BOOK REVIEW

BETWEEN COMPLICITY AND CONTEMPT: RACIAL PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS

SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS. By A. Leon Higginbotham, Jr. New York: Oxford University Press. 1996. Pp. 304. $30.00.

Reviewed by RONALD K. NOBLE*

> We have left behind the midnight hour of slavery, traveled through the gray dawn of segregation, and we are now in a cloudy divide, poised between freedom and inequality.[1]

As a sixteen-year-old freshman at Purdue University in Lafayette, Indiana, A. Leon Higginbotham, Jr.[2] and the eleven other black Purdue students were required to sleep in an unheated attic during the dead of winter, segregated from the white students who slept in campus dormitories.[3] "One night, as the temperature was close to zero, I felt that I could suffer the personal indignities and denigration no

* Associate Professor of Law, New York University. B.A., 1979, University of New Hampshire; J.D., 1982, Stanford University. Writing a review of Judge Higginbotham's book has been a challenge for me. In one sense, I am an ideal reviewer because when I was one of his law clerks while he served on the United States Court of Appeals for the Third Circuit, I saw firsthand the many late nights, weekends, and holidays that he devoted to this book. Since clerking for him I have read every article he has written and have come to appreciate him even more as a dedicated scholar on the intersection of race and the law. As a result of his mentoring, I also have immersed myself in issues of race and the law and thus can provide both an intellectual evaluation and personal insight. I am a non-ideal reviewer, however, because I consider him a mentor, a confidant, and a person who has deeply influenced my study of the law. With this cautionary note in mind, I hope that my review will be taken as a humble guide to the work's many insights.

I thank Professor William E. Nelson, Greg Clarick, Andrea Dennis, Victor Hou, Robert Kaczorowski, and Linda Yueh for their insight, assistance, and commitment to this review.

[1] A. Leon Higginbotham, Jr., Shades of Freedom: Racial Politics and Presumptions of the American Legal Process xxxii (1996) [hereinafter Higginbotham, *Shades of Freedom*].

[2] Judge Higginbotham is former Chief Judge of the United States Court of Appeals for the Third Circuit. On March 5, 1993, he retired from the federal bench, ending almost three decades as a jurist. 2 Almanac of the Federal Judiciary (1993).

[3] See A. Leon Higginbotham, Jr., In the Matter of Color—Race and the American Legal Process: The Colonial Period vii (1978) [hereinafter Higginbotham, *In the Matter of Color*].

longer,"[4] Judge Higginbotham recalls. The next day, he asked the university president if there was some way that the black students could stay in separate but heated university housing.[5] Purdue's President retorted: "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] Shortly thereafter, Judge Higginbotham transferred to Antioch College and eventually graduated from Yale Law School.[7]

The impact of this painful encounter with Purdue's President stayed with Judge Higginbotham for decades. In 1978, reflecting on the meeting, Judge Higginbotham wrote:

> 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.[8]

In some ironic way, we should be thankful that this humiliating experience happened to such an impressionable young man, for the journey that the renowned jurist began at Purdue University, he continues with the publication of *Shades of Freedom*.

The second volume in a series entitled "Race and the American Legal Process," *Shades of Freedom* continues an odyssey that Judge Higginbotham embarked on over thirty years ago. Published in 1978, the first volume, *In the Matter of Color—Race and the Legal Process: The Colonial Period*, which earned the highest praises,[9] "document[ed] the vacillation of the courts, the state legislatures, and even honest public servants in trying to decide whether blacks were people, and if so, whether they were a species apart from white humans, the difference justifying separate and different treatment."[10]

In *Shades of Freedom*, Judge Higginbotham has again produced significant legal and social scholarship. This work shepherds the

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[4] Id.

[5] See id. at viii.

[6] Id.

[7] See id. at ix. At Yale he earned more awards in oral advocacy than any student in Yale Law School's history. For an account of Judge Higginbotham's many accomplishments, see generally Ronald K. Noble, Dedication: In Honor of A. Leon Higginbotham, Jr.: A Tribute to a Scholar, a Wise Jurist, and a Role Model, 142 U. Pa. L. Rev. 531 (1993).

[8] Higginbotham, *In the Matter of Color*, supra note 3, at viii-ix.

[9] *In the Matter of Color* won five awards: the American Bar Association Silver Gavel Award; the National Bar Association Literary Award; the Frederick Douglass Award, National Conference of Black Journalists; the Book Award, National Conference of Black Lawyers; and the Charles Houston Medallion of Merit, Washington Bar Association. See id. at back cover (paperback ed., 10th printing).

[10] Id. at 7.

reader through centuries of ever-changing legal oppression of African Americans.[11] As elegantly put by Judge Higginbotham himself, this book "delineate[s] the law's contribution to the frequent dehumanization of many African Americans and its impact on the journey from the midnight of total oppression to some early dawns, where there were occasional glitters of light and muted shades of freedom."[12]

Though *Shades of Freedom* focuses on a period in this country's history when the treatment of blacks bordered on barbaric, the work's major theoretical underpinning centers on the invisible, yet often permanent, scars that such treatment has left on African Americans.

Shades of Freedom relates "the journey from total racial oppression toward the goal of true racial equality,"[13] a journey that has been "long and tortuous"[14] for the author and for all Americans who have been part of it. Though the book is written by a man whose race made him an object of legally enforced racial discrimination, who rose above discrimination's oppressive force to become one of the nation's leading litigators and jurists,[15] and who participated in the legal struggle to dismantle the American system of "racial apartheid"[16] and establish "varying shades of freedom,"[17] this book cannot easily be situated in the current construct of literature concerning race and the

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[11] The terms "black" and "African American" are used interchangeably. As Judge Higginbotham explains:

> "While African American is increasing in current usage, there is no reason to believe that this is a final designation; for the political and cultural winds that produced it continue to blow, perhaps sweeping before them earlier designations and bringing forth at some later time a designation as yet unknown."

Higginbotham, *Shades of Freedom*, supra note 1, at x (quoting John Hope Franklin & Alfred A. Moss, Jr., From Slavery To Freedom: A History Of African Americans xix (7th ed. 1994)).

[12] Id. at xxiv.

[13] Id. at xxiii.

[14] Id.

[15] Notwithstanding racism and legally enforced racial discrimination, Judge Higginbotham has led a life full of accomplishments. He was the first black and youngest person to serve as a Commissioner on the Federal Trade Commission. See 2 Almanac of the Federal Judiciary (1993). On January 6, 1964, he was sworn in as a United States District Court Judge for the Eastern District of Pennsylvania. In 1977, he was nominated to the United States Court of Appeals for the Third Circuit. He became Chief Judge of the Third Circuit in 1990. On March 5, 1993, he retired from the federal bench. See id. He has taught at the following law schools: Harvard, New York University, Stanford, Yale, and the Universities of Hawaii, Michigan, and Pennsylvania. Currently, he is Public Service Professor of Jurisprudence at Harvard's Kennedy School of Government. He has received more than 70 honorary degrees and was recently awarded the Presidential Medal of Freedom, the nation's highest civilian honor.

