

GIANT: A HIGGINBOTHAM MEMOIR

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Not a giant because of his physical size, though when we first met more than forty years ago he was struggling to fit his six-foot, six-inch frame into second-hand, six-foot clothes. Poverty, New Haven style. Rather, he is a giant at overcoming obstacles, crushing through them though he might bruise himself. A giant in ability, a giant in diligence, a giant in integrity, and a super-giant in eloquence. As a standard reference shows, “giant” is a word frequently applied to him by Third Circuit lawyers, for in every dimension of mind and spirit, he is an outsize fellow.¹

To reach his present eminence, he had a long road to travel. The short list at this end of the road is Chief Judge, Retired, of the United States Court of Appeals for the Third Circuit, Harvard professor, director of *The New York Times*, counsel to Paul, Weiss, Rifkind, Wharton & Garrison, serious scholar, and author.

The beginning was sixty-five years ago, son of a laborer at the C.V. Hill factory in Trenton, New Jersey. His father pushed and hauled and did the other chores there for forty-five years, as had his own father before him. The Judge was ticketed for the same life; the president of the company said that the Higginbotham boys could always have jobs at his factory. His mother migrated to New Jersey from tobacco labor in Virginia; Abraham Lincoln’s “angel mother” phrase accurately conveys the spirit of the Judge toward his own mother. She was a domestic servant in the Trenton area, had a seventh-grade education, and great determination for her children. As a thirteen and fourteen-year-old, the Judge worked as a busboy in a hotel and as a wheelbarrow pusher at a pottery factory. His mother wanted more for him. She wanted Leon to work in an office and wear a white shirt with a tie.

That happened, but it wasn’t easy. The Judge went to a segregated grade school, a four-room schoolhouse in which each teacher taught three grades. There was, specifically, no Latin coursework offered.

On leaving the country grade schools, the white children of the area went to white schools in Trenton and the black children went

† Lewis and Roca, Phoenix, Arizona.

¹ See 2 ALMANAC OF THE FEDERAL JUDICIARY 19 (1993).

to Lincoln, a segregated junior high. Lincoln had an academic program and a trade program. In forty years, no one from the Judge's grade school had gotten into the academic program because the steering device was Latin; without a year of Latin, most of the students were eternally tracked into life as elevator operators, or street workers, or as hands in factories or fields. The only escape came much later for those who earned an education the hard way under the G.I. bill.

The Judge's mother would not accept this fate for her son. She went to the principal at Lincoln and talked him into letting her son enter the academic program by enrolling in a second-year Latin course. Without that remarkable end-run, the probability is great that no one but his intimates would ever have heard of Leon Higginbotham again. With that step, he could move on to college and law school.

Again, nothing was easy for the Judge. It is very hard to read works such as the Gallic Wars before learning one's *amo, amas, amat*. A generous and supportive teacher gave him a courtesy pass to her second-year Latin class, and then set out to make him earn it. She tutored Leon, without charge, during the summer. He biked some twenty miles, two or three times a week, for several weeks and in this way pushed open the door to his future.

There are sinners as well as saints in this saga. In 1944, at the age of sixteen, the Judge went to Purdue University. At that early moment, he had no clear life plan. The Purdue of that era cannot be described as segregated. There were 6,000 white students and 12 black students, and the black students were simply isolated. They were housed with sleeping quarters in an unheated attic. During the cold months they sometimes had to go to bed with earmuffs and with shoes on to try to keep warm.

This youthful student went to see Edward Charles Elliott, the president of the University. He asked the president whether there were, somewhere on campus, warmer quarters the students could use.

He got a very direct answer. President Elliott said, "Higginbotham, the law doesn't require us to let colored students in the dorm, we will never do it, and you either accept things as they are or leave the university immediately."²

² A. Leon Higginbotham, Jr., *The Dream with Its Back Against the Wall*, YALE L. REP., Spring 1990, at 34, 35.

