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The Unique Path of A. Leon Higginbotham, Jr.— A Voice for Equal Justice Through Law

Clifford Scott Green* and Stephanie Franklin-Suber*

I.

Judge A. Leon Higginbotham, Jr., once observed, in paying tribute to a friend, that "every successful person identified with a racial minority must seek to design or sort out the unique path or responsibility for his or her own life."¹ To illustrate his point, Judge Higginbotham quoted Dr. W.E. Burkhardt DuBois:

One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

The history of the American Negro is the history of this strife—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the doors of Opportunity closed roughly in his face.²

Without a doubt, Leon Higginbotham is "a successful person." His career as a lawyer and a judge is one of the most noteworthy and distinguished of any American. He has had a significant impact on American jurisprudence and the law generally. He also happens to be "identified with a racial minority." And it is because of this immutable characteristic that, throughout his career, he has strived to translate the ideal of equal justice under the law

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1. A. Leon Higginbotham, Jr., *C. Clyde Ferguson, Jr.—An Irreplaceable Scholar and Friend*, 97 Harv. L. Rev. 1272, 1272 (1984).

2. *Id.* (quoting W.E.B. DuBois, *The Souls of Black Folk: Essays and Sketches* 3-4 (1903)).

into a reality for African Americans and black South Africans. His effectiveness as an individual in this struggle lies in the fact that he has "merged his double self into a better and truer self" — one that synthesizes the many strengths of his American heritage with the many strengths of his African heritage.

As a result of his personal experiences with racism, his exhaustive study of race and the legal process, and his extensive travels throughout South Africa, Leon Higginbotham is acutely aware that America and South Africa have much to teach the world and each other about unequal justice. Yet, despite the personal indignities and sad lessons of racism, Leon Higginbotham believes that it should be possible for a person to be both black and an American or black and a South African without having "the doors of Opportunity" closed. He has always remained confident that the legal process in both societies can and should provide the means for making the society egalitarian. And more importantly, he does not mouth the concept in the abstract.

As a lawyer, civic leader, scholar, and educator, Leon Higginbotham has persistently—individually and in association with others, black and white—called for the establishments in America and South Africa to open the doors of society's institutions to all Americans and to all South Africans. Individually and in association with others, he has been a tireless voice for equal justice. This is the "unique path" Leon Higginbotham has designed for himself. He has made the struggle for equal justice and human rights in America and South Africa his paramount goal.

II.

A.

As a young man, Leon Higginbotham experienced first-hand the unequal application of legal standards to deny equal citizenship to African Americans.

He grew up in a working-class family during the Great Depression in Trenton, New Jersey, the son of a laborer and a domestic. At the age of 8, Leon told his father and uncle he wanted to be a fireman. They laughed and said, "The Ewing Township fire company's never going to take a colored boy." It was then that he first learned that skin color can make a difference.³

Race remained an issue for Leon Higginbotham. After attending segregated public schools, at the age of 16 he went to Pur-

3. Arthur S. Hayes, *A. Leon Higginbotham: Headed for the High Court?*, *Am. Law.*, Nov. 1987, at 86.

due University in West Lafayette, Indiana, for engineering. It was there that he was provoked to consider law as a career. There Leon Higginbotham began to view the law as an instrument for remedying and preventing racial injustice. There he began to design his unique path.

At Purdue University in 1944, Leon Higginbotham began his pursuit of equal justice. He spent the winter living in an unheated attic with a dozen other African American students. They were forced to stay in the attic because they were not allowed to share the dormitories with the white students. In the preface to his book *In the Matter of Color*⁴ he wrote, "One night, as the temperature was close to zero, I felt that I could suffer the personal indignities and denigration no longer."⁵ Leon Higginbotham forcefully, yet deferentially, approached the university president and requested that the African American students be allowed to stay in some section of the state-owned dormitories—segregated, if necessary, but not freezing and humiliated. The university president replied: "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."⁶

Fortunately, Leon Higginbotham has never been one to "accept things as they are." He left Purdue and "abandoned engineering for social engineering."⁷ He transferred to Antioch College in Ohio, where he studied sociology. He then went on to Yale Law School.⁸

During his last year at Yale, Leon Higginbotham interviewed at a major Philadelphia law firm that treated him as a prime candidate, until his race was discovered at the interview. Irrespective of his superior credentials, he was unable to break the color barrier at the law firm. Undaunted, Leon Higginbotham began his legal career as a law clerk to Justice William Curtis Bok of the Philadelphia Court of Common Pleas in 1952.