[16] See Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 83-114 (1993) (analyzing segregation and persistent black poverty).

[17] Higginbotham, *Shades of Freedom*, supra note 1, at xxiv.

law. This work is neither a political memoir of black Americans' struggle to survive and achieve within a political and legal order of exclusion,[18] nor a scholarly testament,[19] nor a fictionalized account created by a black novelist.[20] Nonetheless, *Shades of Freedom* reflects the personal pain of exclusion that binds these mentioned works. The book reflects Judge Higginbotham's own realist view about the prospect of genuine racial equality in this country. This outlook, which he shares with the late Justice Thurgood Marshall, tempers optimism about true racial equality with a skepticism forged by painful personal experience.[21] It is a view that avoids some of the nihilism attributed to critical legal theorists[22] without diluting the power of their message.

Like *In the Matter of Color*, *Shades of Freedom* is remarkable in its own right and stands as a testament to the journeys of so many otherwise nameless and faceless African Americans.[23] Judge Higginbotham's analysis lays bare the complicity of the Framers, legislators, and judges in the subjugation of African Americans with an often brutal honesty that damns purveyors of myth and hate often with their own words. Like conscientious citizens in post-war Germany who searched for examples of people who actively opposed the atrocities of the Third Reich, one must scour American history for examples of heroes who combatted the horrors of slavery and entrenched racism. One must search desperately for affirmation that as a people Americans could not succumb to such moral evil. Yet, as

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18 See, e.g., Frederick Douglass, Life and Times of Frederick Douglass (1941); Claude Brown, Manchild in the Promised Land (1965).

19 See, e.g., W.E.B. DuBois, The Souls of Black Folk (1903); Derrick Bell, Confronting Authority: Reflections of an Ardent Protestor (1994); Patricia J. Williams, The Alchemy of Race and Rights (1991).

20 See, e.g., Ralph Ellison, Invisible Man (1952); James Baldwin, Go Tell it on the Mountain (1953); Toni Morrison, Beloved (1987).

21 See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 552-53 (1989) (Marshall, J., dissenting) ("constitutionalizing [the majority's] wishful thinking" that "racial discrimination [is] largely a phenomenon of the past" does a "grave disservice . . . to those victims of past and present discrimination"); Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 453-54 (1993) (transcribing Thurgood Marshall's speech: "I wish I could say that racism and prejudice were only distant memories. . . . But as I look around, I see not a nation of unity but of division . . . .").

22 See, e.g., Peter Goodrich, Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America, 68 N.Y.U. L. Rev. 389, 390 (1993) (calling critical legal studies movement "on occasion even 'nihilistic'").

23 While I would suggest that one truly interested in grasping the role of the legal system in creating and perpetuating racial oppression should begin the process by reading *In the Matter of Color* and then moving on to *Shades of Freedom*, such an undertaking is not necessarily required.

Judge Higginbotham's work makes painfully clear, there are few heroes in this history.[24]

Shades of Freedom surveys chronologically the history of slavery and racism in the United States. It begins with an extensive description of the legal enforcement of slavery, thus complementing both Judge Higginbotham's earlier work, *In the Matter of Color*, and other seminal social and political histories of slavery.[25] *Shades of Freedom* moves on to trace the replacement of slavery with legally enforced segregation, elaborating upon Robert Kaczorowski's magnificent book, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*,[26] by discussing the law's role in the social and political history of the Civil War era to a greater extent than any other book to date.[27] It examines in detail the role of the Supreme Court after the Civil War in rejecting the promise of freedom and racial equality intended by the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments and the congressionally enacted Reconstruction civil rights statutes. With its in-depth analysis of the Supreme Court's establishment of legally enforced segregation, America's form of apartheid, *Shades of Freedom* makes clear that the post-Civil War years indeed constituted an "unfinished revolution."[28]

That Judge Higginbotham's book has contributed to the study of race and the law can not be disputed. I argue here that Judge Higginbotham makes contributions in *Shades of Freedom* that also re-

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[24] Even abolitionists such as William Lloyd Garrison and Harriet Beecher Stowe do not escape Judge Higginbotham's careful scrutiny. Of abolitionists he writes, the "cup of charity and brotherhood they fed to the slaves was often laced with more than a touch of condescension and high-handedness." Higginbotham, *Shades of Freedom*, supra note 1, at 58. Higginbotham shows that even Garrison's good works were bound with a certain "contempt" for the very group he tried so hard to free. See id. This is evidenced by Garrison's own remarks that slaves "as a class" were not able to "perceive" or "understand" the philosophy of their own emancipation. See id. Stowe's *Uncle Tom's Cabin*, Higginbotham writes, depicted African Americans as fitting into a "particular stereotype" and as a class of "noble, ignorant but kind" savages. See id. Yet Judge Higginbotham balances these observations with the unquestionable acknowledgement that abolitionists did make an "incalculable contribution" to free slaves. See id.

[25] See, e.g., Eugene D. Genovese, Roll, Jordan, Roll: The World the Slaves Made (1974) (arguing that slaves, as objective social class, laid foundation for separate black national culture); Kenneth Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (1956) (examining "America's most profound and vexatious social problem"—southern slavery).

[26] Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1976 (1985).

[27] See, e.g., James M. McPherson, Battle Cry of Freedom: The Civil War Era (1988); C. Vann Woodward, The Strange Career of Jim Crow (1966).

[28] See Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (1988).

verberate beyond the study of race and the law. First, he creates a groundbreaking jurisprudential framework, distilled to the "Ten Precepts of American Slavery Jurisprudence,"[29] for analyzing race and the American legal process. Second, he uses those precepts, especially that of inferiority, as a way to understand and analyze the current socioeconomic position of African Americans. Third, and most important because it recognizes that major works must shape the way people think and act, he calls on Americans to appreciate the heroes of our past and to work creatively in achieving racial equality. Taken together, these three contributions move us closer to an understanding of what is meant by the magnificent phrase "We the People"[30] and the guarantee of equality under the law in the U.S. Constitution.[31]

Shades of Freedom's first major contribution to the literature on race and the law is Judge Higginbotham's articulation of the "Ten Precepts of American Slavery Jurisprudence." He argues that "for those Americans in power, there were several premises, goals, and implicit agreements concerning the institution of slavery that at once defined the nature of American slavery and directed how it was to be administered with the imprimatur of the legal process."[32]

Like Thomas Kuhn, who brought new perspective to the process of evolving scientific research in his book, *The Structure of Scientific Revolutions*,[33] Higginbotham offers the Ten Precepts as an original and unique paradigm within which one might understand landmark cases such as *Dred Scott v. Sandford*,[34] *Plessy v. Ferguson*,[35] and *Brown v. Board of Education*.[36] This dynamic framework thus goes further than earlier scholarly treatments of these cases.[37] *Shades of Freedom* is a fitting supplement to John Hope Franklin's *From Slavery to Freedom: A History of Negro Americans*,[38] a classic social and political history of African Americans penned by Judge Higginbotham's mentor.

