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The Complicated Ingredients of Wisdom and Leadership

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I. INTRODUCTION

Leon Higginbotham was, and will always be, an original. As the world has long recognized, he was a distinguished jurist, an unyielding advocate on and off the bench for racial justice in the United States and throughout the world, and an indefatigable scholar of the legal history of race in the United States. He was also a mentor to generations of law clerks and law students, many of whom he selected for positions based in part on their own passion and dedication. These protégés now inhabit many important seats of influence across the United States—a legacy, I think, that might make him almost as proud as any other.

Few judges in the history of our country will ever equal his energy and passion or his commitment to improving the lot of his fellow man. For the Judge, these activities went far beyond his judicial role. They included service on a number of influential commissions, advising institutions and countries on racial and other social policies, and, last but by no means least, awakening and energizing a generation through his truly remarkable speeches and writings outlining the affirmative role we all should play in improving the world around us.

He was, of course, all of these things—and more. He was a loving father, a dedicated (but not great) tennis player, and a relentless (but also not highly successful) dieter. (The latter is a trait that I shared with him and about which I commiserated with him often.) He was tall and statuesque and blessed with a deep and booming voice that commanded any room he entered or any group he addressed. At the same time, his speech was often punctuated with those delightful, high-pitched giggles when he relaxed with friends or staff and put all around him at ease. All of these qualities combined to make him as engaging and delightful a person, yet as thoughtful and relentless an advocate for the betterment of the legal system and the society around him, as I have ever known. In short, there was and will never be anyone quite like him—not even close.

The purpose of this Essay, however, is not to detail his public accomplishments. Those participating in this and similar symposia held in the past year have already conveyed eloquently the extraordinary breadth

* Dean, University of Pennsylvania Law School; Law Clerk to Judge Higginbotham, 1979–1981. The author would like to thank Chaim Stern for research assistance in the preparation of this Essay.

and range of the Judge's contributions to the betterment of the legal system and society around him.[1] Precisely because those public efforts have been so well documented, I would like to focus here on a more personal aspect of the Judge's life and personality—his distinctive judgment, or, to use a current academic label, his *practical wisdom*. Anthony Kronman has aptly characterized this capacity in judges as "the ability to live and work in what [Alexander Bickel called] the Lincolnian tension between a society's ideal, on the one hand, and the reality of its present situation, on the other."[2] Kronman goes on to observe, "The main job of the [courts] is to guide the process of societal self-reform through which existing laws and practice are reshaped in the image of our deepest ideals."[3]

That is clearly the role the Judge assumed for himself and which guided all of his diverse public roles. More importantly, the Judge's ability to navigate this complex process, I think, was an extremely important ingredient in the remarkable success he enjoyed in so many different types of public spheres—as a trial judge, as an appellate judge, as a legal scholar, as a public and inspirational speaker, and as a public advisor and advocate for social change. For the organizers of this symposium who have asked that these essays engage the Judge's academic interests, this commentary also affords an opportunity to explore indirectly an issue that intrigued him and a host of other academics in recent years: what type of qualities serve as a source of judgment as well as leadership in our public figures today. Such attributes help us understand those individuals, such as the Judge, who are able to rise above their circumstances and pursue a social vision.

II. THE COMPLEX INGREDIENTS OF WISDOM AND LEADERSHIP

While many academics, including the Judge, have written with great insight about practical wisdom over the years, the place he would have started the discussion is with a story.[4] Let me, once again, follow his lead.

I first began to be aware of the Judge's peculiar judgment late one night many years ago soon after I first began clerking for him in 1979. Fresh out of law school, I was quite enamored with all of the latest and fashionable academic theories. Law was first beginning to fully embrace its tremendously important move toward interdisciplinary inquiry—a development with which I was then, and still am, quite fascinated. Not heeding the Judge's cautionary words, however, I was all too captivated

