

Aristotle and Western Liberalism: The Fundamental Tenets of Judge A. Leon Higginbotham's Scholarship

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I. Introduction

There is but a small circle of jurists who belong in the pantheon marked "scholarly jurists." Known as much if not more for the fecundity and imagination of their writings off the bench as for the craftsmanship and moral vision of their rulings on the bench, these justices and judges trace their heritage back to the intellectual heroes of our legal profession—Story, Holmes, Cardozo, Frankfurter, Frank, Hand, and Friendly. Judge A. Leon Higginbotham, Jr., walks in the tradition of these celebrated jurists. He is one of the outstanding scholarly jurists of our time, a living legend.

True to the tradition of the scholarly jurist, Judge Higginbotham's off-the-bench writings are steeped in western liberalism.¹ Often misunderstood, the term *western liberalism* requires some explanation at the outset.²

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1. Judge Higginbotham makes a brief reference to the term *western civilization* in a famous article. See *infra* text accompanying note 43. Usually, however, neither the term *western liberalism* nor *western civilization* is expressly used in his scholarship. Nonetheless, as I shall argue in this article, Judge Higginbotham's scholarship is grounded in (and critical of) the intellectual tradition of the West.

2. In recent years, some scholars have intensified the debate concerning the extent to which, if any, the ancient Greeks derived—some would say "stole"—their culture from a more ancient Egyptian society dominated by blacks. Distinguished African American and white scholars argue that black Africans invented much of what is called western culture—from science to government, mathematics to philosophy. See Martin Bernal, *Black Athena: The Afroasiatic Roots of Classical Civilization—The Fabrication of Ancient Greece 1785-1985* (1987)(vol. 1); Cheikh Anta Diop, *Precolonial Black Africa* (1987). See also *Egypt Revisited* (Ivan Van Sertima ed. 1991); Cheikh Anta Diop, *Civilization or Barbarism: An Authentic Anthropology* (1991); George G.M. James, *Stolen Legacy: Greek Philosophy is Stolen Egyptian Philosophy* (1954). Some scholars are critical of the "stolen legacy" theory. For example, Frank Snowden argues that although history was greatly influenced by Egyptian civilization, Egypt is a Middle Eastern culture, not African. See Frank M. Snowden, *Blacks in Antiquity: Ethiopians in the Greco-Roman Experience* (1970). See also, *The Challenge of Black Athena*, *Arethusa*, Fall (1989); Carol Inners, *Some Scholars Dispute "Black" Egypt Theory*, *Wash. Times*, Feb. 26, 1990 at 1

Western liberalism is less a concept of geography than a body of attitudes, values, and knowledge. It is the culture of a liberal democratic society, whether that society is located in Western or Eastern Europe, Asia, Africa, or the Americas. All the constituent groups in the United States—including African Americans—contribute to western liberalism as it is manifested in this country. Thus, western liberalism in our liberal democratic state (the United States) is an amalgamated culture.

Regardless of where it is practiced, western liberalism has two predominant themes. The first is the democratic ideal, which has come to mean a form of government committed to the principles of participation of the governed (usually by majority rule with inviolable minority rights) and the rule of law. In our society, the democratic ideal also incorporates a belief in the democratization of economic progress (or the ideology of progress)—that is, an unwavering faith in widespread and ever-increasing economic opportunity for individuals, coupled with a strong preference for individual advancement over communitarianism.³ The second major theme of western liberalism is individual liberty, or simply liberalism. There are several forms of liberalism, ranging from free-market liberalism to reform liberalism.⁴

(citing several scholars). In the latest edition of his seminal work on African American history, John Hope Franklin does not address the "stolen legacy" theory directly. He does, however, make at least two relevant observations. First, Africans were using iron in their economy when Europeans were still in the Stone Age. Second, "Slavery was an important feature of African social and economic life. The institution was widespread and was perhaps as old as African society itself." John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom: A History of Negro Americans* 15, 18 (6th ed. 1988). In speculating on the resolution of the issue concerning the roots of western civilization, it is useful to consider the direction in which a similar debate is moving. The probable resolution of that debate, which concerns the origin of modern *Homo sapiens*, is explained as follows by Professor Leonard Thompson of Yale University: "On the evidence available at present—and there has been an escalation of sophisticated work on early humans in Southern Africa by archaeologists and physical anthropologists in recent years—it is probable that the hominid predecessors of modern humans originated in various parts of East and Southern Africa." Leonard Thompson, *A History of South Africa* 5-6 (1990). In light of this discussion, it seems reasonable to draw the following distinction between an Afrocentric and Eurocentric view of history: The former gives an account of history that includes the contributions of Africans; the latter tells the story of humans that ignores or minimizes the contributions of Africans.

So as not to draw attention away from the intellectual and moral achievements of one of our greatest living judges, I shall not attempt to develop further or otherwise resolve the controversial issue concerning the origin of western civilization. For purposes of this tribute to Judge Higginbotham, I shall assume that our traditional understanding of western civilization is correct.

3. See *infra* Part IIA. On the ideology of progress, see Christopher Lasch, *The True and Only Heaven: Progress and Its Critics* (1991).

4. See *infra* Part IIB.

Aristotle, the great Greek philosopher and the father of logic who lived circa 384-322 B.C., envisioned the form of democracy that has existed in the United States since the ratification of our Constitution.⁵ His epistemology⁶ and ethics⁷ have also played an important role in shaping other features of western liberalism in our democratic society. In many respects, the intellectual genealogy of western liberalism in our society can be traced back to Aristotle.