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29 See infra notes 44-53.

30 U.S. Const. preamble.

31 See U.S. Const. amend. XIV, § 1.

32 Higginbotham, *Shades of Freedom*, supra note 1, at 3.

33 See Thomas Kuhn, The Structure of Scientific Revolutions (1962).

34 60 U.S. (19 How.) 393 (1857) (declaring Missouri Compromise unconstitutional because statute deprived slaveowners of their property without due process of law).

35 163 U.S. 537 (1896) (holding racial segregation on railway car does not violate Thirteenth and Fourteenth Amendments and establishing "separate but equal" doctrine).

36 347 U.S. 483 (1954) (holding that segregation in public schools is unconstitutional).

37 See, e.g., Don Edward Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978); Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975); Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (1987).

38 Franklin & Moss, supra note 11.

"Precept," as Judge Higginbotham acknowledges, has more than one meaning.[39] In the context of this work, "precept" delineates the "prevalent moral and political theories, intuitions of public policy, avowed or unconscious, *even the prejudices which judges* [and other public officials] *share with their fellow-men*."[40] Believing it possible to "provide a more comprehensive view of the evolution of slavery jurisprudence and race relations law in a single state,"[41] Judge Higginbotham, in formulating the precepts, focuses on Virginia because of its "major role in leading the American Revolution and in shaping the destiny of the new nation after 1776"[42] and because of its unfortunate role as a "leader in the debasement of African Americans by pioneering a legal process that perpetuated racial injustice."[43]

The Ten Precepts Judge Higginbotham identifies are: (1) inferiority,[44] (2) property,[45] (3) powerlessness,[46] (4) racial "purity,"[47] (5) manumission and free blacks,[48] (6) family,[49] (7) education and cul-

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39 See Higginbotham, *Shades of Freedom*, supra note 1, at 3-4.

40 Id. at 4 (citation omitted).

41 Id.

42 Id.

43 Id.

44 Inferiority: "Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of blacks." Id. at 195.

45 Property: "Define the slave as the master's property, maximize the master's economic interest, disregard the humanity of the slave except when it serves the master's interest, and deny slaves the fruits of their labor." Id.

46 Powerlessness:

> Keep blacks—whether slave or free—as powerless as possible so that they will be submissive and dependent in every respect, not only to the master but to whites in general. Limit blacks' accessibility to the courts and subject blacks to an inferior system of justice with lesser rights and protections and greater punishments. Utilize violence and the powers of government to assure the submissiveness of blacks.

Id.

47 Racial "Purity":

> Always preserve white male sexual dominance. Draw an arbitrary racial line and preserve white racial purity as thus defined. Tolerate sexual relations between white men and black women; punish severely relations between white women and non-white men. As to children who are products of interracial sexual relations, the freedom or enslavement of the black child is determined by the status of the mother.

Id.

48 Manumission and Free Blacks: "Limit and discourage manumission; minimize the number of free blacks in the state. Confine free blacks to a status as close to slavery as possible." Id.

49 Family: "Recognize no rights of the black family, destroy the unity of the black family, deny slaves the right of marriage; demean and degrade black women, black men, black parents, and black children; and then condemn them for their conduct and state of mind." Id. at 196 (citation omitted).

ture,[50] (8) religion,[51] (9) liberty—resistance[52] and (10) by any means possible.[53] As Judge Higginbotham explains:

> Although the totality of the precepts was never codified in one comprehensive legal document, together these precepts, nevertheless, operated as the basic legal premises of this slaveholding land. Paralleling our written governing documents, they wielded the same authority; they were, in effect, the Shadow Constitution, the Bill of Non-Rights for African Americans, the Anti-Preamble justifying a bifurcation of the society between "We the People" and "We, the *Other* People."[54]

This theoretical framework gives us a new paradigm in which Judge Higginbotham analyzes and in which we can further analyze the intersection of race and the law. Throughout the work, Judge Higginbotham assesses court precedents and legal structures through the lens of the Ten Precepts. This apparatus allows him to delve coherently into the historical meaning of individual cases and, more importantly, to show the lines of continuity from one case to the next—lines that defined American legal history and that perpetuated the subjugation of African Americans in American society.[55] In this respect, Judge Higginbotham's work breaks novel ground.

Understanding how the Ten Precepts became embedded in society, largely through the law, provides an explanation for the existence of institutionalized racism today, to which blacks attest to based on their own personal experiences and which many whites deny because they cannot see it. The Ten Precepts are "institutionalized values,

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[50] Education and Culture: "Deny blacks any education, deny them knowledge of their culture, and make it a crime to teach those who are slaves how to read or to write." Id.

[51] Religion:

> Recognize no rights of slaves to define and practice their own religion, to choose their own religious leaders, or to worship with other blacks. Encourage them to adopt the religion of the white master, teach them that God who is white will reward the slave who obeys the commands of his master here on earth. Use religion to justify the slave's status on earth.

Id.

[52] Liberty—Resistance: "Limit blacks' opportunity to resist, bear arms, rebel, or flee; curtail their freedom of movement, freedom of association, and freedom of expression. Deny blacks the right to vote and to participate in government." Id.

[53] By Any Means Possible: "Support all measures, including the use of violence, that maximize the profitability of slavery and that legitimize racism. Oppose, by the use of violence if necessary, all measures that advocate the abolition of slavery or the diminution of white supremacy." Id.

[54] Id. at 5-6 (footnotes omitted).

[55] Judge Higginbotham's argument does not depend on an unbroken chain of legal history that sought to denigrate blacks and other minorities. Indeed, his analysis is more dynamic and shows the ebbs and flows of legal subjugation and protection that permeate American jurisprudence.

standards, or assumptions for which there was a broad acceptance, at least on the part of those who wrote and interpreted the laws."[56]

The Ten Precepts are also a cipher to understand race relations even outside of the black-white perspective. Indeed, Judge Higginbotham's work seems to fulfill the promise of the series subtitle, "Racial Politics and Presumptions of the American Legal Process," because of its utility in analyzing the relationship between other races and American law. Though Judge Higginbotham does not develop this point in the work, the application of the precepts to other races is readily apparent.