1. Needless to say, they are truly remarkable. *See, e.g.*, Symposium, *In Memoriam: A Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1801 (1999); Dedication, *In Honor of A. Leon Higginbotham, Jr.*, 142 U. PA. L. REV. 511 (1993); Symposium, *Honoring Judge A. Leon Higginbotham, Jr.*, 9 LAW & INEQ. J. 383 (1991). In the last eighteen months moving memorial services have been held at Harvard University, New York University, the University of Pennsylvania, and Yale University, among other places.
2. ANTHONY T. KRONMAN: THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 24 (1993) (summarizing the work of Bickel).
3. *Id.* at 24–25.
4. For a discussion of the Judge's successful use of stories in his speeches and writings, see *infra* text accompanying note 37.

by "how bright [my] colleagues [were.]"[5] The case before us that evening dealt with an issue that I argued should be resolved through a somewhat technical economic/statistical analysis. (I can't remember the exact subject matter, but the substance is less important than the method.) The Judge and I went back and forth about whether the statistical analysis could or should resolve the issue. While the Judge loved statistics, he remained skeptical about their application in this instance. After some further discussion, he finally turned to me and said, "Look, Mike, the model may seem right, but you have to take this statistical approach with a grain of salt. If I thought all statistics were always determinative, I would still be living in Trenton."[6]

At the time, I only had a vague sense of the underlying significance of the Judge's retort, but I have thought about it quite often since that December evening. Like all great individuals, the sources of the Judge's passion and insight were complex. As his comment indicated, he had great faith in immersing oneself in the facts of a case or problem. At the same time, he had a intuitive faith that one needed to see through those facts when the problem demanded it. The confluence of these two impulses was both an intriguing paradox and, in the end, a source of his greatness. Let me explain.

On the one hand, the Judge was, almost above everything else, the consummate, fact-driven and fact-bound thinker, long before this process had become academically fashionable, as it has in recent years.[7] This observation may seem odd to those who have become familiar with him only through some of his more public and inspirational roles, such as testifying on impeachment or speaking out on the injustices in South Africa. But his judicial colleagues and clerks certainly would not be surprised. One Third Circuit friend correctly described him as "basically a centrist judge, respectful of precedent and judicial tradition,"[8] not someone who would "push beyond the limits of the law."[9] Indeed, the Judge himself

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5. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1010 (1992). The Judge wrote his well known letter to Justice Thomas on the occasion of the latter's elevation to the Supreme Court. For a discussion of this issue, see *infra* text accompanying notes 12–15, 33.
6. The quote is a paraphrase. The advancing years have reduced my ability to recapitulate the exact words.

   Higginbotham's recognition of the need to take chances and move beyond the past was well captured in another story he frequently told about when he was growing up in Trenton, and expressed to his mother a desire to become a fireman. (At the time, the occupation was closed to blacks, and his goal on one level might have been seen as quite ambitious.) His mother, who was a towering presence in his life, advised him not to think about being a fireman, that his aspirations should be much higher. He took great delight in that episode, especially what it showed about his mother's character and her own ability to see beyond the statistical odds and envision a better future. It was a lesson he carried with him the rest of his life.
7. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999); RICHARD A. POSNER, OVERCOMING LAW (1995); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).
8. Edward R. Becker, *In Memoriam: A. Leon Higginbotham*, 112 HARV. L. REV. 1813, 1815 (1999).
9. John P. Frank, *Giant: A Higginbotham Memoir*, 142 U. PA. L. REV. 521, 527 (1993).

would call his opinions "[not] 'black opinions,' [but] 'black-letter opinions.'"[10] He loved facts and believed that an immersion in the facts, whether it be in a trial record or the history of slavery in the 1800s, would be the greatest source of wisdom and insight. In other words, he truly believed, in the famous words of Justice Holmes that he so often quoted, "[A] page of history is worth a volume of logic."[11]

There was no better illustration of this impulse than the Judge's response to Clarence Thomas's elevation to the Supreme Court. In Higginbotham's well known letter advising the Justice on how to approach his new tasks, the Judge exhorted Thomas, first and foremost, to "reflect more deeply on legal history than you ever have before."[12] What Thomas should not do, the Judge cautioned, was to become entranced by "how bright your colleagues [on the Court] are."[13] As the Judge frequently pointed out, many of the Justices of the Court that decided *Plessy v. Ferguson*,[14] had graduated from some of the nation's most prestigious law schools; the greatest insights, he was convinced, came from knowing the historical facts.[15]

