

# Race Law



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## Cases, Commentary, and Questions

SIXTH EDITION

**F. Michael Higginbotham**

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UNIVERSITY OF BALTIMORE SCHOOL OF LAW



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# Dedication

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This book is dedicated to the memory of Judge A. Leon Higginbotham, Jr.,<sup>1</sup> “Uncle Leon” as I called him,<sup>2</sup> whose life and work represent a commitment to racial justice for all. During his professional career as a lawyer, teacher, and judge, Leon Higginbotham often spoke for those who needed it most—the poor, the powerless, and the hopeless. As a result, he provided inspiration to many and the belief in a better tomorrow. In recognition of Leon Higginbotham’s values and steadfastness, many referred to him as the conscience of the American judiciary on issues relating to race.

Preparation for this book began in 1995 as a joint project between Leon Higginbotham and me. It was a project we discussed for more than a decade but one that had been delayed due to job demands and time constraints. After Leon Higginbotham retired from the federal bench in 1993, I was determined to go forward with this project. This co-authorship was an outgrowth of our close personal and professional relationship. Leon Higginbotham served as a second father to me, providing guidance, support, and love. Our working relationship began in 1974 and included my service

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1. For articles honoring the work of A. Leon Higginbotham, Jr., see Gates, *Remembering Leon*, VI HARV. J. AFR. AM. POL. 1 (2000); Nye, *Harvard Farewell*, VI HARV. J. AFR. AM. POL. 5 (2000); Sellers, *Working With the Judge*, VI HARV. J. AFR. AM. POL. 7 (2000); Higginbotham, *Promises Kept*, VI HARV. J. AFR. AM. POL. 11 (2000); Chon, *The Mentor and His Message*, 33 LOY. L.A. L. REV. 973 (2000); Adams, Sinins & Yueh, *A Life Well Lived: Remembrances of Judge A. Leon Higginbotham, Jr.—His Days, His Jurisprudence, and His Legacy*, 33 LOY. L.A. L. REV. 987 (2000); Higginbotham & Anderson, *Who Will Carry the Baton?*, 33 LOY. L.A. L. REV. 1015 (2000); Costilo, *An Unforgettable Year Clerking For Judge Higginbotham*, 33 LOY. L.A. L. REV. 1009 (2000); Higginbotham, *A Man for All Seasons*, 16 HARV. B.L. L.J. 7 (2000); Fitts, *The Complicated Ingredients of Wisdom and Leadership*, 16 HARV. B.L. L.J. 17 (2000); Green & Franklin-Suber, *Keeping Thurgood Marshall’s Promise—A Venerable Voice For Equal Justice*, 16 HARV. B.L. L.J. 27 (2000); Higginbotham, *Saving the Dream for All*, 26 HUM. RIGHTS 23 (1999); Becker, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1813 (1999); Ogletree, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1818 (1999); N. Jones, *In Memoriam: A Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1818 (1999); E. Jones, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1823 (1999); Norton, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1829 (1999); Hocker, *A. Leon Higginbotham: A Legal Giant*, 13 NAT. BAR ASSOC. MAG. 16 (1999); and Brennan, *Tribute to Judge A. Leon Higginbotham, Jr.*, 9 LAW & INEQ. 383 (1991).

2. Although Leon Higginbotham has no brothers or sisters, I always refer to him as my Uncle even though he and my Dad are cousins. In the Higginbotham Family, it is customary to refer to cousins of one’s parents who are from the same generation as Uncle or Aunt, consistent with a tradition followed by some black families with southern roots.

as a research assistant on *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*, co-author of three law review articles, and co-teacher of Race and the Law classes at the University of Pennsylvania and New York University. Some of the original material contained in this book was initially drafted or edited by Leon Higginbotham.

Upon Leon Higginbotham's death in 1998, I decided to complete the project we started together. While my name appears as the sole author, the idea for this book and its earlier development represent a collaborative effort of Higginbotham and Higginbotham.

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# Foreword

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F. Michael Higginbotham<sup>1</sup>  
*Speaking Truth to Power:*  
*A Tribute to A. Leon Higginbotham, Jr.*<sup>2</sup>

It has been several years since that November day when A. Leon Higginbotham, Jr.<sup>3</sup> made his last public appearance, testifying before the House Judiciary Committee considering the impeachment of President William Jefferson Clinton. His candid,

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1. (footnote omitted).