The Judge attributes the fact that he is a lawyer today to President Elliott. He calls it negative motivation. If he was going to make things better, he needed to find a base from which to do so. For this reason he chose the law. As he narrated in a law day speech in 1993 upon receiving a cherished award from the Alliance for Justice, a great push in that direction came later in his law student days when he heard Thurgood Marshall argue in front of the U.S. Supreme Court. The experience made vivid to him that "it was possible to advocate great causes."³

First, there was the rest of his education. He took President Elliot's second option, left Purdue and went to Antioch College where a special fund had been created for black students. He and Coretta Scott, later King, were among the first black students at Antioch in many decades. A woman in the Antioch administration who had set up the fund extended herself endlessly to help. Eighteen years later, when the Judge became a member of the Federal Trade Commission, the first black appointee to any federal regulatory commission, he sent that woman an invitation and an airplane ticket for the swearing-in; he wanted her to see what she had wrought.

Yale Law School came after Antioch. The same Antioch official who had seen to the funding of his college education found someone to fund his beginning law school education. This was only enough for the first semester and he would have to make it on his own the rest of the way.

He did, and it was this need which brought us together. A non-lawyer was earning a family trust by doing a biography of an ancestral Supreme Court Justice. As a member of the Yale faculty, I was pot-boiling by helping with his research. I recruited the Judge as my research assistant and we worked together for a short time; he recalls the pay as \$1.50 an hour. He came to know my wife and me, and on occasion he was at our house for a meal. This was a relief from the leftover hamburger meat he bought in bulk from a fast-food place in New Haven after it had passed its requisite freshness date. These were really hard times.

I learned about these hard times in New Haven forty years later. This is not because we were not friends, nor because there was any restriction on candor. It is because, then and now, my assistant was

³ A. Leon Higginbotham, Jr., Address at Alliance for Justice Annual Meeting (June 18, 1993).

a proud man, and was not, then or now, looking for sympathy from anyone. When I finally learned of this story I wrote in abject apology, for it would have been child's play to do more; but one cannot wipe away the tears of him who will not cry.

The Judge's special gift is an extraordinary verbal talent. Great speech making, even among lawyers and public figures, is a diminishing art. Any person reading these words who asks herself when she last heard real eloquence is likely to have to stretch his memory a little. If the reader knows the subject of this essay, the recollection may very well be when she last heard Judge Higginbotham speak. Text is smooth, word choice is excellent, and delivery superb.

This talent contributed mightily to shooting the Judge to the top. At Purdue, for all its limitations on black students, he was on the debate team at the very beginning of his life there. True, when the team went to Chicago for a contest, he could not sleep in the same hotel as his teammates because he was told "we don't take your people here." Yet, he helped lead his team to triumph. At Yale, he quickly distinguished himself in moot court and by the end of the first year he was in the moot court finals before a panel headed by Justice Tom Clark of the Supreme Court. In his second year, he helped represent Yale in the National Moot Court Finals with prize-winning results and he won the highest award in his third year.

He was, in short, a good student and on the forensic side of the law about as good a job prospect as ever graduated from Yale Law School. Dean Wesley Sturges of the Law School bought him a new suit and sent him off to the Yale Law School representative in Philadelphia to arrange placement interviews. But, as it turned out, this service was not for black students. Let me quote his own reminiscence of that time:

I went down the elevator in the Girard Trust Building, and I cried. I mean it. I cried because I thought of my mother. I thought of all the dishes she had washed, all the floors she had scrubbed, all the pain she had suffered. And after seven years, I couldn't get a job.⁴

Our friend finally did get a clerkship with Justice Bok of the Pennsylvania Supreme Court. He attributes this to Professor Tom Emerson and to me; I don't remember this, therefore it was

⁴ Higginbotham, *supra* note 2, at 38.

probably Professor Emerson. When he had finished, he went into the office of District Attorney Richardson Dilworth, followed by entering practice with a black firm in Philadelphia, with part-time duties in the State Attorney General's Office. When he left Philadelphia to become a commissioner of the Federal Trade Commission in 1962, he knew the ways of the courthouse inside and out.

From 1964 to 1977, he was a federal district judge in Philadelphia, and from then until his resignation in 1993, honors flooded upon him. In a standard reference, it takes six and a half inches of type simply to list his pro bono activities, his honors and awards, and his publications from 1964 until today.⁵ His book on race and the American legal process in the colonial and early years of the republic is a profoundly scholarly work. Professor Paul Carrington has fairly described him as "the most distinguished black legal historian of our time."⁶ It is a key goal of the rest of his life to continue that study.