Over the next decade Leon Higginbotham earned a distinguished reputation in the local, state and federal government, as well as in private practice.

4. A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* (1978) [hereinafter *In the Matter of Color*].

5. *Id.* at viii.

6. *Id.*

7. *Hayes, supra* note 3, at 85.

8. Judge Higginbotham and Judge Green first met representing their respective law schools, Yale and Temple, at the American Law School Moot Court Competition in 1951.

B.

As a young lawyer, Leon Higginbotham was a resonant voice for equal justice.

In 1953, Leon Higginbotham became an assistant district attorney in Philadelphia. He then became a partner at Norris, Schmidt, Green, Harris & Higginbotham, one of the first African American law firms in Philadelphia, and practiced there from 1954 to 1962.⁹ He represented small business, individuals in personal injury suits, and large African American churches and local church organizations. These were the wealthiest clients an African American lawyer could hope to represent in Philadelphia at that time.¹⁰

During his years at Norris, Schmidt, Green, Harris & Higginbotham, Leon Higginbotham established himself as one of the outstanding trial lawyers at the bar. Moreover, notwithstanding the long hours necessary to succeed in the practice of law, he found substantial time to devote to community affairs.

While at Norris, Schmidt, Green, Harris & Higginbotham, Leon Higginbotham served as President of the Philadelphia Chapter of the NAACP. In lawsuits brought on behalf of the NAACP and other civic organizations, he challenged laws and customs that were in conflict with the constitutional guarantee of equal protection under the law. Additionally, he served as special hearing officer for the Department of Justice, as Special Deputy Attorney General for Pennsylvania, and as a Commissioner on the Pennsylvania Human Relations Commission.

Leon Higginbotham's crusading efforts in Pennsylvania did not go unnoticed. In 1962, he was nominated by President John Fitzgerald Kennedy for a seven-year term as a Commissioner on the Federal Trade Commission. He was the first African American to be a member at the commission level of any federal regulatory agency.

Two years later, Leon Higginbotham was named by President Kennedy as United States District Judge for the Eastern District of Pennsylvania,¹¹ the youngest federal judge to be appointed in three decades. The American Bar Association unanimously rated him "well qualified." In 1977, President Carter elevated him to the United States Court of Appeals for the Third Circuit. The

9. Judge Higginbotham and Judge Green were law partners at Norris, Schmidt, Green, Harris & Higginbotham from 1953 to 1962.

10. Hayes, *supra* note 3, at 86.

11. Judge Higginbotham was initially nominated by President Kennedy. However, the appointment and commission lapsed due to President Kennedy's assassination. President Johnson resubmitted the nomination and ultimately appointed Judge Higginbotham to the federal bench.

American Bar Association rated him "exceptionally well qualified."

On January 15, 1990, Leon Higginbotham became the nation's third African American judge to become chief judge of one of the federal judiciary's twelve circuits.¹²

III.

A.

As a judge, Leon Higginbotham has continued to be a resounding voice for equal justice.