2. The phrase “speaking truth to power” is taken from Anita Hill’s wonderful book of the same name examining the 1991 Anita Hill-Clarence Thomas hearings before the Senate Judiciary Committee. ANITA HILL: SPEAKING TRUTH TO POWER (1997). To speak truth to power is to maintain the truthfulness of one’s speech or actions in the face of a powerful and potentially hostile audience.

As will be indicated in footnotes throughout this Tribute, portions of this Tribute are reprinted with permission from F. Michael Higginbotham, A Man for All Seasons, 16 HARV. BLACKLETTER L.J. 7, 13–14 (2000) [hereinafter Higginbotham, A Man for All Seasons]; F. Michael Higginbotham & Jose Felipe Anderson, A. Leon Higginbotham, Jr.: Who Will Carry the Baton?, 33 LOY. L.A. L. REV. 1015 (2000); and F. Michael Higginbotham, Saving the Dream for All, HUMAN RTS., Summer 1999, at 23 (Reprinted by Permission: Copyright © 1999 by the American Bar Association; F. Michael Higginbotham) [hereinafter Higginbotham, Saving the Dream].

3. Aloysius Leon Higginbotham, Jr. was born the only child of Aloysius Leon Higginbotham, Sr. And Emma Douglas Higginbotham in Trenton, New Jersey. He graduated from Ewing Park High School in Trenton at the age of sixteen and went on to Purdue University, but transferred to Antioch College in Ohio, from which he graduated in 1949. He graduated at the top of his class from Yale Law School in 1952 and was admitted to the Pennsylvania Bar in 1953. In the years following, Judge Higginbotham served as President of the Philadelphia branch of the NAACP, a commissioner of the Pennsylvania Human Relations Commission, and a special deputy attorney general.

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

During his judicial service, Chief Justices Warren, Burger, and Rehnquist appointed Judge Higginbotham to a variety of judicial conference committees and other related responsibilities. Judge Higginbotham also found time to teach at the law schools of Harvard University, University of Michigan, New York University, University of Pennsylvania, Stanford University, and Yale University.

By appointment of President Johnson, Judge Higginbotham also served as Vice Chairman of the National Commission on the Causes and Prevention of Violence. In November 1995, he was appointed

objective, and scholarly testimony before the Committee helped to convince many members of Congress that the impeachment of Clinton was inconsistent with constitutional provisions, unsupported by legal history, and intellectually dishonest. As he did so many times throughout his professional career, Leon spoke truth to power.<sup>4</sup> Sometimes, power acceded to his truth, but more often only history proved him right. Nonetheless, Leon had the courage to speak the truth no matter how strong the opposition or controversial the issue.

Leon's position regarding impeachment was that, while Congress certainly has the power to remove the President from office when an impeachable offense has been committed, President Clinton's alleged act of perjury was not such an offense.<sup>5</sup> In Leon's view, not all illegal acts, not even all felonies, rise to the level justifying Congress's removal of the President. Leon posed the following hypothetical question: Would the Judiciary Committee have proposed impeaching President Clinton had he been cited for driving at a speed of fifty-five miles per hour in a fifty mile-per-hour speed zone, yet later falsely testified, under oath, that he had been driving only forty-nine miles per hour?<sup>6</sup> He then stated:

I submit that as to impeachment purposes, there is not a significant substantive difference between the hypothetical traffic offense and the actual sexual incident in this matter. The alleged perjurious statements denying a sexual relationship between the President of the United States and another consenting adult do not rise to the level of constitutional egregiousness that triggers the impeachment clause of Article II.<sup>7</sup>

As Leon intimated, yes, it was true that President Clinton may have lied under oath. Yes, it was true that President Clinton's behavior with Monica Lewinsky may have been unwise. Yes, it was true that some of these activities could reasonably be characterized as felony offenses. Yet, as Leon so persuasively argued, it was also true that not all felonious conduct would or should lead to impeachment. The Senate's subsequent refusal to convict President Clinton and remove him from office suggests its recognition of Leon's truth.

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to the United States Commission on Civil Rights. Also in 1995, he received the Presidential Medal of Freedom, the nation's highest civilian award.

4. See *supra* note \*\*. Perhaps Leon's most famous "truth to power" was the letter he sent to Justice Clarence Thomas in 1992 after Thomas's confirmation as an Associate Justice of the United States Supreme Court. A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U.P.A. L. REV. 1005 (1992). Much has been written about this letter, but a further examination of it and the circumstances surrounding its writing are beyond the scope of this article.

