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"I cannot praise a fugitive and cloistered virtue," wrote the poet John Milton, "unexercised and unbreathed, that never sallies out and sees her adversary."[1] The writer of a tribute to Leon Higginbotham suffers no such inhibition, for Judge Higginbotham has indeed "sallied out" and engaged the world. He has undertaken a remarkable range of activities—for the most part, happily, in the public sphere: as skillful jurist, probing scholar, dedicated teacher, and indeed a kind of conscience for the legal profession, prodding us to remember law's responsibilities to those whom law once oppressed. All of us are richer for Judge Higginbotham's work, and it is thus a pleasure to join in this expression of appreciation for a good friend and gifted colleague.

There is much that is special about Judge Higginbotham's opinions: their exposition is clear—often eloquent, their tone is measured, their legal analysis is meticulous and thorough. The thoroughness bespeaks several admirable qualities: a mastery of doctrine, an awareness of subtleties, a belief in law's capacity to resolve problems, and a desire to place legal results in context. But it is not only for craftsmanship that Judge Higginbotham's opinions are held in such high regard. They are rightly esteemed, as well, for their legal insights. These insights are the product of a keen mind, an empathetic spirit, and broad experience.

When he joined the federal judiciary, Leon Higginbotham brought with him an experience of American life that other colleagues could not possess. His mother (as he tells us) "was a victim of [rural Virginia's] worst racist and economic policies . . . [who] did not get past the seventh grade"; his father was a second generation factory worker in Trenton.[2] Their hopes for a better future were transmitted to their son who, through determination

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* Associate Justice (Ret.), United States Supreme Court. Justice Brennan served as Circuit Justice for the Third Circuit Court of Appeals, on which Judge Higginbotham sits, from 1956 to 1990.

1. John Milton, Areopagitica 45 (Edward Arber ed. 1925) (spelling modernized).

2. A. Leon Higginbotham, Jr., *The Dream With Its Back Against the Wall*, Yale L. Rep., Spring 1990, at 34.

and talent, achieved success in a virtually all-white college, in a virtually all-white law school, at the virtually all-white bar of Philadelphia, and on the virtually all-white bench of the Third Circuit.

I mention Judge Higginbotham's background not for the usual reason of marvelling at the barriers he overcame but simply to note that this experience has enriched his work as lawyer, teacher, writer, and judge. For he has brought to each of these roles a rare combination of sensibilities: the analytic disposition of a lawyer and the personal awareness of discrimination's sad legacy.

That dual perspective, I think, has made him particularly adept at reviewing claims in the difficult areas of equal protection law. Adjudicating civil rights suits requires sensitivity, insight, and a firm sense of not only the scope but the limits of legal doctrine. Judge Higginbotham possesses all of these qualities; I note here only a few cases that illustrate those qualities in diverse settings.

Two cases, for example, reflect the sometimes small insights that can nevertheless be crucial in evaluating an individual plaintiff's claim. In *Jackson v. University of Pittsburgh*,[3] a black attorney alleged discrimination in his loss of a job. Writing for a unanimous panel reversing a summary judgment, Judge Higginbotham rejected the view that a plaintiff's deposition, "because it is his only record evidence, is insufficient to create a genuine factual issue on the ultimate question of race discrimination."[4] Noting the realities of the workplace, Judge Higginbotham observed:

> [m]uch of the discrimination that remains resists legal attack exactly because it is so difficult to prove. Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. That is one of the reasons why our legal system permits discrimination plaintiffs to "prove [their] case[s] by direct *or circumstantial* evidence."[5]

The same awareness of workplace realities informed Judge Higginbotham's decision in *Coventry v. U.S. Steel Corporation*,[6] which reversed summary judgment against an age discrimination claim. The issue in *Coventry* was whether the plaintiff, who was required to waive his discrimination claim as a condition for receiving a pension, did so voluntarily. Judge Higginbotham recognized the "Hobson's choice" that confronts a worker who must choose between accrued employment benefits, on which he de-

3. 826 F.2d 230 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988).

4. 826 F.2d at 235.

5. *Id.* at 236 (citation omitted).