At the same time, and this is the intriguing point, the Judge understood instinctively the need to see through those facts and think imaginatively with vision when the situation demanded it. That was the import of his retort about remaining in Trenton. The critical gift, of course, is to know when and how to exercise that discretion and leadership; that is, when to use the moral capital accumulated over a series of cases and roles and pursue a greater vision. This is when the Judge was at his best, whether it was during impeachment hearings or denying recusal in a race discrimination case. On those occasions, "He used his post as a bully pulpit to encourage a better society when he could not mandate its change."[16] While some might see this combination of fact and vision as a contradiction, it was not. Indeed, it was the foundation of the Judge's ability to be a leader in so many different and varied contexts. For him, the facts limited but at the same time informed that vision, and were a major source of his energy.

This complex, dialectical approach, which has been the subject of much study and comment within the legal academy in recent years, raises the age-old question about what makes a great and wise decision-maker, and, when the situation demands it, a leader. For some, the great judge is thought of as a "Hercules," imposing his values from the insights that he derives from above.[17] I think, however, that Higginbotham's approach reflected an older philosophy, which has acquired much support of late, and is aptly described in Anthony Kronman's important book on the

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10. Michael deCourcy Hinds, *Legal Scholar to Take Helm of the Third Circuit*, N.Y. TIMES, Dec. 15, 1989, at B20 (quoting Higginbotham).
11. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).
12. Higginbotham, *supra* note 5, at 1014.
13. *Id.* at 1010.
14. 163 U.S. 537 (1896).
15. *See* Higginbotham, *supra* note 5, at 1009.
16. Frank, *supra* note 9, at 529.
17. *Cf.* RONALD DWORKIN, LAW'S EMPIRE (1986) (developing a theory of law by depicting the approach to adjudication of an ideal judge).

practical wisdom of lawyers, *The Lost Lawyer*. There, Kronman shows how lawyers historically have had a special role in exercising judgment through their capacity to advise and represent their clients—that is, in their relationship to actual cases. The same is true for judges. As Kronman puts it,

> Judges are disciplined by the specificity of the cases they must decide, and this discipline not only puts a limit to the speculative theorizing in which they may engage, but is also bound to remind them, as they go about their work, of the value of deliberative wisdom—the wisdom that consists in a knowledge of particulars and that no general theory can provide.[18]

While Kronman insists that we have lost this traditional role in the modern practice of law, the Judge, who was as forward-looking as they come, embodied many of these same qualities in his judicial and scholarly approach.

Yet obviously, Higginbotham was far more than simply a wise common-law decision-maker. He also knew, in his judicial and extrajudicial roles, when and how to be a public leader. This latter connection is explored in a complementary study of political and social leadership by Howard Gardner, *Leading Minds*.[19] Gardner argues that political visionaries exhibit a capacity to understand and capture an underlying ideal of their society and articulate that ideal to the public at large. In other words, they understand the Lincolnian tension and move effectively to make the public aware of it and to reduce its gap. Stories, something the Judge used in his opinions and speeches with distinction, are also critical in this process, according to Gardner, both in capturing the essence of a social ideal and communicating that vision to the public at large. The inchoate ability to connect the "is" and the "ought"—a relationship that has absorbed philosophers since time immemorial—is ultimately what distinguishes good judgment in our judges and wise political leaders.

The Judge's personal background and underlying social philosophy serve as an illuminating and forceful illustration of those qualities—practical wisdom and vision—that one finds in great judicial, legal, and political leaders. Not coincidently, in his own writing on legal history and the judicial role, he repeatedly confronted this same question of how one exercises practical wisdom and leadership, subject to the institutional and psychological constraints in which we all operate.[20]

III. THE JUDGE AS LEGAL HISTORIAN

There is no better example of this inclination in the Judge than in his indefatigable determination to study legal history. Certainly he became interested in writing a definitive legal account of race in the United States

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18. KRONMAN, *supra* note 2, at 319.
19. HOWARD GARDNER, LEADING MINDS: AN ANATOMY OF LEADERSHIP (1995).
20. In his studies on U.S. history, the Judge constantly asked when were individuals able to rise above the limited options that appeared to constrain their world and exercise the discretion to make the world a better place.

because he recognized this legacy had been inadequately treated in the law schools and legal treatises, resulting in insufficient appreciation for the tortured history of slavery and race.[21] As a judge and advocate for racial justice in the United States, he also believed the past was of enduring significance in understanding our continuing moral obligation to write the legal wrongs that had been committed against African Americans in the United States.