On the bench, Judge Higginbotham has emphasized the protection of *all* American citizens by the majesty of the law. At a 1977 conference addressing federal judicial reform, he said, "The basic reason for . . . having the courts available to vindicate the rights of our citizens is that other institutions, in our society, institutions designed to either vindicate or protect those rights, have either failed to do so or have broken down completely."¹³

While on the United States District Court, Judge Higginbotham wrote an opinion which eloquently articulates the full participatory role that he envisions for African American judges and that African American judges should expect and demand. In *Commonwealth v. Local 542, International Union of Operating Engineers*,¹⁴ a case involving a civil rights suit arising out of alleged racial discrimination, the defendants moved to have Judge Higginbotham recuse himself from the case. They alleged that he was personally biased because of his race and his active affiliation with "Black Causes." In setting forth why it was essential that he not withdraw from the case, he wrote:

Blacks on the bench, although not legislators, politicians or appointed officials, should be free to speak out on the injustices and inequalities of the society. Furthermore, black judges should not be required to disparage blacks in order to placate whites who would otherwise be fearful of our impartiality.¹⁵

Judge Higginbotham went on to note that his Jewish colleagues on the bench are active in their community relations councils and publication boards, as are Catholic and Protestant judges active in their respective churches and organizations. He concluded by saying that as long as they continued to preside over matters where

12. The others were William H. Hastie of the Third Circuit and Spottswood W. Robinson, III, of the District of Columbia Circuit. Judge Higginbotham went on senior judge status in January of this year.

13. Hayes, *supra* note 3, at 88.

14. 388 F. Supp. 155 (E.D. Pa. 1974).

15. *Id.* at 180.

Jew and Gentile or Catholic and Protestant disagree then he too would preside where African Americans and white Americans disagree.¹⁶

Furthermore, as a judge, Leon Higginbotham has not confined himself to the disposition of cases but has also been actively involved in the organization and administration of the court system, having served on the Commission on Reform of Federal Criminal Laws and the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts.

B.

As a civic leader, Leon Higginbotham has been a strident voice for equal justice.

Off the bench, Leon Higginbotham has been outspoken on sensitive racial issues and has not hesitated to take an activist role in the community for fear he may appear partial in the eyes of the majority:

Apolitical [is] probably a traditional stance [for a judge to take off the bench] . . . but that's not my stance . . . what seems to concern people is that I look at the law and spend my time not on the periphery of those things but with the interaction of law and society, the negatives and positives. And when you do that you approach the margins of controversy or you might say that I get right in the center of it.¹⁷

In the mid-1960's, while a district court judge, Leon Higginbotham was invited to speak at one of the annual meetings of the American Bar Association. He was one of the first African Americans ever to address the ABA at such a gathering. He began his remarks by thanking the ABA for the invitation and by letting the association know that he knew that it expected him to talk about non-controversial and comfortable issues. Instead, he took advantage of the opportunity to point out to his white colleagues in the predominantly white ABA that, at that time, the ABA was a "bastion of racism."

Leon Higginbotham has also maintained an active affiliation with "Black Causes" and causes for social justice. He has served actively on the board of trustees or as a member of more than thirty national organizations—including the National Commission on the Causes and Prevention of Violence to which he was appointed by President Lyndon B. Johnson. In so doing, he has re-

16. *Id.*

17. Hayes, *supra* note 3, at 86.

ceived more than fifty local, regional, and national honors, which include the National Human Relations Award, presented by the National Conference of Christians and Jews, Inc.; the Annual Brotherhood Award, presented by Congregation Rodeph Shalom of Philadelphia to an outstanding American who has dedicated himself to the principles of brotherhood and fellowship; and the Martin Luther King Award for outstanding service in the field of human rights, presented by The Educator's Roundtable, Philadelphia, Pennsylvania.

C.

As one of the foremost scholars and educators in the field of race and the legal process, Leon Higginbotham has been and remains a compelling voice for equal justice.

Leon Higginbotham has lectured at numerous universities and currently serves as an Adjunct Professor at the Wharton Graduate School, Department of Sociology; a Lecturer-in-Law at the University of Pennsylvania Law School; and a Lecturer-in-Law at the New York University Law School. He has received more than fifty honorary degrees from colleges and universities. He has published more than fifty articles in major scholarly journals.

His book *In the Matter of Color* has received several national awards, including the Silver Gavel Award (American Bar Association), the National Bar Association Literary Award, the Frederick Douglass Award of the National Association of Black Journalists, and the Book Award of the National Conference of Black Lawyers.¹⁸

In *In the Matter of Color*, Leon Higginbotham painstakingly analyzes the history of the effort to eradicate discrimination and injustice in the United States for examples of how the law can be used both to perpetuate and to eliminate racial injustice. His writings illustrate that history has been filled with many instances of racial bigotry and hatred by American judges and lawyers.