5. Portions of the following anecdote are reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note \*\*, at 13–14.

6. *Consequences of Perjury and Related Crimes Before the House Comm. on the Judiciary*, 105th Cong. 67 (1998), available at <http://www.house.gov/judiciary/full.htm> (statement of A. Leon Higginbotham, Jr.).

7. *Id.*

A. Leon Higginbotham, Jr. began speaking truth to power in 1944 when he was a sixteen-year-old freshman at Purdue University. In the preface to his first book, *In the Matter of Color*,<sup>8</sup> Leon wrote about his first experience speaking truth to power:

I was . . . one of twelve black civilian students. If we wanted to live in West Lafayette, Indiana, where the university was located, solely because of our color the twelve of us at Purdue were forced to live in a crowded private house rather than, as did most of our white classmates, in the university campus dormitories. 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.” Surely there was room enough in that world, I told myself that night, for twelve black students in a northern university in the United States to be given a small corner of the on-campus heated dormitories for their quarters. Perhaps all that was needed was for one of us to speak up, to make sure the administration knew exactly how a small group of its students had been treated by those charged with assigning student housing.

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.

At the scheduled time I arrived at President Elliot’s office, neatly (but not elegantly) dressed, shoes polished, fingernails clean, hair cut short. Why was it, I asked him, that blacks—and blacks alone—had been subjected to this special ignominy? Though there were larger issues I might have raised with the president of an American university (this was but ten years before *Brown v. Board of Education*) I had not come that morning to move mountains, only to get myself and eleven friends out of the cold. 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.

Perhaps if President Elliot had talked with me sympathetically that morning, explaining his own impotence to change things but his willingness to take up the problem with those who could, I might not have felt as I did. Perhaps if he had communicated with some word or gesture, or even a sigh, that I had caused him to review his own commitment to things as they were, I might have felt I had won a small victory. But President Elliot, with

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8. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978). The book has been cited by federal and state courts as a reliable source of the legal history of the American colonial period. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting); *United States v. Long*, 935 F.2d 1207, 1211 (11th Cir. 1991); *Commonwealth v. Rogers*, 393 A.2d 876, 880 (Pa. Super. Ct. 1978).

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.”

As I walked back to the house that afternoon, I reflected on the ambiguity of the day’s events. I had heard, on that morning, an eloquent lecture on the history of the Declaration of Independence, and of the genius of the founding fathers. That afternoon I had been told that under the law the black civilian students at Purdue University could be treated differently from their 6,000 white classmates. Yet I knew that by nightfall hundreds of black soldiers would be injured, maimed, and some even killed on far flung battlefields to make the world safe for democracy. Almost like a mystical experience, a thousand thoughts raced through my mind as I walked across campus. I knew then I had been touched in a way I had never been touched before, and that one day I would have to return to the most disturbing element in this incident—how a legal system that proclaims “equal justice for all” could simultaneously deny even a semblance of dignity to a 16-year-old boy who had committed no wrong.<sup>9</sup>

Leon explained the simple facts to the most powerful person at Purdue University. It was true that the attic was cold. It was true that the attic was overcrowded. Unfortunately, as Leon found out that day, it was also true that those in power at Purdue University would not remedy this injustice. In this initial experience, Leon began to display the commitment, leadership, dedication, sacrifice, honesty, directness, and courage that would guide him throughout his life.

Some of Leon’s most powerful truth was reserved for the leaders of the National Party, the ruling political party in South Africa from 1948 until 1994 and the creator of apartheid.<sup>10</sup> In 1986, on one of his six trips to South Africa, Leon and a group of American business and academic leaders<sup>11</sup> visited during a period of “reform” of the apartheid system.<sup>12</sup> While the National Party had instituted apartheid in 1948 and had

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9. HIGGINBOTHAM, *supra* note 7, at vii–ix

10. After winning its first national election in 1948, the National Party began to implement a variety of racial segregation laws and policies that collectively became known as apartheid. See A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763; A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990) [hereinafter *American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993) [hereinafter Higginbotham, *Seeking Pluralism*]]. The following anecdote is in large part reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note \*\*, at 9–10.

11. The group included W. Michael Reisman, Professor of Law at Yale University, James Laney, President of Emory University and member of the board of directors of Coca Cola, and Robert Rotberg, President of the World Peace Foundation.