The business of judges is judging, and since 1964 Judge Higginbotham has been doing that business. His work record is monumental and in this largely personal memoir can be touched only lightly; but there are of course notable elements which reflect the man.

There is, for example, Higginbotham the teacher. As an introductory aside, it is scarcely a secret that the constitutional views of this judge are not exactly concurrent with those of a majority of the present Supreme Court. The *Open Letter to Justice Thomas*, published in this Review, is a spectacular illustration.⁷ Yet Judge Higginbotham, as a faithful judge of an intermediate court, must follow the mandates from on high. Where a prisoner, found guilty of a misconduct offense in the prison on the basis of a urine specimen for which there was no clear chain of custody, complained of the decision, Judge Higginbotham, in an oblique departure from the current trend, concluded that the prisoner must lose "under the current constitutional standards."⁸ But the Judge grudgingly

⁵ See 2 ALMANAC OF THE FEDERAL JUDICIARY 17 (1993).

⁶ Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 FLA. L. REV. 501, 504 (1992).

⁷ A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

⁸ *Thompson v. Owens*, 889 F.2d 500, 503 (3d Cir. 1989) (Higginbotham, J., concurring) (expressing the hope that "prison administrators will consider what is fair and not merely what avoids constitutional infraction").

acquiesced. The thing is wrong and he knew it; "the real possibility of a mistake by the laboratory in its chain of custody" creates a situation in which there are not "any safeguards to prevent injustices to inmates."⁹ The Judge argued that the Department of Justice has regulations which should have prevented this situation. He asked the Department to obey its own regulations; the Department should have "recognize[d] that winning a lawsuit is not the equivalent of an affirmation that they have been fair or that they have exemplified that important but rare quality—common sense."¹⁰

The Judge does not take injustice lightly and even where the rules of the legal game require him to perpetuate injustice, his protests to the public authority may perhaps teach them to change their ways. For illustration, the Pennsylvania Department of Public Welfare is charged with the duty of giving care to the retarded, but it does, by virtue of under-funding, perpetuate or perhaps even create dreadful situations. In one instance, the patient was a twenty-three-year-old woman who was profoundly mentally retarded and legally blind.¹¹ Having been in a private school for the blind to the age of twenty-one, she became emotionally stable, reasonably happy, and toilet trained. Because the state could not give her the care which the Pennsylvania statutes seemed to require, she had deteriorated dreadfully within two years, was no longer toilet trained, could not use even minimal sign language she had acquired, screamed in the night and injured herself. The court could not compel more appropriations or better distribution of funds, but it could tell the funders what was wrong: "[P]eople who desperately need services are placed on waiting lists, sometimes, [as in this case,] for years."¹² The Department was "not making the good faith effort" required under the law.¹³ It not only "failed to make a good faith effort to obtain sufficient funds," but it also misallocated them.¹⁴ The result was the frustration of parents like those in the instant case "who keep running into blind alleys and dead ends."¹⁵

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Alessi v. Commonwealth of Pa., Dep't of Pub. Welfare*, 893 F.2d 1444, 1445 (3d Cir. 1990).

¹² *Id.* at 1451.

¹³ *Id.*

¹⁴ *Id.* at 1454.

¹⁵ *Id.* at 1453.

Would that the Congress might heed his counsel on the mandatory sentencing minimums. The Judge said in decrying a ten-year mandatory sentence for a very minor twenty-one-year-old drug offender that few worse ideas have been enacted into law than these judicial straightjackets. Although he found that the sentence was required, he felt that it was "unduly harsh" and a "tragic example" of a system he suggested Congress should reconsider.¹⁶ As he explained, "[Judges] are not sentencing widgets or robots, but human beings."¹⁷

These are illustrations of situations when the Judge could teach justice but could not do what, in the individual case, he obviously regarded as justice. He was not always so handicapped. The Allegheny County jail at Pittsburgh had been dreadfully overcrowded and there had been years of litigation and sanctions in the federal courts due to Eighth Amendment violations.¹⁸ In the 1990 round at the Circuit, Judge Higginbotham observed that the County had "consistently failed to house its inmates in compliance with the sparse and minimal commands of the Eighth Amendment."¹⁹ The public officials were in that plight because the County "consistently failed to comply with long-standing court orders directing them to provide constitutionally adequate housing for inmates."²⁰ They were ordered to pay \$25,000 a month as a general sanction, plus \$100 a night for every prisoner that was not properly housed.²¹ The ruling, while stern, was not arbitrary. The trial court had also allowed \$23,000 in counsel fees and this portion of the order was reversed because that court had not given notice nor had held a hearing as to justifiability of the charges.²² In short, he was scrupulously tough, but scrupulously fair.