For instance, the precepts generally, and inferiority in particular, help to forge an understanding of how law also has placed an indelible mark on the lives of Asian Americans throughout U.S. history despite the substantial differences in their legal treatment from that of blacks.[57] Judge Higginbotham tracks the "four stages" in the legal development of inferiority[58] and breaks down the four essential steps that comprised the first stage of development: presume and establish black inferiority; establish white superiority; publicly enforce such notions; and use theology to justify these notions.[59]

Ironically, Justice Harlan's storied dissent in *Plessy v. Ferguson*[60] proves almost on its own the cross-application of the precepts to Asians. Justice Harlan vividly outlined three of the essential steps in the presumption of inferiority when he wrote:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while [black citizens are required to sit in segregated cars].[61]

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56 Higginbotham, *Shades of Freedom*, supra note 1, at 5.

57 Professor Maltz made this point by noting that the "legal issues that arose from the plight of the Chinese [during the 1800's] parallelled those raised by the mistreatment of free blacks." Earl M. Maltz, Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution, 12 Ga. St. U. L. Rev. 973, 1002 (1996).

58 See Higginbotham, *Shades of Freedom*, supra note 1, at 15-16. The four stages are: (1) the presumption of black inferiority; (2) the process of legally defining and enforcing precept; (3) the legal process's defense of the precept; and (4) the legal process's unsuccessful attempt to break free of the precept. See id.

59 See id. at 15-17.

60 163 U.S. 537 (1896).

61 Id. at 561. These racist, anti-Chinese sentiments were of course published and saved for posterity, though history has elected to remember Harlan for the more uplifting segments of his opinion.

In this illuminating fragment of the opinion, Justice Harlan presumes white superiority by making Asians the "other" and by classifying their culture and racial makeup as being alien to "our" own. He establishes Asian inferiority in comparison to both white and black races.

This aspect of the opinion is important to scrutinize. Justice Harlan has in essence set black rights in opposition to those of Asians. By identifying the right of the Chinese to sit in a particular passenger coach in contradistinction to a black's lack of such right to do so, he has set the races against each other in their struggle for white recognition. He momentarily aligned white interests with black interests by calling Asians the other. He sets into motion what Professor Lisa Ikemoto has called "positioning."[62] Professor Ikemoto tells the story of African American and Asian American conflict as one of white privilege. Each side uses white stereotypical notions to criticize the other while positioning themselves within the white hierarchy to secure the attendant benefits.[63] This analysis complements Judge Higginbotham's ironic point that part of the precept of inferiority's development is its unifying capability to bring poor and wealthy whites together in the myth that whatever their economic status, whiteness prevails over color. Judge Higginbotham also mentions that white elites had good reason to perpetuate these myths—namely, to prevent poor whites from aligning with blacks to overthrow economically and politically oppressive institutions. Yet these myths have perpetuated self-hate and the exaltation of whiteness to the point that minorities have turned against each other. Each group is convinced the other is depriving it of opportunity. Judge Higginbotham's insightful analysis here could be transformative by getting to the heart of inferiority and its cynical propagation.

Two years after *Plessy*, Justice Harlan again expressed his support of the systematic and deliberate exclusion of the Chinese from citizenship and membership in the American polity. Justice Harlan joined

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[62] See Lisa C. Ikemoto, Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles," 66 S. Cal. L. Rev. 1581, 1588-89 (1993).

[63] This might explain why some parents of color might favor lighter-skinned babies. See, e.g., Portia Williams, Beyond the Pale: Why My 'Too Black' Friends Want Light-Skinned Babies, Wash. Post, Apr. 25, 1993, at C1.

Some data suggest that both blacks and Asians in California supported xenophobic statutes like Proposition 187, the statewide initiative approved in California in 1994 that sought to deny educational and social benefits to undocumented immigrants, and reacted to other minorities with a degree of nativism. See, e.g., Norman Matloff, Immigration Hits Minorities Hardest, S.D. Union-Trib., Feb. 26, 1995, at G3 (reporting that exit polls taken by Associated Press showed 56% of African Americans and 57% of Asian Americans voted for Proposition 187, compared to 59% of general population).

the dissent in *United States v. Wong Kim Ark*,[64] in which the majority upheld a claim of citizenship brought by an American-born Chinese man whose parents were Chinese citizens permanently domiciled in San Francisco. Wong Kim Ark argued successfully that under the plain language of the Fourteenth Amendment he was entitled to United States citizenship.[65]

Although Wong Kim Ark prevailed, there was a discriminatory undertone permeating the case, expressed in the dissent and in an amicus brief opposing Wong Kim Ark's claim. The dissent argued ostensibly that under the Roman principle a child's citizenship followed that of its parents.[66] The amicus brief stated:

> For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we *must* accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage.[67]

Though they did not prevail, the dissenters in *Wong Kim Ark* saw their views realized through later judges, who played a cumulative role in the concerted deprivation of the rights of Asians and other minorities. Even in modern times, Asian Americans have felt the legal institutions' indifference to their civil rights, as evidenced by *Korematsu v. United States*[68] and other Japanese internment cases during World War II.[69]

In addition to legal opinions that deprived Asians of humanity and certain rights, legislatures singled out Chinese immigrants for victimization. The Chinese Exclusion Act of 1882[70] institutionalized these racist sentiments in its title and content.[71] The white populace

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64 169 U.S. 649 (1898).

65 See id. at 693.

66 See id. at 709 (Fuller, C.J., dissenting).

67 Brief on Behalf of the Appellant at 34, *Wong Kim Ark*, 169 U.S. 649 (No. 904).

68 323 U.S. 214 (1944) (upholding American citizen's conviction for violating exclusion order).

69 See, e.g., Hirabayashi v. United States, 320 U.S. 81 (1943) (9-0 decision) (upholding curfew for Japanese Americans). Yet in 1944, in Ex parte Mitsuye Endo, 323 U.S. 283 (1944), the Supreme Court voted unanimously to grant a writ of habeas corpus filed by a Japanese woman who was being held at a relocation center. For references or citations to more of these cases, see Peter Irons, Justice at War: The Story of the Japanese American Internment Cases (1983).