Yet Leon Higginbotham has also recognized that there is a powerful interrelationship between his fifteen-year study on race and the American legal process and race and the South African legal process. As a result, he has become a pioneer in the field of comparative analysis of the South African and United States laws and legal systems.¹⁹

18. Judge Higginbotham is currently writing two additional books in his *Race and the American Legal Process* series.

19. See, e.g., A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. Rev. 479 (1990).

Leon Higginbotham has traveled extensively in South Africa and has witnessed firsthand the application of unequal legal standards to deny equal citizenship to blacks in South Africa. He has also received numerous South Africans visiting the United States and has been actively involved in the work of the Southern African Legal Services and Legal Education Project, Inc., and The Southern Africa Project of The Lawyers Committee for Civil Rights Under the Law.

On his first trip, Leon Higginbotham spent sixteen days in South Africa at the invitation of the Black Lawyers Association ("BLA"). After several members of the BLA visited the United States under the sponsorship of the State Department, the organization concluded that the experience of African American lawyers in the American civil rights struggle might be an invaluable source for black South African lawyers to draw on in their own struggle to articulate and achieve political and social change through the law. The BLA approached the Carnegie Corporation of New York with a proposal for Carnegie's funding of a visit of distinguished African American lawyers to South Africa.

As a member of this American delegation, Leon Higginbotham visited the major metropolitan areas in South Africa and met with members of the South African bar association, the judiciary, political and social leaders, religious leaders, and average citizens. He also visited the law schools and universities and spent time in the black townships. He saw and felt the operation of the unequal legal process.

His first trip to South Africa had a special significance for Leon Higginbotham and an unusual and lasting impact on his life. It reinforced his view that there is a relationship between the struggle of African Americans to be free of the vestiges of slavery and the struggle of black South Africans to be free of the chains of apartheid. The experience continues to motivate Leon Higginbotham's efforts to denounce these discriminatory barriers to equal justice.

With the freeing of Nelson Mandela and negotiations underway between dissident political groups and the white government, South Africa has recently begun to implement certain rights reforms.²⁰ And, in February of this year, in connection with these reforms, Leon Higginbotham was the only American judge invited to participate in a conference convened by leading South African scholars on the formation of a constitutional court in South Africa. He was asked particularly to address the problems of a racially un-

20. *Id.* at 479.

representative bench, and he continues actively to participate in this ongoing initiative.

Leon Higginbotham's comparative study of race and the South African legal process have provided him with a frightening picture of the path we in America have followed and, more importantly, will follow in the future if we fail to preserve the fundamental civil rights and egalitarian philosophy incorporated in our Bill of Rights, the fourteenth and fifteenth amendments, our civil rights laws, and the human rights decisions of the United States Supreme Court.²¹

He identifies many similarities between America and South Africa in the perpetuation of racial injustice: between the pass laws during the era of American slavery and the current pass laws in South Africa; between the disenfranchisement of African Americans in the nineteenth and early twentieth centuries and the disenfranchisement of black South Africans today; and as to hundreds of other deprivations. He points out that early Americans perceived African Americans as inferior and that this perceived inherent inferiority rationalized slavery. Similarly, in South Africa, apartheid was designed to preclude blacks from making demands on freedom and liberty.²²

Leon Higginbotham calls for Americans to act to attain the ideals we purport to embrace and to make, as he has, equal justice our paramount obligation:

[A]ll people stand on an equality before the bar of justice in every American court. . . . [C]ourts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or . . . victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon [a] court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.²³

IV.

Leon Higginbotham is a professional and personal model of excellence, commitment, and action by which we should all measure our own roles in society and design our unique paths of accomplishments. Every American should be a voice for equal justice, as Leon Higginbotham is.

21. *Id.* at 501.

22. *Id.* at 501.

23. *Id.* at 501.