If Aristotle is the key to understanding western liberalism, he is also important in understanding Judge Higginbotham's scholarship at its most fundamental level, as I shall try to illustrate in this article. After discussing the Aristotelian democratic ideal and liberalism, I shall explain how these principles appear in Judge Higginbotham's scholarship. My basic attempt here is to show that although Judge Higginbotham's scholarship is grounded in western liberalism, it also offers a vigorous and unrelenting challenge to western liberalism applied in this and other liberal democratic societies. His scholarship, in other words, is *anchored* in and *critical* of western liberalism. Retired Supreme Court Justice William Brennan and the late Judge Skelly Wright are among the few other scholarly jurists of our time whose scholarship proceeds in this complex fashion. Stripped to its core, Judge Higginbotham's message is twofold: racism begets its own results—to wit, racial oppression—even in a society so committed to the democratic ideal and liberalism as ours; and racist jurisprudence is an undemocratic assumption of power by white judges that no amount of honored tradition or fancy analysis should make us hesitate to correct.⁸

Next, I shall discuss the epistemological and ethical themes in Judge Higginbotham's work.⁹ On both counts, I shall argue that Judge Higginbotham is very much an Aristotelian, that his philosophy bends toward Aristotle's.¹⁰ In short, my ambition in this article is to delve into the fundamental aspects of the thinking of one of our greatest living jurists.

II. Western Liberalism

Western liberalism refers to the traditional principles that

5. See *infra* Part IIA.

6. See *infra* Part IIIA.

7. See *infra* Part IIIB.

8. See *infra* Part II.

9. See *infra* Part III.

10. Judge Higginbotham's philosophy is not coextensive with Aristotle's. For example, they disagree on the ontological status of women. See *infra* text accompanying notes 26-27.

underpin our liberal democratic state. Democracy and liberalism are the most important of these principles. I shall discuss these concepts briefly before moving to Judge Higginbotham's scholarship.

A. *The Democratic Ideal*

The word *democracy* is derivative of two Greek words: *demos* (which means "people," or, more precisely, "common people"); and *kratein* (which means "to rule"). These two words were joined to form the Greek word, *demoskratia* (meaning "rule by, and in the interest of, the common people.")¹¹ Because the common people were in the best position to know their own interests, and because they constituted a numerical majority in Greek society, democracy came to mean majority rule in ancient Greece.¹²

In actuality, democracy in Greek society in the fifth and fourth centuries B.C. had many unsavory, undemocratic, and illiberal features. Women were denied the right to vote or to hold office; *metics* (resident aliens) were enslaved; and the rights of freedom of speech, assembly, and press were legally denied. Indeed, any person who openly expressed an unpopular view could, by majority vote, be banished from the city or even executed, as was the fate of Socrates.¹³

While Socrates, and later his student Plato, criticized democracy for its excesses and, more specifically, on the ground that truth cannot be determined by majority vote,¹⁴ Aristotle, Plato's best student, embraced a modified form of democracy. Aristotle accepted the basic idea of democracy (i.e., majority rule), but he also believed that the majority should rule in a manner aimed at promoting the good of society *en toto* rather than the good of a particular group or class. Thus, Aristotle would incorporate republicanism (or *polity*) into his concept of democracy.¹⁵ Democratic rule, for Aristotle, had to be virtuous rather than self-interested; it had to follow the "golden mean."¹⁶

11. Terrance Ball and Richard Dagger, *Political Ideologies and the Democratic Ideal* 23 (1991).

12. See Thucydides 126-35 (Benjamin Jowett trans. 2d ed. rev. vol. I 1900).

13. See Plato, *The Trial and Death of Socrates* (1983).

14. See *id.*; Plato, *The Republic* (trans. Benjamin Jowett Bk. VIII 1871).

15. See Aristotle, *The Politics* (T.A. Sinclair trans. Trevor J. Saunders rev. Bks. III-IV 1981) [hereinafter *The Politics* (Saunders)]; Aristotle, *The Politics* 145-49 (Benjamin Jowett trans. 1943). The word *republicanism* may be more associated with the Greek historian Polybius than with Aristotle, but the concept of "republicanism" is certainly featured in Aristotle's political theory, which preceded Polybius's writings. See Polybius, *Histories* (1889).

16. See *infra* text accompanying notes 68-73.

In our society, the term *democracy* is not as contested a concept as it was in ancient Greece. Today, *democracy* has taken on a meaning that is close to Aristotle's understanding of the term. Democracy means majority rule *and* the protection of minority (or individual) rights.¹⁷ Inherent in this notion of democracy is the idea of a government ruled by laws rather than persons, an idea Niccolo Machiavelli emphasized in the *Discourses*.¹⁸

In the last two hundred years, democracy, especially in the United States, has come to be identified with a particular form of liberalism—free-market liberalism—which promotes the belief that the good life is accessible to the many rather than the few. This ideology of progress, rooted in middle-class culture, looks forward to universal abundance (the democratization of economic progress) and favors individual advancement over community solidarity. It is oppositional to the anti-progressive tradition found not only in today's lower middle-class but also in the cultural preferences of Ralph Waldo Emerson.¹⁹

The democratic ideal is a major theme in Judge Higginbotham's scholarship. It is manifested in at least two ways. First, there is an unmistakable acceptance of democracy as majority rule. Judge Higginbotham does not deny the basic right of a numerical majority to govern. But like Aristotle and Polybius,²⁰ he believes that such governance must be virtuous.²¹ It must be public-interested rather than self-interested; and this means "non-racial democracy."²²

Judge Higginbotham's acceptance of majority rule includes a limited commitment to the ideology of progress.²³ On the one hand, he champions individual advancement. He himself has risen far above the socioeconomic level of the community into which he was born.²⁴ On the other hand, he believes in individual responsibility to society. Both the individual and the community move for-

17. See, e.g., Russell L. Hanson, *The Democratic Imagination in America: Conversations with Our Past* (1985); C.B. Macpherson, *The Life and Times of Liberal Democracy* (1977).

18. See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

19. Free market liberalism is discussed *infra* text accompanying notes 34-35. For a critical examination of the ideology of progress, see Lasch, *supra* note 3.

20. See *supra* note 15.

21. See, e.g., A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U.L. Rev. 479, 572-78 (1990).

22. *Id.* at 582.