70 Ch. 126, 22 Stat. 58 (1882), repealed by Act of Dec. 17, 1943, Pub. L. No. 78-199, 57 Stat. 600.

71 See Sucheng Chan, This Bitter Sweet Soil: The Chinese in California Agriculture, 1860-1910, at 76-78 (1986) (discussing Exclusion Act and its consequences).

created their own myths about the status of "Chinamen," as an 1876 editorial in the *Marin Journal* illustrates:

> That he is a slave, reduced to the lowest terms of beggarly economy, and is no fit competitor for an American freeman.
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> That he herds in scores, in small dens, where a white man and wife could hardly breathe, and has none of the wants of a civilized white man.
>
> That his sister is a prostitute from instinct, religion, education, and interest, and degrading to all around her.
>
> That wherever they are numerous, as in San Francisco, by a secret machinery of their own, they defy the law, keep up the manners and customs of China, and utterly disregard all laws of health, decency and morality.[72]

Asians have also been the target of nefarious restrictive covenants that polluted property titles until *Shelley v. Kraemer*.[73] Consider, for example, a restrictive covenant in a Maryland deed brought before the Maryland Supreme Court for enforcement in *Goetz v. Smith*.[74] The deed contained a provision that restricted the "sale, lease, transfer or permitted occupation of the respective properties mentioned to or by 'any negro, Chinaman, Japanese, or person of negro, Chinese or Japanese descent.'"[75]

Judge Higginbotham's formulation can enable readers to parse through this country's history and find terrible continuity between the legal process's historical maintenance of racial inferiority of blacks and other minorities. Though the law can eradicate the legal formulations of the precepts, the law has not been able to combat de facto discrimination, nor has it entirely succeeded in imposing a sense of morality. Judge Higginbotham's Ten Precepts not only contribute to an understanding of race and the law, but are a testament to the self-correcting potential of American constitutional law when considered from the perspective of those nameless and faceless persons who for many years were not included in the Constitution's aspirational Preamble.

The second major contribution of *Shades of Freedom* is its insight into the poor socioeconomic position of African Americans today.

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72 Elmer C. Sandmeyer, The Anti-Chinese Movement in California 25 (1991) (quoting Marin J., Mar. 30, 1876); see also S.F. Post, Mar. 1, 1879, at 1 ("[T]he chinaman has impoverished our country, degraded our free labor, and hoodlumized our children. He is now destroying our young men with opium.").

73 334 U.S. 1 (1948) (declaring that judicial enforcement of racially restrictive covenants violates Equal Protection Clause of Fourteenth Amendment).

74 62 A.2d 602 (Md. 1948).

75 Id. at 602.

The state of African Americans can be explained in large part by the dominant theme of the work—inferiority, the first of the Ten Precepts. Judge Higginbotham argues that the concept of racial inferiority is the predominant, and perhaps most pernicious, of the Ten Precepts.[76] This concept has permeated American history and Judge Higginbotham's exhaustive research has unearthed a multitude of instances within the judicial process that created, perpetuated, and maintained the social system of white superiority and black inferiority.

The chapter titled "The Constitutional Language of Slavery"[77] is an example of the way in which Judge Higginbotham alters the discourse of constitutional law on issues of race and the law. Judge Higginbotham points out that the word "slavery" first appeared in the Constitution in the Thirteenth Amendment—when slavery was abolished.[78] Further, the purported neutrality of key provisions of the Constitution, such as the Three-Fifths Clause[79] and the Fugitive Slave Clause,[80] mask the Founding Fathers' perpetuation of the concept of racial inferiority.[81] "In these clauses some references to 'Persons' meant slaves, but the provisions were drafted so that only the most sophisticated would know that the term 'Person' had such a malevolent meaning in the Constitution."[82] These provisions profoundly impacted the major race cases of *Dred Scott*[83] and *Plessy*,[84] which, like the Constitution's text, presumed the inferiority of blacks. And it is through Higginbotham's understanding of the inherent meaning of such provisions that one can come to make sense of these pernicious subsequent rulings.

Judge Higginbotham continues his analysis of the duality of the American legal process with a chapter on "The Supreme Court's Sanction of Racial Hatred,"[85] in which he discusses the decisions of

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76 Even in 1994, some "scholars" were still trying to prove a relationship between race and intelligence. See Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (1994). As Judge Higginbotham observed in a recent address, the attention given to the "study" could be taken as evidence that Americans "still seek to justify a belief in black inferiority." A. Leon Higginbotham, Jr., The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority, 17 Cardozo L. Rev. 1695, 1707 (1996).

77 Higginbotham, *Shades of Freedom*, supra note 1, at 68.

78 See id.

79 U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

80 U.S. Const. art. IV, § 2, cl. 3.

81 See Higginbotham, *Shades of Freedom*, supra note 1, at 69.

82 Id.

83 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

84 Plessy v. Ferguson, 163 U.S. 537 (1896).

85 Higginbotham, *Shades of Freedom*, supra note 1, at 94.

the 1883 *Civil Rights Cases*,[86] which effectively repudiated many hard won gains of African Americans that resulted from passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. Judge Higginbotham calls the end of Reconstruction a period of "ultimate betrayal of African Americans."[87] He argues that the Supreme Court continued to legitimize the de facto discriminatory treatment of African Americans even when the Reconstruction Amendments had torn down many of the formal barriers of racism. He points out various instances where the Court "blind[ed] itself to the unequal treatment" of African Americans "by creating unnecessary legal doctrine that had harsh racial consequences."[88]

As Judge Higginbotham explains, the denial of equal rights by the *Civil Rights Cases*—where the Supreme Court implicitly sanctioned the precept of racial inferiority—blossomed into a full legitimization of that precept in the infamous *Plessy v. Ferguson* case. By 1896, the Supreme Court's sanction of racism became explicit in *Dred Scott*, when Chief Justice Taney wrote the words that would ring in the ears of generations of Americans: that blacks had been regarded at the time of the Declaration of Independence as "so far inferior that they had no rights which the white man was bound to respect."[89] In one stroke, the Supreme Court pronounced what had been silently, almost conspiratorially, assumed. And in doing so, the high court created the system of segregation that would dominate American society at least until *Brown v. Board of Education*,[90] and arguably for decades more. Judge Higginbotham documents well the role of the Supreme Court in making the doctrine of inferiority pervasive within the fabric of American democracy.

Judge Higginbotham points out that state courts and the criminal justice system also sanctioned and perpetuated the precept of inferiority. Racist symbols and incidents in the courts, Higginbotham argues, are particularly powerful messages that "reinforce" and "legitimate" racism in broader society.[91] He painstakingly chronicles

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[86] 109 U.S. 3 (1883) (construing narrowly congressional powers under Reconstruction Amendments).

[87] Higginbotham, *Shades of Freedom*, supra note 1, at 94.

[88] Id.

[89] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

[90] 347 U.S. 483 (1954).