But this history was also important for what it taught us about the related and enduring question of how we should exercise moral choice. In this regard, in his prize-winning book on the early colonial period, *In the Matter of Color*, the Judge took special interest in the lost promise of Georgia, which originally outlawed slavery but later reneged.[22] Pennsylvania was also critical to the moral analysis, for it was here, in 1688, that the first anti-slavery forces gathered in Germantown.[23]

Why did certain colonies break away from the slave system at early points, while others did not? What influenced Georgia to backtrack and re-institute slavery? His fascination with the options available to judges during this period revealed a similar dilemma; time and time again, he wanted to understand what choices were available within legal precedent and how the judiciary exercised those options. Did judges have the authority to choose freedom, he would often ask, or were they formally and prudentially constrained? In some instances, as in the famous *Somerset v. Stewart* case in England that he loved to quote, Lord Mansfield exercised that discretion in favor of emancipation, proclaiming, "[F]iat justitia, ruat coelum," that is, "[L]et justice be done whatever be the consequence."[24] Unfortunately, he found that time and time again they failed to pursue available options. What explained the difference? The question absorbed him.

Needless to say, in part for this reason, the Judge's historical explorations were exhaustively detailed. The facts were exceedingly important for him as a judge as well as a scholar. As a result, all the colonial cases had to be analyzed and processed, all the states included in the history. To the scholar, as with the trial judge, the morality and moral compass would rise through the facts, not be imposed on them. He was always skeptical of grand theorizing, whether it was found in law review articles or judges' opinions that strayed far from the facts and the world with which they were most acquainted.

Of course, some might detect a somewhat ahistorical quality to this philosophy. Many historians conceive of their role as explaining and understanding outcomes solely in their historical context. David Strauss has

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21. *See* A. Leon Higginbotham, Jr., Book Review, 122 U. PA. L. REV. 1044, 1049 (1974) (reviewing DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (1973)) (noting that Bell's work was the first casebook of its kind and asserting that "one of the values of Professor Bell's book is that it gives some, but probably not enough, of the history of past racial deprivations so that today's problems can be understood in an appropriate legal and historical context.").
22. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 216–66 (1978).
23. *See id.* at 267–310.
24. Somerset v. Stewart, 98 Eng. Rep. (Lufft) 499, 509 (K.B. 1772).

characterized this as a "genuine effort to understand, in context, an earlier time,"[25] not to moralize about it, as lawyers frequently do, from the vantage point of our present ethical compass. But legal arguments, as Strauss has also pointed out, "don't depend on [immersive] reconstruction [of the original context.] They depend on making selective use of the wisdom of the past, modified by normative considerations, to address current problems."[26] The Judge's work was a *tour de force* in bridging these two roles.

Viewed from this synthetic perspective, the underlying purpose of the Judge's project was to understand when social actors are able to rise above their circumstances, and when they are not, as evidenced by the failure of the American legal system to confront slavery. As he wrote in the introduction to *In the Matter of Color*, the central question motivating the inquiry was whether "the law merely perpetuate[d] old biases and prejudices" or whether it had "been an instrument . . . in establishing . . . injustices based on color."[27] In short, he wanted "to ascertain to what extent the law *itself* had created the mores of racial repression."[28] The legal system, from this perspective, was an independent moral agent. For the Judge, this was *the* fundamental historical and moral legal issue—the failure of our legal system and its representatives, judges acting under the common law and state statute, to pursue those options available to them that would have enabled them to protect and assist African Americans.[29]

IV. HIGGINBOTHAM AS A TRIAL AND APPELLATE JUDGE

This same Lincolnian tension, between the ideals of society and its reality, is also, of course, an everyday dilemma for a sitting judge. Higginbotham was and is rightly known as a strong advocate for using the law and Constitution as a means of pursuing racial and gender justice. Yet the institutional issues of the judicial role constantly gnawed at him. In this context, as in his legal history, Higginbotham let the facts constrain, but, at the same time, inform his social vision.