12. For improved domestic and international relations, on several occasions, the National Party made minor or cosmetic changes to the racial laws of South Africa. See TOM LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* (1985).

vigorously defended it for forty years, due to some recent newspaper accounts, there was some sense among members of the American delegation that the Party might be willing to reevaluate its position. Upon arrival at the impressive government building in Capetown, however, the American delegates were roundly informed that the National Party remained enthusiastically committed to racial segregation and discrimination. Several National Party members of Parliament explained that blacks and whites had vastly different cultures, resulting in constant conflict between the races. Consequently, they said, it was necessary to separate the races in order to protect each from the other and to create an atmosphere where each culture could thrive. These lawmakers were adamant that the races must remain separated, and throughout their presentation, they appeared to ignore Leon, the only black person in the delegation.

Most of the Americans seemed stunned that the National Party officials had reiterated their commitment to racial separation so enthusiastically, had been so dogmatic in their presentation, and had displayed such rudeness to Leon. When the Americans were asked to respond, they all looked to Leon to articulate their collective feelings.<sup>13</sup>

Leon addressed the Party officials without fear or hesitation. He began by talking about how much all human beings have in common. They all need food, shelter, and clothing. They all desire love and happiness. And they all are able to benefit from education, scientific discoveries, and health care. He kept reiterating the theme that we are all part of the human family, and that when we work together we are able to accomplish so much more. Leon then discussed the infamous atrocities that human beings had committed against one another over the years and how the perpetrators of such oppression had been judged in the corridors of history. He talked about how wrongs would not go unpunished much longer. In conclusion, Leon quoted the character Shylock from William Shakespeare's play "The Merchant of Venice." Shylock said to his adversaries:

He hath disgraced me . . . scorned my nation . . . cooled my friends, heated mine enemies, and what's his reason? . . . If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die? And if you wrong us shall we not revenge? If we are like you in the rest, we will resemble you in that. . . . The villainy you teach me I will execute, and it shall go hard but I will better the instruction.<sup>14</sup>

Leon then added a final, stinging observation. He stated that based upon the substance and behavior of the speakers, he could no longer, in good conscience, consider them part of the human family.<sup>15</sup>

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13. *Id.* at 9

14. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, in *THE COMPLETE WORKS*, act 3, sc. 1, 11, 50–68 (Stanley Wells & Gary Taylor eds., Clarendon Press 1986).

15. Leon often quoted Shakespeare in responding to comments made in support of apartheid. Cf. Higginbotham, *Seeking Pluralism*, *supra* note 9, at 1061–63

As Leon knew so well, Shakespeare's expression captures the hidden fears of all persons who are or have been oppressors. While none of the Americans were deluded into thinking that any racist attitudes had been changed that day by Leon's truth, there was a great sense of satisfaction in knowing that these race supremacists had been made to understand that they, not black South Africans, were the real outcasts, and that sooner or later there would be a high price to pay for their continued oppression. As each American delegate stood, indicating unanimous agreement with Leon's response, the powerful members of Parliament were made to consider the truth of those statements. The National Party's subsequent negotiation with the African National Congress to end apartheid suggests their recognition of Leon's truth.

Leon had a special gift for helping decision-makers in positions of authority realize the error of their thinking and to open up their hearts' compassion.<sup>16</sup> He could criticize without being offensive, prod without being irritating, and motivate without being preachy. One of his favorite stories involved his alma mater, Yale University, and its decision to make its undergraduate program coeducational. Leon was the first African American to serve on Yale's board of directors,<sup>17</sup> and he was a vigorous advocate for the admission of women into Yale College. Leon often reminded listeners of the vast contributions of both America's forefathers and foremothers, and how Americans should recognize the significant involvement of women in the abolition of slavery and in the Civil Rights Movement.<sup>18</sup> More specifically, Leon spoke at several board meetings about how to measure the quality of a university. He talked about the extent of the resources, the quality of the faculty, but, most significantly, the contribution of its students. He then began to identify the many contributions to the life of the university made by female graduate students at Yale, and how those contributions had benefited the entire school. After an historic meeting where, at the urging of Leon and others, the board of directors decided to admit women to its undergraduate ranks,<sup>19</sup> one of the directors opposed to such admission remarked to Leon that it was a sad day in Yale's great history and one that they all would come to regret. Several years later that same director told Leon at a Yale graduation ceremony how happy he was and what a great day it was for him because his daughter was in Yale College's graduating class.