23. For a discussion of the ideology of progress, see *supra* text accompanying note 19.

24. See A. Leon Higginbotham, Jr., *The Dream with Its Back Against the Wall*, 36 Y.L. Rpt. 34 (1990).

ward under Judge Higginbotham's democratic model.²⁵ This is quite consistent with, and no doubt arises from, Judge Higginbotham's embrace of reform liberalism.²⁶

Democracy is reflected in Judge Higginbotham's scholarship in a more powerful way. Here there is an important difference between Judge Higginbotham and Aristotle. Unlike Aristotle, Judge Higginbotham gives special emphasis to the minority rights tenet of the democratic ideal. For example, notwithstanding his democratic zeal, Aristotle would not extend democratic rights to women, an oppressed minority in ancient Greece. Consistent with the custom of ancient Greece, Aristotle believed that women should not have the right to participate in the political process. He felt that women should be honored, but only if they occupied a subordinate status to men.²⁷

Aristotle and Judge Higginbotham are miles apart on the question of women's rights. Judge Higginbotham's views on this matter are closer to those of Plato who believed that women should be educated and allowed to participate in the political process.²⁸ The judge's frequent citations to female scholars (whom he places on his list of "prominent historians"),²⁹ his decision to write with a female co-author,³⁰ and his selection of a woman as his first law clerk (Eleanor Holmes Norton) must certainly give Aristotle cause to turn over in his grave.

Judge Higginbotham's treatment of the minority rights tenet is mainly one of criticism. Through an ongoing commentary on the history of racism in the United States legal system, Judge Higginbotham demonstrates how our laws were crafted, interpreted,

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

26. See *infra* text accompanying notes 38-43.

27. See *The Politics* (Saunders), *supra* note 15 (Bk I). In contrast, Plato believed that women should participate in the political process. *The Republic*, *supra* note 14 (Bk. V). For a complete discussion of Plato's and Aristotle's views on women, see Sarah B. Pomeroy, *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity* (1975).

28. See *supra* note 27.

29. A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 Wash. U.L.Q. 673, 686 (1989). Judge Higginbotham's list of prominent historians rightfully includes his wife, Dr. Evelyn Brooks Higginbotham. *Id.*

30. See, e.g., A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967 (1989); A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 Ohio St. L.J. 511 (1989). Dr. Kopytoff is identified on the first page of both articles as a co-author of equal status. She writes a tribute to Judge Higginbotham in this symposium issue.

and applied to exclude African Americans from the democratic process in all facets. Before discussing this important aspect of Judge Higginbotham's scholarship in greater detail, it may be useful to consider the liberalism theme in his work.

B. Liberalism

Liberalism is a much more complex term than *democracy*. It comes from the Latin word *liber* (which means "free").³¹ At its most basic level, then, liberalism means the absence of external restrictions, obstacles, or barriers on the individual. Liberalism proclaims the sovereignty of the individual; it sees the individual as an autonomous entity endowed with a set of natural rights over which no person or institution can exercise control without the individual's consent. For John Locke, these rights consisted of life, liberty, and property.³² Later, Thomas Jefferson slightly modified Locke's array of natural rights to read life, liberty, and the pursuit of happiness.³³

A free market and a minimalist state are the principal means of guaranteeing liberalism in a liberal democratic society. The former allows individuals to maximize their own economic interests in competition with others who pursue their own economic interests. The latter limits the scope and power of the government so that it does not intervene in market transactions nor tell its citizens how to live their lives. Taken together, these generalizations form the political theory of *classical liberalism*, which finds expression today as libertarianism or neoclassical liberalism.³⁴

Because classical liberalism is difficult to digest full strength, several diluted versions have emerged over the centuries. One form of liberalism (not entirely diluted, however) is *free-market liberalism*. This brand of liberalism emphasizes the economic side of liberalism, or *laissez faire*. It promotes self-interested market behavior—that is, private markets rather than centrally controlled

31. *Supra* note 11, at 49.

32. See The Works of John Locke 9-21, 339-47 (1823). See also Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (1986).

33. The Unanimous Declaration of the United States of America (1776). For further discussion on the Declaration of Independence, see Gary Wills, *Inventing America: Jefferson's Declaration of Independence* (1978); A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period* 371-89 (1978) (hereinafter *In the Matter of Color*).

34. See, e.g., William Graham Sumner, *What Social Classes Owe to Each Other* (1883) (arguing that human beings are locked into a struggle in which only the strong will survive); Murray Rothbard, *For a New Liberty* (1973) (arguing that government should be abolished altogether); Robert Nozick, *Anarchy, State, and Utopia* (1974) (arguing that the function of government is to protect its citizens and nothing more).

markets. Free-market liberalism is most closely associated with the Scottish philosopher and economist Adam Smith and his book, *The Wealth of Nations*.³⁵

Utilitarian liberals, such as Jeremy Bentham, place a moral gloss on free-market liberalism. Utilitarianism holds that human beings are by nature pleasure-seekers and pain-avoiders. Hence, human nature impels us to maximize our pleasures, or happiness, and to minimize our pains (i.e., to run a felicific calculus). The good or just course of action is to follow the principle of utility: do that which yields the greatest good for the greatest number.³⁶

Free-expression liberalism, developed most prominently by John Stuart Mill in his book, *On Liberty*,³⁷ focuses on the free market in ideas and opinions. It argues that the state may not restrict the expression or dissemination of ideas, however unpopular they might be. As to acts, rather than expressions, free-expression liberals hold that the state has no right to interfere with private acts (i.e., acts that affect only the persons performing them), but the state may legitimately step in to restrict or regulate public acts (i.e., acts that actually harm individuals other than those performing them).³⁸

Finally, *reform liberalism* holds that other forms of liberalism, as well as liberalism in its most basic sense, presuppose equality of opportunity in economic, political, and social affairs. State intervention into private affairs may be necessary to make this presupposition a reality. The state may have to intervene to make certain that the playing field is in fact level and, indeed, more level than it has been in the past. Reform liberals reject the notion held by other liberals that human beings are by nature pleasure seekers. Instead, they argue, that human pleasures, unlike animal pleasures, are mediated by reflection and ideals (such as, justice and fairness). Upon reflection, we understand that liberalism is not simply freedom to do what one well pleases provided it does not interfere with someone else's freedom to do what he or

35. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776). For an updated version of Smith's thinking, see, e.g., Milton Friedman & Rose Friedman, *Free to Choose* (1981).