6. 856 F.2d 514 (3rd Cir. 1988).

pends, and legal rights of which he may be unsure.[7] The decision held that, when an employee waives his rights in such circumstances, courts must satisfy themselves that the employee not only understood that he signed a waiver but also had a "meaningful comprehension of the *legal* significance of a release of [his] claims . . . ."[8]

In the two cases just mentioned, Judge Higginbotham reversed a lower court decision, but he has proved willing to subject his own judgment to the same scrutiny. An example is *Green v. USX Corp.*,[9] involving a Title VII challenge to a steel company's hiring practices. That case reached the Supreme Court, but we remanded for further review in light of a new precedent affecting disparate impact claims.[10] On remand, Judge Higginbotham found the precedent not applicable but reversed himself on a separate ruling in the case that had upheld the disparate treatment claim. He recognized that the hiring practice had an unfair impact on minorities but concluded that plaintiffs could no longer demonstrate the employer's improper motive, given the Supreme Court's "imposition of an increasing burden of proof on civil rights plaintiffs . . . ."[11] It is a rare judge who reassesses his fidelity to changing doctrine, but Judge Higginbotham noted that the court's "obligation to the parties . . . require[s] us on remand to correct what we now think the Supreme Court would consider to be a significant error in our original opinion."[12]

In *Wilmington United Neighborhoods v. United States*,[13] Judge Higginbotham held for a divided panel that Congress had barred judicial review of locational decisions for medical facilities, even if those decisions adversely affected civil rights. Judge Higginbotham was "not unmindful" of the impact of the decision on the "weak and the poor . . . [as] options for the inner city are reduced by moving major centers or services to the suburbs . . . ."[14] Yet, after a thorough analysis of a complicated statute, he concluded that Congress intended its overriding purpose of reducing health care costs (by shielding health care providers from litigation) to prevail.[15]

Similarly, in *Business Association of University City v. Lan-*

7. *Id.* at 524.
8. *Id.* at 525.
9. 896 F.2d 801 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 53 (1990).
10. USX Corp. v. Green, 490 U.S. 1103 (1989).
11. 896 F.2d at 806.
12. *Id.* at 806 n.4.
13. 615 F.2d 112 (3rd Cir. 1980), *cert. denied*, 449 U.S. 827 (1980).
14. 615 F.2d at 122.
15. *Id.*

drieu,[16] Judge Higginbotham rejected the claim that the location of new low-income housing would contravene federal law by exacerbating the concentration of minorities in Philadelphia. Acknowledging the plaintiffs' good faith in seeking to integrate other neighborhoods, Judge Higginbotham nevertheless concluded that, "under the guise of . . . concern about the poor," the suit would "push the doctrine of integrated housing . . . beyond the limit of the logic of any of our prior cases, [or] any civil rights statutes . . . ."[17]

Judge Higginbotham's sensitive review of a summary judgment record emerges in *Wilmore v. City of Wilmington*.[18] That case involved a firefighter's promotional exam that tested, among other things, administrative skills for which only whites had received training. The city argued successfully in district court that there was no discrimination because minorities on average still did better on the full exam. Judge Higginbotham saw the deeper implications of the record. He noted that minorities were conceded to be qualified for the training they never received, that those who received training performed best on the exam, and that minorities would likely have achieved yet higher scores—and thus some of the coveted promotions—had they been eligible for administrative training.[19]

Finally, I might note the case of *Levendos v. Stern Entertainment, Inc.*,[20] in which a plaintiff claimed that gender discrimination had forced her out of her restaurant job. In finding that there *was* a possibility of constructive discharge, Judge Higginbotham declined to "state as a broad proposition of law that a single nontrivial incident of discrimination can never be egregious enough to compel a reasonable person to resign."[21] (That conclusion faintly echoed an episode in Judge Higginbotham's own life. As a freshman at Purdue, he appealed to that University's President to admit black students to the school's dorms instead of relegating them to unheated, off-campus quarters. The temerarious freshman was told that the law did not require such accommodations and that, if he was dissatisfied, he should leave.[22] Whether or not this lone ep-

16. 660 F.2d 867 (3rd Cir. 1981).

17. *See id.* at 878.

18. 699 F.2d 667 (3rd Cir. 1983).

19. *Id.* at 674-75.

20. 860 F.2d 1227 (3rd Cir. 1988).

21. *Id.* at 1232.

22. *See, e.g.*, A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process vii-viii (1978).

isode constituted constructive discharge, young Higginbotham heeded the message and soon transferred to another college.)

As these sample cases demonstrate, Judge Higginbotham has made the law fulfill its potential while scrupulously respecting its intended limits. Regardless of outcome, each decision has displayed the care and thoroughness that bespeaks respect for all of the parties. Like the young man in Wordsworth's poem, an opinion by Judge Higginbotham contains within it "a dark inscrutable workmanship that reconciles discordant elements, makes them cling together in one society."[23] By demonstrating to all parties that the law has been fully canvassed and fairly applied, his opinions in these often divisive cases have nevertheless engendered respect for the adjudicatory process.