It was true that Yale College would admit women for the first time. It was true that such admittance would help to create gender equality, which would fundamentally change Yale forever. History has proven Leon's assertion that this fundamental change would be good for far more than just those women admitted. It was also good

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16. Some portions of the following anecdote are reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note \*\*, at 10.

17. Samuel M. Hughes, *Summing Up Leon Higginbotham*, PA. GAZETTE, Feb. 1993, at 18, 20.

18. See A. Leon Higginbotham, Jr., *Rosa Parks: Foremother & Heroine Teaching Civility & Offering a Vision for a Better Tomorrow*, 22 FLA. ST. U. L. REV. 899, 900-8 (1995).

19. The Yale Law School had begun admitting women in 1884. A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 796 n. 2 (1987).



for those men who would be their classmates, and for the university. It was good for those who lacked the foresight to perceive the long-term common benefit, for those who lacked the compassion to see the unfairness of such exclusion, and for those who possessed the selfishness to want to keep the greatness of Yale all to themselves.

As an enthusiastic supporter of the Civil Rights Movement, Leon often spoke to conservatives who had unsuccessfully opposed the movement and subsequently attempted to reverse its accomplishments. In an eye-opening 1992 editorial entitled “The Case of the Missing Black Judges,”<sup>20</sup> Leon examined the impact and meaning of the judicial appointments of President Reagan and the first President Bush, concluding that their desire to create a more “conservative” federal court system resulted in few judicial appointments of African Americans. He explained:

[T]o the extent that the appointment of judges is a barometer of a President’s feelings about placing historically excluded groups in positions of power, Jimmy Carter showed that he had complete confidence in African Americans.

President Reagan apparently felt otherwise and President Bush apparently does, too. On taking office, they both asserted that they wanted a far more “conservative” Federal court system. In that, they have succeeded admirably. But in the process they have turned the Courts of Appeals into what Judge Stephen Reinhardt of the Court of Appeals for the Ninth Circuit has called “a symbol of white power.”

In eight years of office, out of a total of 83 appellate appointments, Ronald Reagan found only one African American whom he deemed worthy of appointment, Lawrence W. Pierce. President Bush’s record is just as abysmal. Of his 32 appointments to the Courts of Appeals, he also has been able to locate only one African American he considered qualified to serve: Justice Clarence Thomas. . . .

By 1993, six of the 10 African Americans sitting on the Courts of Appeals will be eligible for retirement. As the African-American judges appointed by President Carter have retired, Presidents Reagan and Bush have replaced them largely with white judges in their 30s and early 40s. . . .

I am forced to conclude that the record of appointments of African Americans to the Courts of Appeals during the past 12 years demonstrates that, by intentional Presidential action, African-American judges have been turned into an endangered species, soon to become extinct.<sup>21</sup>

Shortly after publication of this editorial, the first President George Bush was defeated by Bill Clinton, whose judicial appointments were much more racially diverse than his immediate predecessors. In seven years, Clinton appointed 52

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20. A. Leon Higginbotham, Jr., *The Case of the Missing Black Judges*, N.Y. TIMES, July 29, 1992, at A15

21. *Id.*

African-American judges out of a total of 296, including five to the courts of appeals.<sup>22</sup> Thanks to a concerted effort to reverse political conservatism in the courts, which was initially identified and enthusiastically supported by Leon, it seems that President Clinton was able to recognize the truth of Presidents Reagan and Bush's judicial appointments records and to solve "the case of the missing black judges."

Leon served as a judge on the federal bench for twenty-nine years.<sup>23</sup> In one of his most powerful opinions, *Commonwealth v. Local 542, International Union of Operating Engineers*,<sup>24</sup> Leon responded to a motion asking that he recuse himself because he was black. This case was a civil rights employment action brought by black construction workers against the construction industry. The defendants moved for Judge Higginbotham to recuse himself because of comments the Judge had made while speaking to a luncheon organized by the Association for the Study of Afro-American Life and History. At the luncheon, Leon stated that African Americans could no longer rely exclusively on the Supreme Court as an instrument for social change. In responding to this recusal motion, Leon explained that the presence of bias, not skin color, should be the determining factor in a recusal decision.<sup>25</sup> He explained:

I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just like most other ethnics take pride in theirs. However, that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant.<sup>26</sup>

Again, Leon spoke truth to power. It was true, he was a proud black man understanding and appreciating the obstacles, sacrifices, and accomplishments of those African Americans who had fought and, in some cases died, for freedom and equality. It was true that he was not consequently anti-white. Leon spent his entire professional career writing, speaking, and treating all individuals, irrespective of race, as equal and respected members of the human family.<sup>27</sup> But as Leon so truthfully pointed out, he was not going to allow wealthy and powerful white litigants to characterize him as less objective than white judges just because he happened to be black.