36. Bentham states: "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do." Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* 1 (1948). Bentham further states: "The business of government is to promote the happiness of society, by punishing and rewarding." *Id.* at 70.

37. John Stuart Mill, *On Liberty* (1859).

38. See John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* 72-77, 111-12, 123-28 (1910).

she well pleases. Liberalism, instead, is the freedom of our higher or ideal selves from the temptations to which our lower or animal selves often succumb. Accordingly, the state should intervene, especially in economic matters, to ameliorate the conditions of the poor and the weak. Such regulation advances rather than represses real freedom—it encourages our higher selves to realize noble, just, and generous ideals as it restricts our lower selves.³⁹

Judge Higginbotham is a reform liberal. His writings extol the virtues of the higher self in us all. But it would be wrong to count Judge Higginbotham among the new intellectual movement, which might be called neo-progressive liberalism, that places a renewed emphasis on social obligation.⁴⁰ Even though Judge Higginbotham and the neo-progressives share a belief in communitarianism to the extent that they both attempt to temper unfettered individualism with a strong declaration of the rights of the community, Judge Higginbotham's liberalism predates the neo-progressive movement. Neo-progressive liberalism is a response to the radical individualism of the Reagan '80s⁴¹ and Judge Higginbotham's advocacy of individual responsibility predates the 1980s.⁴²

No where is Judge Higginbotham's liberalism more eloquently stated than in a 1980 commencement address published under the title "Lawyers, Values and Commitment":

When it comes to values or commitment, some lawyers will be

39. See *The Works of Thomas Hill Green* (R.L. Nettleship ed. vol. 3 1888). See generally John Gray, *Liberalism* (1986). John Rawls is the most important reform liberal of today. Rawls argues in his book, *A Theory of Justice* (1971), that liberty and equality of opportunity are the two basic principles of justice in our society. Each person should have as much liberty as possible and enjoy equal opportunity. To achieve and maintain a just society, Rawls proposes the following: Each person in society starts with an equal share of wealth and power. This distribution of wealth and power is changed (made unequal) only if a new distribution of wealth and power benefits the worst-off persons in our society. *Id.* For example, if A has 100 units of wealth or power and B has only 50, then an unequal distribution of wealth or power (such as nothing to A and 25 units to B) would be just if both A and B (i.e., everyone, including the worst-off person, B) end up with an equal number of units (say 75). If justice dictates that lawyers receive a greater salary than social workers, then it cannot be because lawyers are (supposedly) smarter or harder workers than social workers. Rather, it can only be because this pay scale is the best way to provide for good legal services and, thus, promote the community's strong interest in competent legal representation, which interest includes the strong interest of the worst-off.

40. See Lasch, *supra* note 3; *The Responsive Community: Rights and Responsibilities*, Winter 1990/91.

41. See sources cited *supra* note 40.

42. See A. Leon Higginbotham, Jr., *Lawyers, Values and Commitment*, 2 En Banc 6 (1980). Subsequent articles that elaborate on this philosophy include: A. Leon Higginbotham, Jr., *Judge William Henry Hastie—One Who Changed the Immutability*, 24 How. L.J. 259 (1981); A. Leon Higginbotham, Jr., *Roles of the Black Lawyer: A Symposium*, 7 Black L.J. 1 (1981) (foreword); *supra* note 25.

found on every major issue confronting our civilization. Some lawyers plotted with Hitler to develop that awesome power which threatened to destroy western civilization. Some lawyers supported slavery with vigor while others such as Charles Sumner of Massachusetts were leading abolitionists. Some lawyers have ruthlessly exploited the poor while others have vigorously aided the weak, the poor and the dispossessed.

Looking at the events of Watergate we know that many lawyers were convicted and still others implicated in crimes which reflected a tragic lack of public morality. Yet, in contrast, even while Watergate was occurring, other lawyers were working steadfastly as architects for peace and a responsible and responsive judicial process.

Where will each of you stand? Will you be aligned with those forces that expand the horizons of opportunity for the weak, the poor, the powerless and the many who haven't had our options? Or will you be a part of the indulgent new majority in our society which seems to say, "Now that I have made it, I don't care whether anyone else does," and who seem to feel that the quality of morality in our nation's public life is unimportant so long as they have a good salary and a comfortable home in suburbia. Will you as lawyers merely be experts on indifference and non-commitment? Will you be concerned solely about obtaining the highest fees with the least amount of effort and with no concern about whether we are improving the quality of life in our nation or world?

The roles which we accept will be dependent upon our personal philosophies as intertwined in our daily lives. In terms of improving the quality of life in our nation I will not submit to you a theme from a jurist, a lawyer or even from the very pinnacle of wisdom—a law professor. Instead, I submit to you the philosophy of a former slave.

In March, 1852, Frederick Douglass, then a distinguished abolitionist, was asked what the role of a free Negro should be. He replied that his mission was "to stand up for the downtrodden, to open my mouth for the dumb, to remember those in bonds as [if] bound with them."