On the one hand, as I have noted, he was no radical judicial activist. While he could be a pioneer when the circumstances demanded it, he was judicious in his choice of the moment. Just as he was absorbed with revealing the genuine options for judges acting in the 1700s and dealing with slave cases, he was constantly concerned with the breadth that lay

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25. David Strauss, Common Law, Common Ground, and Jefferson's Principle 7 (1999) (unpublished manuscript) (on file with the author).
26. *Id.* at 19.
27. HIGGINBOTHAM, *supra* note 22, at ix.
28. *Id.* (emphasis added).
29. In this respect, the Judge had immense respect for those pioneers who toiled without public acclaim or national recognition, but who took on the cause, despite their limited office. There were many figures drawn from his historical research, but there were also many other, more current figures. Of particular interest were such unheralded notables as Charles Hamilton Houston and Austin Norris in Philadelphia, who at an early age waged a battle for racial justice when the costs were high and the personal payoffs quite modest. His clerks learned about their achievments in what can now be described as oral history. Higginbotham understood that, in part because of his special gifts and his place in history, he might be better known than these earlier pioneers. At the same time, he well understood their importance to the cause he held so dear.

before him as a judge, as suggested by his aforementioned comment to a *New York Times* reporter, "I don't write 'black opinions,' I write 'black-letter opinions.'"[30] He was not, as his good friend John Gibbons observed at his memorial service, a legal radical who sought to push the law beyond its social and historical grounds. In this sense, he shared a view that has since found increasing support in the academy about the value and wisdom in thinking and morally theorizing through specific facts. There has been an explosion in scholarship exploring this point,[31] and the Judge understood it instinctively early on, in his judging and in his own writing.

Indeed, this respect for facts led him, on many issues, to be quite deferential in his legal philosophy to other institutions that might be in better command of the record. For example, he tended to believe in deference to administrative agencies (perhaps a result of his service on the FTC) and in deference to the fact finding of the trial court judge (in part a result of his confidence in the wisdom flowing from the trier of fact). In these cases, I suspect he understood that other institutions—trial judges and administrative agencies—might be in a better position to understand what was really going on.

At the same time, there would be those occasions when something about the case or the doctrine would impel him to use a case to move the law or the public imagination. Certainly, his passionate opinion in the *Operating Engineers* decision,[32] when he refused to recuse himself in a race discrimination case when it was claimed he could not be impartial because he was black, or his famous letter to Justice Thomas on the moral obligations of being a Justice,[33] are only two of countless examples.

V. THE JUDGE'S CONNECTION WITH PEOPLE

The Judge's ability to know when and how to seize the moment and to be an effective advocate was directly related, I suspect, to his intuitive understanding of the human personality. The Judge loved people—connecting with them, identifying with them, figuring out what made them tick, no matter the walk of life from which they came, no matter what their political stripes. As a student fresh out of law school, I received no better education than the late night conferences with the Judge, in which he would expound on the real motivations behind the litigants in the case—as well as a host of other figures, including political or academic leaders in Philadelphia and the country at large. I heard stories about the lives of the women and men who cleaned the floor in the entrance hallway at the courthouse as well as those of presidents and cabinet secretaries. He could be very practical in his assessments, but he was always, at the same time, exceedingly compassionate and insightful. For, above all else, he liked people, especially if they were passionate about what they were doing. In my own case, my fundamental relationship with him

30. Hinds, *supra* note 10 (quoting Higginbotham).
31. *See supra* note 7 (providing examples of such scholarship).
32. Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974).
33. Higginbotham, *supra* note 5.

changed little from the first moment I began work for him as a research assistant, to the point when, as the associate dean at Penn, I recruited him to join the law faculty as a Senior Fellow while still on the bench.