Leon saved his most frequent criticism, however, for those who refused to acknowledge the continued presence of racism in America. He frequently reminded listeners

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22. Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 275, 280 (1999)

23. Leon was appointed to the United States District Court for the Eastern District of Pennsylvania in 1964 by President Lyndon Johnson. He was elevated to the United States Court of Appeals for the Third Circuit in 1977 by President Jimmy Carter. He became Chief Judge of the Third Circuit in 1989. The following story is reprinted with permission from Higginbotham, *A Man for All Seasons*, *supra* note \*\*, at 11

24. 388 F. Supp. 155 (E.D. Pa. 1974)

25. *See id.* At 159–60

26. *Id.* at 163

27. (footnote omitted).



of Justice Roger Brooke Taney's<sup>28</sup> 1857 opinion in *Dred Scott v. Sandford*,<sup>29</sup> where Taney reasoned that blacks were "beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his [own] benefit."<sup>30</sup> Leon reminded listeners that the *Dred Scott* opinion will be remembered as the legal decision that paved the way for the Civil War.<sup>31</sup>

Leon also recognized that *Dred Scott* will be remembered as the case that most clearly demonstrates that many white Americans embraced the notion of black inferiority. Justice Taney explained that the assumed inferiority of blacks at the time the country was founded was "fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute."<sup>32</sup> This view was shared by writers of the time<sup>33</sup> and endured after the Civil War into the early 1900s.<sup>34</sup>

Leon observed that this belief that "African Americans are of an 'inferior order' is an idea some find difficult to abandon."<sup>35</sup> Although he recognized that many people would challenge this notion and even more would find the suggestion that they harbor such feelings "downright insulting,"<sup>36</sup> he nevertheless was adamant in opposing the notion that the Civil War had a cleansing effect on the wrongness and impact of slavery.<sup>37</sup> He spoke truth in the face of an unreceptive white majority. He began by identifying the problem that the majority of white Americans believe "that they personally have nothing whatsoever to do with slavery, segregation, or racial oppression because neither they nor—as far as they know—their ancestors ever enslaved anyone, ever burned a cross in the night in front of anyone's house, or ever denied anyone a

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

29. 60 U.S. 393 (1857)

30. *Id.* at 407

31. Professor Derrick Bell points out that "the very excessiveness of the decision's language likely spurred those opposed to slavery to redouble their efforts to abolish [slavery]." DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 25–26 (3d ed. 1992). Portions of the following discussion are reprinted with permission from Higginbotham & Anderson, *supra* note \*\*, at 1027

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

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

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

35. A. LEON HIGGINBOTHAM, JR.: SHADES OF FREEDOM 7 (1996)

36. *Id.*

37. See *id.* at 29.

seat at the front of the bus.”<sup>38</sup> This “self-absolving denial,” Leon maintained, made it “nearly impossible to have an honest discussion about what used to be called ‘the Negro Problem.’”<sup>39</sup> In Leon’s view, this explains why it is so difficult to remove racial oppression from our society even though *de jure* segregation and discrimination have been eliminated in the law. He would ask rhetorically, why are so many statistical,<sup>40</sup> economic,<sup>41</sup> and educational<sup>42</sup> disparities attributed to racism by most blacks, but dismissed as mere coincidence by many whites? Leon’s explanation for this dichotomy was that the effects of dormant or even unconscious racism emerge through the application of law, but cannot be directly traced to the law itself.