One hundred and eighteen years later, Douglass's theme is still a relevant mission for us as lawyers today. As we witness the steady decline of our cities, as we feel the increased polarization, as we hear the rhetoric of hatred, as we see phrase-makers use jargon to divide us, we must all recognize our obligation as stressed by Douglass. The downtrodden, the rejects, the discards of our society must be brought into a bigger dream of America so that we may move more quickly from disillusionment of hope, from rhetoric to attainment.⁴³

Impelled by his deep commitment to democratic values (particularly minority rights) and his laudable liberalism, Judge Higginbotham seeks to expose the repeated failures of our legal

43. *Lawyers, Values and Commitment*, *supra* note 42, at 7, 15.

system to extend the ideals of western liberalism—democracy and liberalism—throughout the citizenry. “The downtrodden, the rejects, the discards of our society”⁴⁴ have been denied opportunities or even basic protections others have received in our liberal democratic society. These opportunities and protections include liberty in all its forms, free elections, the right to petition government, and many other basic democratic guarantees.⁴⁵

To advance this argument, Judge Higginbotham primarily concentrates on African Americans and uses historical analysis.⁴⁶ For example, in his most famous work, *In the Matter of Color*,⁴⁷ Judge Higginbotham meticulously discusses the experiences of African Americans during our colonial period. He documents the manner in which colonial leaders and elites used the legal system—the protector of western liberalism—to lay a solid foundation for the total enslavement of African Americans under the rule of law for years to come. For nearly 250 years, these African Americans were denied any semblance of liberty, not even the pretense of freedom. And whether inside or outside the institution of slavery, African Americans were excluded from the democratic process, including free elections. The democratic imperative of minority rights simply meant that the African American, to quote Chief Justice Taney, “had no rights which the white man was bound to respect.”⁴⁸ All this at a time when the oppressors believed so deeply in the democratic ideal and liberalism that they were willing to go to war and even die for both.

This historical criticism of western liberalism—the failure of our legal system to extend the ideals of democracy and liberalism to African Americans—ties together most of Judge Higginbotham’s scholarship. In recent years, Judge Higginbotham has applied this criticism to another western liberal society—South Africa—noting the similarities and differences between American and South African courts.⁴⁹

Judge Higginbotham’s historical perspective and judicentric analysis have both contemporary and societal significance. Study-

44. *Id.* at 15.

45. See, e.g., A. Leon Higginbotham, Jr., *The Bicentennial of the Constitution: A Racial Perspective*, 22 *Stan. Law. J.* 8 (Fall 1987); A. Leon Higginbotham, Jr., *West Virginia’s Racial Heritage: Not Always Free*, 86 *W. Va. L. Rev.* 3 (1983); A. Leon Higginbotham, Jr., *Relevance of Slavery: Race and the American Legal Process*, 54 *Notre Dame Law. J.* 1:1 (1978); *Blacks and the Declaration*, *Pa. Gazette*, Dec. 1978, at 33.

46. See articles cited *supra* note 45.

47. *In the Matter of Color*, *supra* note 33.

48. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

49. See *supra* note 21, at 479.

ing our past racial mistakes helps us to avoid repeating them in the future. Judge Higginbotham has often cited to Santayana's observation that: "Those who cannot remember the past are condemned to repeat it."⁵⁰ Elaborating on this cautionary epigram in a recent article, Judge Higginbotham states:

In his classic treatise, *The Nature of the Judicial Process*, then Judge Cardozo wrote of those issues for which there could be not progress without an understanding of history. Similarly, Judge Hastie, the first black federal judge and later Chief Judge of the United States Court of Appeals for the Third Circuit, concluded in his seminal 1973 article that to understand the progress in the area of race relations required such a historical perspective. Judge Hastie analyzed the period from 1930 to 1950 during which the foundations were being laid for the school desegregation cases of the 1950s. He stressed that the 'struggle can be viewed in perspective only if the *antecedent status* of the Negro is comprehended, and such realization is not easy today, particularly for the many millions of Americans who have reached maturity since 1950."

It is for this reason—lack of historical perspective—that recent generations find it difficult to understand the clamor concerning past racial injustice in America⁵¹

Finally, we learn a great deal about the society in which we live by studying our legal system. Quoting William Goodell, Judge Higginbotham makes the point that "[n]o people . . . were ever yet found who were better than their laws, though many have been known to be worse."⁵² In short, Judge Higginbotham's scholarship teaches us that we must know our history and laws if we are to become a more moral people.

III Aristotelian Epistemology and Ethics

A. Epistemology

The above quoted remarks of William Goodell tell us a little about Judge Higginbotham's epistemology. To acquire a better sense of the epistemological underpinnings of Judge Higginbotham's scholarship, however, it might be useful to focus on his treatment of a controversial term that appears in all his major works: *racism*. Judge Higginbotham provides one of his most complete discussions of the meaning of this term in a recent article entitled *Racism in American and South African Courts: Similarities*

50. George Santayana, Reason in Common Sense 284 (1980)(vol. 1 of The Life of Reason).

51. *Supra* note 29, at 677-79 (emphasis in original).

52. *See supra* note 21, at 482.

and Differences.⁵³ Hence, my discussion shall focus on this article.

In *Racism in American and South African Courts*, Judge Higginbotham, *inter alia*, attempts to delineate various forms of racism sanctioned by the judicial systems of South Africa and the United States. This inquiry necessarily calls for an understanding or definition of racism as well as its validation within the judicial milieu. Judge Higginbotham approaches this task in a manner that is quite in line with Aristotle's epistemology and, per force, inconsistent with Plato's. Judge Higginbotham, in other words, is more an Aristotelian empiricist than a Platonic rationalist. To understand this point, one must begin with Plato's epistemology.

If called to the task, Plato, one of the greatest (if not the greatest) philosophers in western civilization, would attempt to define and validate racism as a mathematician would do in geometry; that is, by searching for an ideal euclidean line. For Plato, knowledge comes from the imagination.⁵⁴ Ergo, racism is defined and validated by reflection.