This is precisely the quality one expects to find in a great judge—a sort of imaginative sympathy and compassion, as well as detachment. It is also a trait one expects to find in a great leader. As Howard Gardner has observed, an effective leader "must be able to address a public in terms of the commonsense and commonplace notions that an ordinary inhabitant absorbs simply by virtue of living for some years within a society."[34] To achieve this success, they are also "typically inclusive."[35] That was the Judge's perspective on life. Despite the high level of potential conflict skirting many of the racial and legal issues he addressed, Higginbotham's language and vision were always inclusive and positive. Not surprisingly, his favorite poem was Langston Hughes's *Dream of Freedom*, which concludes with the famous lines, "This dream today embattled, With its back against the wall—, To save the dream for one, It must be saved for All."[36]

Higginbotham recognized that his selection of law clerks was one method for furthering this vision. In culling through the hundreds of applications, he looked for a high level of technical competence. He also looked for a sense of passion and social commitment that would connect them over their careers to people from all different walks of life. Thus, they had to have a devotion to finding the facts and had to be superb technicians, but, at the same time, they had to have a feeling for rising above those facts. Over the years the result was a chambers as diverse in backgrounds and interests as probably any in the United States. In many ways, it was a microcosm of the Judge's views of what society might be.

The result of this philosophy was remarkable. One has seldom seen a more diverse or multifaceted group, nor a crew more dedicated to changing the society around them. The list of current occupations is impressive and unusual; beyond the traditional law partners, it includes cabinet secretaries, judges, high government officials, distinguished law professors, and important social activists. The collective is a testament to his own technical abilities as a judge—and his passion for knowing when and how to rise above the technical to imagine the different.

Finally, no discussion of the Judge's social ideals and philosophy would be complete without reference to his extraordinary rhetorical prowess. The Judge's ability to move an audience was an integral part of his leadership. As Howard Gardner has observed, great leaders often "achieve success [by] construct[ing] and convincingly communicat[ing] a clear and persuasive story."[37] In the Judge's account of his own life and his original attraction to the law, and in his stories about the lives of slaves and the few judges who responded to their needs, the Judge pursued this approach to perfection. He was a master at balancing the sense of complexity and the sense of judgment. No one I have heard could turn

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34. Gardner, *supra* note 19, at 12.
35. *Id.* at 13 (emphasis omitted).
36. Langston Hughes, *Dream of Freedom*, *in* The Collected Poems of Langston Hughes 542, 542 (Arnold Rampersad ed., 1964).
37. Gardner, *supra* note 19, at 302.

a phrase, or reduce a point to a wonderful story, better than Higginbotham. In this regard, it is no accident that when he graduated from law school, the Judge had garnered more awards for oral advocacy than any other student in memory. Long before legal academics had explored the importance of stories to human understanding and motivation, the Judge demonstrated their potency as part of his everyday professional diet.

In the end, though, all of these capabilities were used toward one objective. In all of his judicial, political, and public roles, the Judge's ultimate goal was to confront the fundamental Lincolnian tension between the ideals and reality of our society. His comments on *Brown v. Board of Education*[38] serve as a final and illuminating example. While some scholars in recent years have reluctantly questioned the impact of opinions such as *Brown* in transforming society through judicial decree,[39] Higginbotham emphasized its long-term effect on *general social values*. As he wrote of the opinion, it "changed the moral tone of America; by eliminating the legitimization of state-imposed racism it implicitly questioned racism wherever it was used."[40] In this sense, Higginbotham appreciated the significance of symbolism and ideas as much as anyone. His own scholarly and public efforts repeatedly highlighted the Lincolnian tension. He knew he needed to earn the respect of his colleagues and the public while, at the same moment, making clear the need to reduce the chasm between present reality and aspirational ideals. As much as anything else, the ability to bridge this gap was the source of his influence and, ultimately, his greatness.

38. 347 U.S. 483 (1954).
39. *See, e.g.*, GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).
40. Higginbotham, *supra* note 5, at 1017–18.