The Judge is consistently decisive without letting his liberal instincts push beyond the limits of the law. When a school district had a parental leave system restricted to women teachers, the plan was found "discriminatory on its face"²³ and the restriction to

¹⁶ *United States v. Tannis*, 942 F.2d 196, 198 (3d Cir. 1991).

¹⁷ *Id.* at 199.

¹⁸ *See Inmates of the Allegheny County Jail v. Wecht*, 901 F.2d 1191, 1192-93 (3d Cir. 1990).

¹⁹ *Id.* at 1192.

²⁰ *Id.* at 1200.

²¹ *See id.* at 1198-99.

²² *See id.* at 1200-01.

²³ *Schafer v. Board of Pub. Educ.*, 903 F.2d 243, 247 (3d Cir. 1990).

females was "per se void."²⁴ What the mother can have, the father should also have. However, the indignant father who was denied this privilege resigned from his job. The question of whether he was forced to resign was remanded to the district court; the court in its burst of goodwill toward fathers held that it would not assume from the empty record that a particular father was beleaguered into quitting.²⁵

All these years have made the Judge into a first-class technical lawyer, and there is sufficient uniformity of style to conclude that he is truly on top of his work. His opinions are comprehensive, carefully analytical, and never brush aside the hard point by pretending it is not there. The observation Judge Learned Hand once made concerning Justice Cardozo is fairly applicable here: "He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table: like John Stuart Mill, he would often begin by stating the other side better than his advocate had stated it himself."²⁶ A discussion of when appeal time runs after a highly unusual denial of a motion for reconsideration was technically neat.²⁷ A collateral estoppel question received precise treatment.²⁸ This is the grist of the normal daily run of the appellate judge's work—nothing particularly spectacular but a task which can be performed either summarily and abruptly or with careful and meticulous attention. Judge Higginbotham always chooses the second course.

Any commentary, however brief, on miscellaneous cases has a hodgepodge quality. Let me go somewhere with this: On his retirement, Judge Leon Higginbotham has put aside a life's work in which he decided cases not through formulas, but in accordance with facts, law and policies. He looked intently at the individual case. He was sensitive to the concerns of the human beings involved. He was not the all-powerful, primitive potentate sitting under a tree and doing justice as his whim dictated; rather he

²⁴ *Id.* at 248.

²⁵ *See id.* at 250.

²⁶ Learned Hand, *Mr. Justice Cardozo*, 48 YALE L.J. 379, 380 (1939) (Judge Hand paying tribute to Justice Cardozo's tenure on the Supreme Court).

²⁷ *See National Passenger R.R. Corp. v. Maylie*, 910 F.2d 1181, 1183 (3d Cir. 1990) (holding that the one-year period for filing a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure commenced when the motion for reconsideration was denied, rather than on the date of original judgment).

²⁸ *Schroeder v. Acceleration Life Ins. Co.*, 972 F.2d 41, 45-46 (3d Cir. 1992) (holding that the district court erred in not giving preclusive effect to the decision of the Pennsylvania Court of Common Pleas).

operated within the strict confines of the law. But he tested those confines, particularly where individual rights and needs were concerned. He used his post as a bully pulpit to encourage a better society when he could not mandate its change.

Judge Higginbotham is pursuing the same goals in his post-retirement years, where he has already taken on three times the normal tasks; he will waste no time. When his wife, Evelyn, herself a distinguished scholar in religion and women's studies, and I planned a several-day long sixty-fifth birthday party with a national committee of the Judge's friends, he announced that he would have none of it; there was too much left to be done and no time for self-indulgence.

In the best sense, he has sought to do justice under law.