Plato would not jettison experience altogether. He would in fact consider several racist experiences, but only for the purpose of arriving at a general account of racism. Racist experiences only provide a basis for further reflection on the concept of racism itself.⁵⁵

Every bit the rationalist, Plato would prefer to search for the common feature in alternative definitions of racism, each of which definition would be created at an abstract level. We cannot, Plato would argue, define racism solely on the basis of sensory experiences. For, we can be led astray by our own experiences. An African American may experience something she might call "racism," but that in itself does not make it racism, properly defined. Her definition of racism is necessarily confined to her own experiences, "she apprehends only a shadow."⁵⁶ Racism must be defined in a much more generalized way. Therefore, we need to come into reflection; we need to back up our experiences with reflection.

There is more to Plato's epistemology that further separates his system from empiricism. Most importantly, Plato would argue that our reflection on racism must be in contact with the forms. These are ultimate models of knowledge, sort of like trump cards

53. See *supra* note 21.

54. See *The Republic*, *supra* note 14 (Bk. VI).

55. See *id.*

56. *Id.* at 258 (Bk. VII).

of understanding. Blackstone, in his *Commentaries*,⁵⁷ borrows from Plato's idea of the forms in constructing his concept of natural law, which he defines as an *a priori* set of eternal, immutable rules from which the proper resolution of all disputes can be deduced.⁵⁸ Like the natural law, the forms operate at the highest level of abstraction—the 'Good' being the most important form—and are discovered by human beings only through deep reflection.⁵⁹

Plato's epistemology is problematic, mainly because it reduces all validation to perspective. Racism may exist in the judicial system from the point of view (or reflection) of an African American, who can well envision it. But such racism may not exist from the point of view of a white American, who may not be able to imagine its appearance in the temple of justice, our most revered government institution.

In defense, Plato would argue that the forms guard against the battle of perspectives. By checking our understanding against these immutable truths, we are all able to have the same perspectives on issues. But, on the other hand, Plato offers no guarantees that such a harmonious state of affairs will in fact materialize.

If all argument is reduced to a battle of perspective, then Thrasymachus of Plato's *Republic* was right—the physically stronger person or group will always prevail.⁶⁰ Arguments get resolved not by reason, but by coercion. This is not only an intellectually inferior way to resolve competing claims, but it also places African Americans—a political and economic minority—in a no-win position.

It is perhaps for these reasons that Judge Higginbotham's epistemology essentially rejects rationalism. Like Aristotle,⁶¹ Judge Higginbotham's analysis is grounded in empiricism and pragmatism. He seeks to validate his truths and the truths of competing claims by appeal to observation. Rationalism is epistemo-

57. See William Blackstone, *Commentaries on the Laws of England* (1765).

58. See *supra* note 14 (Bk. VI).

59. *Id.*

60. Thrasymachus said: "I proclaim that justice is nothing else than the interest of the stronger." *Id.* at 16 (Bk. I).

61. It is of some moment that Aristotle begins *The Politics* with the words: "Observation tells us. . ." *The Politics* (Saunders), *supra* note 15, at l. 12521 (1981) (Bk. I, ch. I). Aristotle tells us in *Nicomachean Ethics* that "understanding requires the perception of particulars, it requires experience." Aristotle, *Nicomachean Ethics*, l. 11436 5-10 (1985) (Bk. VI, ch. II) [hereinafter *Nicomachean Ethics*]. Distinguishing Aristotle's epistemology from Plato's can be difficult at some levels of analysis, because Aristotle examines and interprets the empirical world in light of his own theoretical concepts, particularly his concept of form and matter. See *id.* at xiii.

logically incorrect, because it cannot resolve complex contemporary problems in a fair or just manner.

Accordingly, Judge Higginbotham resorts to empiricism to understand, define, and prove the existence of racism. He delineates several definitions of racism, some "more practical" than others.⁶² However, his favorite one seems to be one that is similar to Justice Stewart's approach to obscenity;⁶³ namely, "*I know it when I see it.*"⁶⁴

These words are less a definition of the term *racism* than an understanding of what the term *racism* means. Judge Higginbotham is saying that he has enough experience in life to know racism when he sees it. Having been black for so long in this society, he doesn't have to construct a formal definition of racism to know it. As Aristotle has said: "We must attend . . . to the undemonstrated remarks and beliefs of experienced and older people or of intelligent people, no less than to demonstrations. For these people see correctly because experience has given them their eye."⁶⁵

Judge Higginbotham attempts to validate the existence of racism in the judicial system by observation. He points, for example, to numerous instances in which United States trial and appellate courts have used or have allowed prosecutors to use racial stereotypes in the conviction of African American suspects.⁶⁶ Significantly, these observations necessarily operate in reverse to inform Judge Higginbotham's empirical definitions or understanding of racism.

To the extent that Judge Higginbotham validates the existence of racism in the United States judicial system, he succeeds in criticizing western liberalism yet again.⁶⁷ He argues that, by denying African Americans racial equality in the judicial process, the legal system and, by extension, society have *in fact* oppressed African Americans. Judge Higginbotham sees a failure of democracy and liberalism in society's treatment of African Americans once again.

B. Ethics

Judge Higginbotham is Aristotelian in another way. His scholarship and, indeed, his actions off the bench follow Aristotle's

62. *Supra* note 21, at 482 n.4.

63. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring).

64. *Supra* note 21, at 482 n.4 (emphasis in original).

65. *Nicomachean Ethics*, *supra* note 61, at l. 11436 10-15.