[91] See Higginbotham, *Shades of Freedom*, supra note 1, at 129. Of course racist symbols in courtrooms and statehouses are not only relics consigned to the past. Indeed, recent battles are still being fought about the appropriateness of Confederate flags in state offices. See, e.g., Flag Policy Aims to Head Off Disputes, News & Observer, Mar. 23, 1995, at A4 (discussing local North Carolina county policy to prohibit Confederate and other flags on county courthouse and building flagpoles); Bill Rankin, Georgian Goes to Appeals Court to Argue Against Confederate Flag, Atlanta J. & Const., Dec. 10, 1996, at C2 (dis-

examples of disparity in treatment on the basis of race in the criminal justice system. He points out the irony of "Apartheid in the Courthouse,"[92] where segregated seating dominated some courthouses as late as the 1960s, until the Supreme Court in *Johnson v. Virginia*[93] finally held that such practices denied equal protection.[94] He further shows the subtle disparate standing requirements to bring suits that were imposed upon African Americans[95] and the overt discrimination by judges in the courtroom.[96] He relates an instance where an African American woman who, while testifying on her own behalf in a habeas corpus proceeding arising out of a civil rights demonstration, refused to answer the questions posed to her by the solicitor.[97] She refused to answer because every other person in court was addressed as "Miss" or "Mister," but she was always "Mary."[98] She was cited for contempt of court.[99] On appeal, the Alabama Supreme Court affirmed the sanction, because the record showed that the witness's name was "Mary Hamilton," not "Miss Mary Hamilton."[100] He describes more overt affronts in the houses of justice by presenting examples where African Americans were called racial epithets ranging from "pickaninny" to "nigger."[101]

Judge Higginbotham chose to focus on inferiority because he believes that "[t]he precepts pertaining to inferiority and powerlessness

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cussing suit to remove Confederate flag from Georgia statehouse because of its representation of "white supremacy").

92 Higginbotham, *Shades of Freedom*, supra note 1, at 132.

93 373 U.S. 61 (1963).

94 See id. at 62 (holding that state-compelled segregation in court violates state's duty to deny no one equal protection of laws). In another poignant vignette, Judge Higginbotham relates the story about how segregation in the Court's own cafeteria persisted until the 1930s when Chief Justice Hughes reportedly admonished the Court's marshal, who expressed his disapproval of blacks using the cafeteria, to take heed of the words "Equal Justice Under Law" etched above the Court entrance. See Higginbotham, *Shades of Freedom*, supra note 1, at 155-56.

95 See Higginbotham, *Shades of Freedom*, supra note 1, at 138 (discussing how judges unsympathetic to cause of equal justice used doctrines, such as standing, to blunt impact of Court's rulings).

96 See id. at 133 (discussing long tradition and implicit approval of judges' segregating courthouse seats by race). In his earlier work, Judge Higginbotham discussed other court rules set by statutes that severely limited the participation of both free blacks and slaves. See Higginbotham, *In the Matter of Color*, supra note 3, at 58, 119-20 (detailing statutes limiting black participation in court). Additionally, evidentiary rules were often erected making it impossible for slaves to testify against whites. See Thomas D. Morris, Slaves and the Rules of Evidence in Criminal Trials, 68 Chi.-Kent L. Rev. 1209, 1209 (1993) (discussing evidentiary rules for slaves).

97 See Higginbotham, *Shades of Freedom*, supra note 1, at 137.

98 See id.

99 See id.

100 See id.

101 See id.

continue to haunt America even today, although it is now more than one hundred and thirty years after the Thirteenth Amendment abolished slavery."[102] Clearly, he is right to focus first and foremost on the precept of inferiority. Unlike de jure discriminatory laws, deeply ingrained notions of racial inferiority have not been and cannot be removed by presidential declaration, an act of Congress, or even a unanimous Supreme Court judgment.

By discussing in detail the role of the law in perpetuating racial inequality, this book provides an historical and contextual framework that allows us to understand why African Americans are in the dire socioeconomic position that they find themselves in today. This framework also helps highlight how legal institutions continue to foster disparate treatment between blacks and whites.[103] Consider the disproportionate effect that drug laws have on blacks and whites.[104] Even though the percentage of drug use is about even between the races, incarceration for blacks is 42% more likely.[105] In the context of punishing particular drug offenses, this disparity is even greater.[106]

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[102] Id. at 5 (citation omitted).

[103] In the criminal law context, the disparate prosecution of blacks for certain drug offenses has caused the Ninth Circuit to rule that there was some evidence of selective enforcement by federal prosecutors in Los Angeles based on race, calling into "question the very integrity of our system of criminal justice." United States v. Armstrong, 48 F.3d 1508, 1514 (9th Cir. 1995) (en banc). The Supreme Court later reversed the Ninth Circuit. See United States v. Armstrong, 116 S. Ct. 1480 (1996) (reversing on ground that Ninth Circuit applied wrong standard to assess adequacy of claim of selective prosecution).

[104] See United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1996) (Jones, J., concurring) (noting that "African-American community has borne the brunt of enforcement" of federal drug laws).

[105] See id. at 1419; U.S. Sentencing Commission: Executive Summary of Special Report on Cocaine and Federal Sentencing Policy, 56 Crim. L. Rep. (BNA) 2159 (1995) [hereinafter Sentencing Commission Report] (stating "inescapable conclusion" that blacks comprise largest percentage of those affected by penalties associated with crack cocaine).

[106] Although powder cocaine and crack cocaine are made of the same chemical compounds, Congress in 1986 set the punishment threshold 100 times tougher for crack. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (1994 & Supp. I 1995); see also Sentencing Commission Report, supra note 105, at 2160-61 (setting forth sentencing scheme for cocaine offenses). The practical effect of this disparity has been the disproportionate punishment of blacks. See Jeffrey Abramson, Making the Law Colorblind, N.Y. Times, Oct. 16, 1995, at A15 (noting sharp racial disparities in sentencing). A U.S. Attorney defended the government's "racially skewed" prosecution pattern in crack cases on the grounds that any allocation of law enforcement resources for crack prosecutions will "inevitably result in the disproportionate concentration of resources in minority, inner-city communities." United States v. Turner, 901 F. Supp. 1491, 1495 (C.D. Cal. 1995); see also Bill Rankin, Perspective: Unequal Justice, Atlanta J. & Const., Nov. 13, 1994, at D1 (describing unequal punishment for black repeat offenders and white repeat offenders). Judge Higginbotham's earlier book was cited by Justice Brennan in a dissent considering whether statistical evidence showing a risk of racial considerations in capital sentencing proved a constitutional violation of a black defendant's Eighth and Fourteenth Amendment rights. See McCleskey v. Kemp, 481

Highlighting just a few of the statistics on the current state of affairs for African Americans reveals the grim results the precept of inferiority has had on the lives of African Americans: "In 1993, 28.9 percent of African-American households earned under $10,000 per year, while 12.2 percent of white households earned under $10,000 annually. . . . In 1989, almost half (46.1 percent) of all African-American children lived in poverty, compared with 17.8 percent of white children."[107] Judge Higginbotham explains:

> The courts, the legislators, and other public officials have played a powerful role in shaping this uneven economic legacy. At various times they have contributed to the legitimization of institutional racism, but at other times they have fostered policies for the eradication of some of the roots of racial injustice.[108]

Shades of Freedom traces the "choices between equality and white supremacy, and between democracy and perceptions of black inferiority"[109] which began when the first African slaves were deposited on this soil in 1619. Over 300 years ago, African Americans were chained, beaten, raped, and murdered at will by whites; denied the support of family; denied education; sold and treated like chattel; and forced to work for the sole economic benefit of their masters. During this time America's rich land made even the world's "outcasts" wealthy at the expense of African Americans and Native Americans. After over 300 years of such treatment, African Americans were set free of the bonds of de jure discrimination. African Americans were told they were free and equal to whites under the eyes of the plain language of the law. The expectation by many was that eliminating bad laws would eliminate the scourge of slavery and its badge of "inferiority." It did not.

