nation for it. Our debt to Judge Higginbotham is immense, and we may only hope that each generation of Americans will remember.⁸³

81. It was always hard for us to believe that the Judge had heroes because he was our ultimate idol.

82. Videotape: *The Road to Brown: The Untold Story of “The Man Who Killed Jim Crow”* (California Newsreel 1989) (on file with the Loyola of Los Angeles Law School Library).

83. The final aspect we want to mention was that the Judge made every speech and every article into an opportunity to remind the later generations not to forget the contributions of those who came before. In reviewing his 600 plus speeches, he made repeated references to Charles Hamilton Houston, William Henry Hastie, Thurgood Marshall, Constance Baker Motley, Damon Keith, and many other distinguished attorneys whose efforts on our behalf made it possible for substantive equality to become reality rather than just a hope for millions. One instance that captures an aspect of this legacy occurred after the Judge had made one of his numerous appearances at NBC. Al Roker, the popular meteorologist from the *Today* show, came running after the Judge as we were leaving. He stopped the Judge to express his appreciation for what he had done to make opportunities possible for so many. This, we submit, as much as any tribute or accolade, is Judge Higginbotham’s legacy.