Judge Higginbotham's public writings explore some of the questions not encompassed by contemporary lawsuits. Much of his scholarly work, for example, has brought us closer to understanding the lingering impact of slavery. In particular, of course, his book *In the Matter of Color*[24] examines the colonial laws that treated African Americans as inferior beings (or, worse, as property). The book is daunting in scale, having required some ten years' research into thousands of documents. One can only marvel at the commitment that sustained Judge Higginbotham's effort while he worked full-time on the bench and, periodically, in the classroom, too. "Nothing great," Emerson observed, "was ever achieved without enthusiasm."[25] One concludes that enthusiasm carried Judge Higginbotham through to the completion of this book. As he confides in its preface, "I became intensely eager to acquaint myself with . . . the lessons of racial history, to ascertain to what extent the law itself had created the mores of racial repression."[26]

The book lives up to this promised scope, and it is shaped throughout by the dual outlook—that of the analytic lawyer and the empathetic observer—that I have mentioned. On the one hand, Judge Higginbotham the lawyer subtly analyzes the colonies' legal regimes that regulated African Americans. His analysis reveals law's capacity both to carry out immoral ends and to give voice to noble aspirations. In some colonies, slaveholders' economic interests were protected by a detailed regime of punishments and prohibitions, while other colonies like Pennsylvania

23. William Wordsworth, The Prelude, 53-55 (1850 version)(J.C. Maxwell ed. 1971).

24. Higginbotham, *supra* note 22.

25. Ralph Waldo Emerson, *Circles*, in Essays 321 (1904)

26. Higginbotham, *supra* note 22, at ix.

were less harsh in subjugating African Americans.[27] Yet even Pennsylvania, which recognized, in 1780, that "He, who placed [men of different complexions] in their various situations, hath extended equally [H]is care and protection to all,"[28] nevertheless granted legal protection to slavery for another 28 years.[29] Thus, at the very moment that America issued its Declaration of Independence, not one colonial judge or legislature would extend that document's basic precept—that "all men are created equal"—to America's black inhabitants.[30]

Judge Higginbotham the humane observer reminds us that "the language of the law shields one's consciousness from . . . the stark plight of its victims,"[31] and that, distant as it may be, this pre-Revolutionary history helps us to understand how, "through the legal process, racial injustice was further perpetuated" for most of the next two centuries.[32] Indeed, much of Judge Higginbotham's other writings have attempted to relate the history of legalized injustice to the modern era. At a bicentennial celebration, he reminded his audience that the Constitution was only recently given life for all Americans.[33] In his Pound Conference lecture on reform of judicial administration, he cautioned against the type of docket clearance that would withdraw access to the courts—access that has been crucial in reversing centuries of discrimination.[34] In commemorating the Harvard Law Review's centennial,[35] he noted that the *Review's* early editors did not even comment on the Supreme Court's lamentable decision in *Plessy v. Ferguson*.[36] Judge Higginbotham counseled today's *Review* editors that "lawyers [should] evaluate how successful we have been as a profession in moving towards the goal of social and legal justice for all," and that "[e]ach lawyer must consciously and constantly assess his or her values and goals in forging rules of law for the future."[37]

In reflecting upon the work of distinguished judges, I am

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27. *Compare id.* at 151-215 (discussing the treatment of slaves in South Carolina *with id.* at 267-310 (discussing the treatment of slaves in Pennsylvania).

28. *Id.* at 301.

29. *Id.* at 302.

30. *See id.* at 268 & n.3, 313.

31. *Id.* at 11.

32. *Id.* at 16.

33. A. Leon Higginbotham, Jr., *The Bicentennial of the Constitution: A Racial Perspective*, Stan. Law., Fall 1987, at 8.

34. A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 154 (1976).

35. A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment and Craftsmanship*, 100 Harv. L. Rev. 795 (1987).

36. *Id.* at 808.

37. *Id.* at 815.

sometimes reminded of Edmund Burke's exhortation to an English audience. "It is . . . our business," he said, "[t]o bring the dispositions that are lovely in private life into the service and conduct of the commonwealth."[38] Judge Higginbotham possesses an abundance of "lovely dispositions": an inquiring mind, a commitment to fairness, a compassion for those ill-treated, and a determination to see their condition changed. We are fortunate indeed that he resolved to "bring th[ese] dispositions . . . into the service and conduct of the commonwealth." His example has surely spurred others to harness their energy and vision to the public good. I know it will continue to do so for decades to come.

38. Edmund Burke, Thoughts on the Cause of the Present Discontents 115 (5th ed. 1775).