After approximately twenty years of affirmative action programs and policies designed to redress the wrongs of the previous 350 years of discriminatory treatment,[110] however, serious questions remain about how much meaningful progress has been made by African Americans toward the goal of actual equality, both under the law and in fact, in this country. Nonetheless, the growing sentiment in this country is that we should retreat from affirmative action policies be-

U.S. 279, 329 (Brennan, J., dissenting) (citing Higginbotham, *In the Matter of Color*, supra note 3, at 253-54 & n.190).

107 Higginbotham, *Shades of Freedom*, supra note 1, at xxix.

108 Id.

109 Id. at xxviii.

110 President Kennedy issued Executive Order 10,925 which prohibited discrimination on the "basis of race, religion, color, and national origin" and also required "affirmative action" to ensure equality of employment opportunity. See Exec. Order No. 10,925, 3 C.F.R. 576 (1959-1963).

cause they benefit African Americans at the expense of white Americans. *Shades of Freedom* gives insight as to why so many "benefits" to African Americans have been illusory and why African Americans deserve this country's continued commitment to put them in the place that they would have been as a people, had they not been enslaved, treated like chattel, and viewed as inferior for over 300 years in this country. We would do well to remember Dr. Martin Luther King, Jr.'s lament over thirty years ago: "Negroes are still at the bottom of the economic ladder. They live within two concentric circles of segregation. One imprisons them on the basis of color, while the other confines them within a separate culture of poverty."[111] Progress, Judge Higginbotham reminds us, has been painfully slow.

However, *Shades of Freedom* does not end with this disturbing analysis. Rather, Judge Higginbotham makes his third and most important contribution by sharing his wisdom and message of hope, setting him apart from other scholars. While Judge Higginbotham's extensive research into the racial disparities of the American legal system challenges our beneficent conception of law, he encourages us at the same time to find, between the shades of black and white, heroes who have worked together to make progress toward racial equality possible. He recognizes that it is not enough for any major work to be merely a descriptive history or an academic text interesting only to those who scrutinize jurisprudential philosophies. Major works must shape the way Americans think and act. *Shades of Freedom* chronicles the slow pace of racial progress. But it is a work of hope. Returning to his precepts he reminds us:

> Today we have come to a time when whites may not own African Americans as property (Precept Two of American Slavery), when African Americans are not totally powerless to control their fate (Precept Three), when whites and African Americans may marry whomever they wish (Precept Four), when whites may no longer completely control where African Americans live and the status they have in the community (Precept Five), when white control is not a predominant worry of the African-American family (Precept Six), when African Americans are free to get an education if they wish (Precept Seven), when the African-American church can chart its own destiny (Precept Eight), when the Bill of Rights theoretically applies equally to African Americans and whites (Precept Nine), and when overt racism in the public sphere is far less tolerated (Precept Ten).[112]

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111 Martin Luther King, Jr., Why We Can't Wait 23 (1964).

112 Higginbotham, *Shades of Freedom*, supra note 1, at 10.

In today's age when despair over race threatens to become overwhelming, his is a soothing voice which speaks of times when it was worse and when there were those who did what they could to make it better. By exposing us to the duality of American jurisprudence and antebellum slavery law, Judge Higginbotham reminds us that our understanding of this past liberates us from perpetuating the legacy of slave institutions and exhorts us to action. This is the real contribution of *Shades of Freedom*.

Although Judge Higginbotham's work illuminates the many dark moments of American legal history, he recognizes the contributions made by courts to improve the legal system. He writes:

> To discuss only those cases that involved the perpetuation of racism in the American courts would significantly distort one's over-all view of the American judicial process. There were thousands of cases involving African Americans that were decided fairly. Furthermore, at various times, the federal courts did impose restraints on the state courts regarding issues involving state-imposed racism.[113]

Judge Higginbotham points out that the Supreme Court of 1930-1941, under the leadership of Chief Justice Hughes, began to make inroads toward racial progress that made the *Brown* decision possible.[114] At the time Justice Hughes became Chief Justice, blacks were "effectively barred from southern voting booths, relegated to inferior public schools and facilities, excluded from most southern state colleges and universities, and subjected to a hostile criminal justice system."[115] Though many scholars look to the Warren and Burger Courts as enforcers of civil rights and civil liberties, Judge Higginbotham argues that the Hughes Court's "diminution of the inferiority precept under law"[116] should well be acknowledged and remembered. Moreover, even as Judge Higginbotham criticizes the recent voting rights cases as a retrogression of civil rights law,[117] he acknowledges a recent decision by Justice O'Connor which flatly stated that *Plessy* was wrong the day it was decided.[118] Her statement

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113 Id. at 152.

114 See id. at 153.

115 Id.

116 Id. at 159.

117 See infra notes 121-27 and accompanying text.

118 See Higginbotham, *Shades of Freedom*, supra note 1, at 118 (quoting plurality opinion in Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992), in which Justice O'Connor, joined by Justices Kennedy and Souter, wrote, "[W]e think *Plessy* was wrong the day it was decided.").

follows on the heels of declarations by even conservative and centrist Justices of the Supreme Court that *Plessy* was wrong.[119]

The one criticism that can be made of *Shades of Freedom* lies in a passing remark in the Introduction. Judge Higginbotham emphasizes "the extraordinary impact the Justices [of the Supreme Court] have had on American race relations"[120] by including pictures of six separate sittings of the Court.[121] The fifth picture is of the Justices who, in *Shaw v. Reno*,[122] adopted a new standard for the creation of majority-minority voting districts.[123] In explaining why he included this picture of the Court, Higginbotham comments that the newly adopted standard "could cause a dramatic reduction of pluralism in the United States Congress through the elimination of ten to seventeen African-American and Latino Members."[124] Indeed, he posited that the *Shaw* standard, when combined with newly drawn voting district boundaries, in all probability would result in those seventeen minority members being replaced by whites.[125] In fact, however, all who chose to run were re-elected.[126]

There are several ways to analyze Judge Higginbotham's prediction. First, one can employ an empirical approach. Using this framework, Judge Higginbotham's prediction can be viewed in the short term, leading to the simple conclusion that the prediction was wrong. Alternatively, one can take a long-term view and conclude that it is too soon to tell the effects of *Shaw*-type challenges.[127] A second approach might be to employ an historical analysis. One may draw par-

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119 See Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting). In *Fullilove*, Justice Stewart, joined by Justice Potter and current Chief Justice William Rehnquist, expressly stated that "Plessy v. Ferguson was wrong" and cited Justice Harlan's dissent in *Plessy*. See id. at 522-23.