66. See *supra* note 21, at 529-45.

67. See *supra* Part II.

ethical theory, the essence of which is the "golden mean."⁶⁸

Aristotle's theory of the golden, or intermediate, mean says that there is a wise and prudent course of conduct in most areas of life. This conduct consists of avoiding the extreme in any given situation. Aristotle argues that one should never go to the extreme. One must always be judicious in his or her private or public behavior.⁶⁹

For example, Aristotle criticizes Plato's requirement that the guardians, the rulers of Plato's Republic, abandon their material wealth (gold and silver). This requirement, Aristotle argues, is extreme because it cuts against the grain of human nature. By nature, human beings desire wealth over poverty. Plato, therefore, goes too far.⁷⁰ Furthermore, there is nothing intrinsically wrong with rulers or private individuals having wealth, Aristotle argues, so long as they use it virtuously; so long as they use it in accordance with the golden mean.⁷¹

Aristotle would admit that there are some situations in which the golden mean cannot be realized.⁷² Child molestation is one such situation. It is not possible to commit this heinous act with the right child and at the right time. Child molestation is an absolutely wrongful act. But most forms of human behavior have a golden mean. Our task, difficult though it may be, is to find it.⁷³

For a sitting lower court judge to criticize a higher court in the former's off-the-bench writings is risky business. When the charge is racism, the danger of criticism heightens tenfold. While some legal scholars today might be inclined to characterize many of the Supreme Court's recent rulings on civil rights as racist,⁷⁴ or even presidential civil rights policy as racist,⁷⁵ Judge Higginbotham eschews that course of behavior. He seeks a middle ground for criticism in this delicate situation; he seeks the golden mean.

68. See Nicomachean Ethics, *supra* note 61.

69. See *id.* (Bk. II, chs. 6-9).

70. See, e.g., *The Politics* (Saunders), *supra* note 15 (Bk. III).

71. See *id.* (Bk. VII); Nicomachean Ethics, *supra* note 61 (Bk. II, chs. 6-9).

72. But not every action or feeling admits of the mean. For the names of some automatically include baseness e.g., spite, shamelessness, envy [among feelings], and adultery, theft, murder, among actions. All of these and similar things are called by these names because they themselves, not their excesses or deficiencies, are base.

Nicomachean Ethics, *supra* note 61, at l. 1107a 5-15 (Ch. 7).

73. See *id.* at l. 1109b 10-25 (Ch. 9).

74. For a discussion of those cases, see Roy L. Brooks, Rethinking the American Race Problem 1, 176 (1990).

75. See, e.g., Randall L. Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1342 (commenting on President Reagan's long-term political opposition to policies designed to eradicate racism).

Judge Higginbotham criticizes the judiciary primarily in a historical context and always by comparison. His focus is historical and, within that context, he places racist judicial conduct in juxtaposition with nonracist judicial conduct. The comparison makes clear which conduct is inspiring and where Judge Higginbotham stands.

For example, in *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*,⁷⁶ Judge Higginbotham discusses *Gaines v. Canada*⁷⁷ in which the Missouri courts held that the University of Missouri Law School, the only state-supported law school in Missouri, did not violate constitutional equal protection when it denied admission to Lloyd Gaines, an African American citizen of Missouri, because of his race. Even though the University of Missouri Law School was by far the closest law school to Gaines's home, which was in the city of St. Louis,⁷⁸ the Supreme Court of Missouri reasoned that "the opportunity offered appellant for a law education in a university of an adjacent state is substantially equal to that offered to white students by the University of Missouri."⁷⁹ Judge Higginbotham sets this reasoning next to the United States Supreme Court's reasoning reversing the judgment of the Missouri Supreme Court. Writing for the Court, Chief Justice Hughes held that "[t]he basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color."⁸⁰ In the company of this language (the language of racial justice), Missouri's jurisprudence is despicably racist. Nothing more has to be said to make this point. In a case like *Gaines*, however, one could conclude that the golden mean calls for a more direct pronouncement of judicial racism. Indeed, Judge Higginbotham makes the following statement: "The *Gaines* case reveals a level of racism by the judiciary which is not distinguishable, in my view, from that in *Dred Scott* and *Celia*."⁸¹ Judge Higginbotham also deemed it prudent to criticize by name a Supreme Court Justice (Justice McReynolds) who not only dissented in *Gaines* (on the ground that admitting Gaines to the law school would "damnify both races"⁸²),

76. *Supra* note 29.

77. *State ex rel. Gaines v. Canada*, 342 Mo. 121, 113 S.W.2d 783, *rev'd sub nom. Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

78. *Id.*

79. 342 Mo. at 137, 113 S.W.2d at 790.

80. *Supra* note 29, at 701.

81. *Id.* at 700.

82. *Id.* at 701.

but also "further tarnished the prestige of the Court by turning his back to [Charles] Houston [the brilliant African American lawyer who argued the case before the Court] and staring at the rear walls of the Supreme Court chambers."⁸³ The word *racism* does not appear anywhere in Judge Higginbotham's criticism of Justice McReynolds, but the message is unmistakable.

Judge Higginbotham's historical and comparative approaches are used repeatedly in his article on racism in American and South African courts.⁸⁴

He states, for example, to understand racism in the [United States] courts, it is helpful to examine the policies of the presidents and other political leaders of the United States from 1896, when Grover Cleveland was President (and when *Plessy v. Ferguson* was decided), through the end of the Roosevelt administration in 1945, and compare them with the statements and attitudes of South African political leaders.⁸⁵

In the more delicate area of living justices and the current Supreme Court, Judge Higginbotham is especially diplomatic about his criticism. Here, the golden mean simply does not allow for the use of the word *racism*. No other legal scholar in the country has as profound an understanding of judicial racism as Judge Higginbotham. He writes about it daily and probably even sees it frequently in his own courthouse. Yet, because Judge Higginbotham is careful to discover the golden mean in particular situations, he may well have decided that the use of the term *racism by a sitting judge* to describe the current Supreme Court's jurisprudence on racial issues would be extreme if not counterproductive. While other legal scholars might be free of institutional constraints to offer a critical race theory analysis of the current Court, Judge Higginbotham certainly is not.

His criticism of the current Court or its members on racial matters is, therefore, indirect and usually by comparison. For example, in the first paragraph of the *Shelley v. Kraemer* article,⁸⁶ Judge Higginbotham praises the Court's 1948 ruling in that case (namely, judicial enforcement of racially restrictive covenants entered into by private parties violates the equal protection clause of the Constitution⁸⁷) but questions the commitment of the current Court to the ideal of racial justice. As to *Shelley* he states: "Forty years ago the United States Supreme Court courageously confronted one aspect of racial segregation in housing in America . . .