As Leon pointed out in his book *Shades of Freedom*, the statistical disparities continue to be overwhelming, and as Leon also highlighted, these disparities began and were exacerbated by slavery, segregation, and discrimination. Leon wrote volumes on the connection between past discrimination and present inequities,<sup>43</sup> but when reason failed he always seemed to return to the one simple axiom “we should not be ignorant as judges of what we know to be true as men.”<sup>44</sup>

Leon refused to accept any award, no matter how prestigious, from organizations that did not reflect racial, ethnic, religious, and gender pluralism.<sup>45</sup> I will never forget the time he rejected the University of Chicago Law School’s invitation to judge their prestigious moot court competition because they had no black faculty at the law school and had not for many years.<sup>46</sup>

Speaking so much truth to power did have its benefits. Throughout his professional career and particularly during the last ten years of his life, Leon received numerous awards, including the Lifetime Achievement Award from the National Bar Association, the NAACP’s Spingarn Medal, and the nation’s highest civilian honor—the Presidential Medal of Freedom. He was the first member of a minority group and the youngest person ever appointed to be a federal commissioner of the Federal

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38. HIGGINBOTHAM, *supra* note 34, at 7. This belief was articulated by Justice Scalia. See Antonin Scalia, *The Disease As Cure: “In Order To Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147, 152.

39. *Id.* at 7–8

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

41. See HIGGINBOTHAM, *supra* note 34, at 7.

42. See BELL, *supra* note 29, at 611 (discussing the lower quality of education in predominantly black schools).

43. See HIGGINBOTHAM, *supra* note 34, at 207–12

44. Justice Frankfurter used these words in *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (citing *Bailey v. Drexel Furniture Co.* (The Child Labor Tax Case), 259 U.S. 20, 37 (1922)

45. Much of the following discussion is Reprinted by Permission. It is taken from Higginbotham, *Saving the Dream*, *supra* note \*\*, at 24.

46. Letter from A. Leon Higginbotham, Jr., Judge of the United States Court of Appeals for the Third Circuit, to Geoffrey Stone, Dean, University of Chicago Law School (Mar. 12, 1987) (on file with Yale Law and Policy Review).

Trade Commission. At the age of thirty-six, he was the youngest African American appointed to the federal bench. At the time of his death, Leon held more than sixty honorary degrees.

While no stranger to criticism from conservatives<sup>47</sup> and never hesitant to refute their constant policy attacks,<sup>48</sup> Leon's primary concern was to continue the progress begun by the Civil Rights Movement.<sup>49</sup> He recognized that the civil rights tradition that he was fighting to preserve was much more important than his own popularity. Personal attacks, no matter how unfounded, would not dissuade him from this focus. Leon expressed specific concerns about several recent decisions of federal circuit courts of appeals that attacked traditional civil rights doctrine. He critiqued the Fifth Circuit's affirmative action decisions<sup>50</sup> and the Fourth Circuit's approaches to accused criminals' procedural rights<sup>51</sup> that represented what he called a "substantial threat to what [he] thought was well-settled legal doctrine."<sup>52</sup>

In one of the last conversations I had with Leon during Thanksgiving weekend of 1997, he suggested that some legal scholars needed to get together and "do the difficult work of reviewing every reported civil rights decision of the circuit courts and attack those decisions which would serve as precedent to turn back the civil rights clock." He lamented that he did not have time to do it himself, saying that such an effort done properly would require thousands of hours by many diligent academics. Nevertheless, he considered such an effort to be the single most important scholarly project one could imagine.

Leon concluded the conversation with the hope that sometime soon he could sponsor a conference in order to discuss some of these ideas with the many supporters of civil rights throughout the country. He thought that such a gathering could be the touchstone for new strategies and initiatives to create equal opportunity in the

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47. Al Knight, *New Racial Stereotypes Are Replacing the Old*, DENVER POST, Aug. 2, 1998, at G3; Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC Dec. 9, 1996, at 27–28; Tony Snow, *Thomas-phobes Are Unremitting; Clarence Thomas Is Hate Target*, CINCINNATI ENQUIRER, June 22, 1998, at A6.

48. See A. Leon Higginbotham Jr., *Blacks Remember Other Contracts Put Out on Them*, PHILA. INQUIRER, May 11, 1995, at A19; A. Leon Higginbotham Jr., *Breaking Thurgood Marshall's Promise*, N.Y. TIMES, Jan. 18, 1998, Magazine, at 28; Higginbotham, *supra* note 19, at A21; A. Leon Higginbotham, Jr., *Dear Mr. Speaker: An Open Letter to Newt Gingrich*, NAT'L L.J., June 5, 1995, at A19.