120 Higginbotham, *Shades of Freedom*, supra note 1, at xxx.

121 See id. at photo gallery. The first picture is of the Justices who decided *Dred Scott*. The second is the Justices who decided *Plessy*. The third is of the Justices who decided Gaines v. Canada, 305 U.S. 337 (1938), which began the movement toward the decision in *Brown*. The fourth is of the Justices who decided *Brown*. The fifth is of the Justices who ruled in Shaw v. Reno, 509 U.S. 630 (1993). The sixth is of the current Justices.

122 509 U.S. 630 (1993).

123 The court held that reapportionment schemes must be "narrowly tailored to further a compelling governmental interest." Id. at 658.

124 Higginbotham, *Shades of Freedom*, supra note 1, at xxxi.

125 See id.

126 See, e.g., Neil A. Lewis, Ruling Ended Use of Race to Redraw Districts, N.Y. Times, Feb. 27, 1997, at B2; Bill Osinski, "The Times Are Changin'": Representative Sanford Bishop's Colorblind Agenda is a Winner in Majority-White 2nd District, Atlanta J. & Const., Feb. 9, 1997, at O5F.

127 At the time of this writing, however, a three-judge panel recently invalidated the boundaries of New York's 12th Congressional District under the rule in *Shaw*. See Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1996) (per curiam). This largely Hispanic district is represented by Nydia Velazquez, who was the first Puerto Rican to be elected to Congress.

allels to the post-Reconstruction era where significant numbers of African Americans were elected to Congress but were displaced at the end of the nineteenth century.[128] Their fate might parallel that of the critical mass of African American representatives today, at the end of the twentieth century. A third approach questions the prediction from the perspective of a social scientist, perhaps leading one to conclude that the two-term incumbent status of these African American Congresspersons confounds the race-based analysis and that it is difficult, if not impossible, to separate incumbency from race in this context. Put another way, if African Americans are given an opportunity to establish a legislative record, then they are in a better position to compete on a more level playing field. Additionally, a social scientist may conclude that the uncertainty and timing of the *Shaw* litigation might have deterred well financed and strategically organized challenges that surely would have occurred otherwise.

Probably no person would have wanted his predictions to be wrong more than Judge Higginbotham.[129] More than anyone, he would want this country to have matured to the point where race and ethnic origin would not be the single most important factor in determining one's opportunities. He has devoted his entire professional life to educating and mentoring persons irrespective of race, gender, religion, and ethnicity. His colleagues, law clerks, and students reflect the richness of America's diverse people. History will, of course, determine whether Judge Higginbotham's prediction will ultimately be proven right or wrong. The real test will come when African Americans and other minorities run for office, not as incumbents, but as new challengers.

In the meantime, Judge Higginbotham should be commended for his courage in drawing a line in the sand for the Supreme Court and all Americans to see. This line is more than symbolic; it represents the choices that we as a society must make to move beyond the precipice of the "cloudy divide, poised between freedom and inequality,"[130] so poignantly stated by Judge Higginbotham, toward a day when "Freedom" is not granted to people in "Shades" but absolutely. Prior to *Shaw*, as a result of the 1982 Amendments to the 1965 Voting Rights

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See Jonathan P. Hicks, A Latino Congresswoman Gets a Show of Support, N.Y. Times, Mar. 9, 1997, at 35. Judge Higginbotham's dire prediction may still come to fruition.

128 See Higginbotham, *Shades of Freedom*, supra note 1, at 172-76.

129 See supra note 0. Here is where my insight as a former law clerk and longtime student of Judge Higginbotham and his work benefit this review.

130 Higginbotham, *Shades of Freedom*, supra note 1, at xxxii.

Act[131] and the creation of majority African American congressional districts by various states, there was a critical mass of African Americans in Congress. Their presence represented a ray of light as African Americans continued their journey from slavery and total oppression to freedom. The question remains whether the success of the incumbent African Americans reflects an actual embrace of pluralism by Americans or simply the recurring motions of the wave of progress and regress that African Americans have continually faced throughout this journey towards inclusion in "We the People."

When the tide of history completes its unrelenting course, there will be few left standing in its wake. One of the few will be A. Leon Higginbotham, Jr. Judge Higginbotham's standing is indisputable as a jurist, teacher, scholar, and mentor to untold numbers. Every scholar can take something from this work because Judge Higginbotham demonstrates that the notion of inferiority of African Americans pervaded all facets of the legal system and society. Yet, the critical essence of this work is that it tells a tale that every American needs to hear in order to understand how racial progress has been achieved slowly in this country and how the law served to maintain the de jure power of whites over African Americans. Thus, it becomes less difficult to understand why it is so difficult for African Americans, as a people, to achieve equal footing with whites, despite the elimination of these laws from the books.

Judge Higginbotham's magnificent first volume, *In the Matter of Color*, made certain that the issue of race and slavery law would become part of the American jurisprudential landscape. Higginbotham spent sixteen years writing *In the Matter of Color*. He pledged "to complete at least three additional volumes on the progress of racial justice from 1776 to 1964"[132] which would "reveal how, through the legal process, racial injustice was further perpetuated and how, eventually, it was partially eradicated."[133] *Shades of Freedom* is the beginning of the fulfillment of that promise. He devoted the last eighteen years to researching and writing *Shades of Freedom*. He promises that within a few years he will complete another volume of his series on Race and the American Legal Process.[134] We all should eagerly anticipate volume three and hope that it will soon be finished; however, if it is as rich and thoughtful as volumes one and two, it will be well worth the wait.

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[131] Pub. L. No. 89-110, § 2, 79 Stat. 445 (1982) (codified as amended at 42 U.S.C. §§ 1971, 1973 (1988)).

[132] Higginbotham, *In the Matter of Color*, supra note 3, at 16.

[133] Id.

[134] See Higginbotham, *Shades of Freedom*, supra note 1, at ix.