49. This discussion is reprinted with permission from Higginbotham & Anderson, *supra* note \*\*, at 1029–30.

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

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

52. This quotation and the following story (including the footnotes) are reprinted with permission from Higginbotham & Anderson, *supra* note \*\*, at 1030.

new millennium. He imagined a conference similar to the legendary Niagara Project, which served as a catalyst for the important work of the NAACP.<sup>53</sup>

Soon thereafter, Leon passed away. But his idea for a second Niagara Conference is alive and well today at Yale. As we go forward to discuss the issues that meant so much to A. Leon Higginbotham, Jr., remember his life, his dedication, his compassion, but most importantly his belief that speaking the truth about injustice, no matter how powerful the recipient or unwelcomed the message, will one day set us all free.

20 *Yale Law & Policy Review* 341, 341–51.

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53. The NAACP was started when a distinguished group of blacks and whites convened a conference on the Canadian side of Niagara Falls in early 1905 to discuss ways to reduce racial discrimination in the United States. A location in Canada was chosen to avoid racial segregation laws in the United States. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 318–20 (7th ed. 1994).





Gift Chapel—Fort Sam Houston, Houston, Texas, November 1, 1917. Largest murder trial in American history. Negro Almanac Collection, Amistad Research Center at Tulane University. Copyright © (1966) Amistad Research Center. Reprinted with permission of the Amistad Research Center. For background information on the trial, see text accompanying the Preface.



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# Preface

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F. Michael Higginbotham  
*Soldiers for Justice: The Role of the Tuskegee  
Airmen in the Desegregation of  
the American Armed Forces*

Perhaps because of the symbolic nature of military service or of the fear of blacks who were organized, disciplined, and trained in the use of firearms and explosives, black military personnel paid a high price for opposing racially discriminatory treatment and policies. Two famous incidents involving black protests and self-defense demonstrate the high price many blacks paid for their patriotism.

The first incident occurred in Brownsville, Texas, in 1906. Soldiers of the Twenty-Fifth Infantry were accused of rioting against white residents of Brownsville who were discriminating against black soldiers. Incidents of discrimination were widespread including refusals of service at stores open to the public, verbal and physical assaults, and false arrests. White residents reported that in the early morning hours of August 14, a group of six to twenty black soldiers fired hundreds of shots into several buildings within a three block radius. One white civilian was killed and a police officer was injured. An investigation failed to identify the soldiers involved in the incident, yet President Theodore Roosevelt imposed a never before utilized group punishment approach and dishonorably discharged three entire companies, totaling 167 men. Some of these men had twenty-seven years of service and six of them were recipients of the Medal of Honor, the Nation's highest military award.

A second incident occurred in Houston, Texas, in 1917. Black soldiers were subjected to the scorn of certain racist civilians and police officers living near the military base, just like those at Brownsville. Not only were they segregated on trolleys, black soldiers were spat upon, called derogatory names, assaulted, and incarcerated in the city jail. After one particularly brutal arrest involving threats of lynching, soldiers of the Twenty-Fourth Infantry broke into the base armory, seized weapons, and attacked some of the townspeople involved in the incident including several of the racist police officers. Seventeen people were killed. In response to the deaths, the military indicted 118 soldiers. Again, military justice was swift, deadly, and severely prejudiced. Thirteen soldiers were tried, convicted, and executed for murder and mutiny before their

appeal could be heard. Six additional soldiers were hung at a later date. Moreover, approximately sixty-three soldiers received sentences of life imprisonment.

While duty, honor, and country were values universally embraced by the United States armed forces, when it came to black soldiers, such values were minimized or completely ignored. The values of duty, honor, and country were subordinated to the notion of white supremacy. Despite a legal system based on the premise of individual guilt and responsibility, African-American soldiers were collectively blamed for the alleged criminal activity of fellow black soldiers. Despite a legal system based on due process of law, African-American soldiers on trial were rushed to judgment and punishment. Finally, despite a legal system based on the notion that the punishment should fit the crime, African-American soldiers were given the harshest sanctions available even in the presence of numerous mitigating circumstances.

These two incidents exemplify the military's notion of race law prior to its desegregation in 1948. As the picture accompanying the preface so starkly portrays, race law often involved white prosecutors, white judges, and white jurors interpreting and enforcing racially discriminatory laws and choosing the harshest options available for non-whites in order to maintain and strengthen the notion of white racial superiority.

8 *William & Mary Bill of Rights Journal* 273, 300–2 (2000).

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