83. *Id.* at 701-702.

84. *See supra* note 21.

85. *Id.* at 573.

86. *Supra* note 29.

87. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

and proclaimed a doctrine that deterred one form of virulent racism⁸⁸ In contrast, he writes, "victories in the extension of human rights protection [in the current Court] have been so rare in recent years."⁸⁹ A hatchet is not needed when a scalpel can do the job just as well.

Judge Higginbotham's circumspection carries over to his civil rights protests. He looks for the golden mean here as well. An illustration is his famous protest of the University of Chicago's faculty hiring practices. *The National Law Journal* reported the incident as follows.

The world is familiar with vocal and visible protests on behalf of minority groups. The Rev. Al Sharpton is often seen in the streets of New York parading on behalf of one or another perceived wrongs. An academic version is the recent, highly publicized action of Prof. Derrick Bell at Harvard, who has taken a leave of absence without pay until Harvard appoints a tenured minority woman to its law faculty.

But not all those who experience prejudice, discrimination or injustice feel comfortable making themselves the center of a highly publicized protest. Sometimes they find other ways.

One such quiet but significant act of protest involves one of the most esteemed black jurists in the nation, A. Leon Higginbotham, Jr., chief judge of the Third U.S. Circuit Court of Appeals in Philadelphia. It also involves one of the most esteemed institutions of legal scholarship, the University of Chicago Law School.

On February 20, 1990, Judge Higginbotham sent a letter to Dean Geoffrey Stone of the University of Chicago Law School. That letter reads in part as follows:

It is my understanding that the University of Chicago is the only law school among the so-called 'top ten' that for more than two decades has not had even one black professor in either a tenured position or a tenure-track position I have looked at the hiring records of Yale, Harvard, Stanford, Columbia, [New York University], Berkeley, University of Pennsylvania, University of Virginia, University of Michigan and University of Wisconsin. All of these schools have at least one black professor on their faculty. Some have three or more black professors. I find it regrettable that minority faculty hiring has not had the same priority at the University of Chicago Law School that it has had at all other prestigious law schools.

For the above reason, I must withdraw my acceptance to participate in the Hinton Moot Court competition I have no doubt that there are many judges who would be delighted to sit with the distinguished members of the panel [Justice

88. *Supra* note 29, at 674.

89. *Id.* at 675-76.

Anthony Kennedy of the U.S. Supreme Court and Judge Douglas Ginsburg of the U.S. Circuit Court of Appeals for the District of Columbia]. However, as a matter of principle, I refuse to participate any longer in programs of institutions which do not have a credible record in hiring minority faculty members.⁹⁰

Judge Higginbotham is truly a remarkable person. He is both an inspiration to those who seek to do the right thing and a challenge to those who see nothing amiss with a world in which "Me-ism" and self-interest prevail in the body social.

IV Conclusion

Aristotelian epistemology and ethics are key ingredients in Judge Higginbotham's thinking. Like Aristotle, Judge Higginbotham is primarily an empiricist. His reflection on one of the most recondite social issues in the history of our nation—racist jurisprudence—is grounded in experience, especially his own and that of other African Americans. While many legal scholars attempt to deal with issues of race, racism, and the legal system at a level of abstraction that gives insufficient deference to the exigencies of life (i.e., as a Platonic rationalist⁹¹), Judge Higginbotham seeks to inform his judgments with the "felt necessities" of life, to borrow a phrase from Oliver Wendell Holmes, an empiricist himself.⁹² Indeed, Judge Higginbotham often paraphrases Holmes's famous aphorism: "The life of the law has not been logic: it has been experience."⁹³

Aristotle's central ethical theorem—discover and follow the golden mean—may be the fulcrum upon which Judge Higginbotham's thinking (and behavior) rests. Clearly, it helps us to understand his scholarship in relation to western liberalism. His scholarship is one of basic acceptance yet criticism of western liberalism. While he is critical of our liberal democratic society for its historical failure to extend the ideals of democracy and liberty to African Americans, Judge Higginbotham is not prepared to jettison these ideals or to otherwise give up on American society. Ju-

90. Marcia Chambers, *Sua Sponte: Hiring Policy Stirs Judge's Quiet Protest*, Nat'l L.J., July 30, 1990, at 13.

91. See *supra* note 73, at 31-32.

92. See Oliver Wendell Holmes, Jr., *The Common Law* (1881).

93. *Id.* at 5. Book Note, 14 Am. L. Rev. 233-36 (1880). Holmes's aphorism is a response to Christopher Columbus Langdell's Platonic, formalistic mode of legal analysis. See Christopher C. Langdell, *A Selection of Cases on the Law of Contracts* (1871). For further discussion see *supra* note 73. Paraphrasing Holmes, Judge Higginbotham has stated that "the life of the law has not been logic, it has been values." *Lawyers, Values, and Commitment*, *supra* note 42, at 7. See also *supra* note 25.

diciously, he calls for reform rather than replacement of western liberalism in our society, lest we throw out the baby with the bath water.⁹⁴

Judge Higginbotham's criticisms of the institution of which he has been a part for nearly thirty years also follows the golden mean. It is rational and balanced. It seeks to edify rather than accuse, to convert skeptics rather than repulse allies. His basic technique is to place, within a historical context, racist jurisprudence alongside nonracist jurisprudence. If this comparison tarnishes the prestige of the judiciary, it also offers redemption. It shows the way to a more just judiciary and, ultimately, a more just society.⁹⁵

94. This theme suggests a criticism of a recent movement in legal scholarship arguing for the replacement of western liberalism with an unspecified new legal order rather than reform of the current system. For further discussion, see Roy L. Brooks, *Racial Subordination Through Formal Equal Opportunity*, San Diego L. Rev. 879, 984-87 (1988). Judge Higginbotham may be saying that, in our zest to improve society, we have to be careful that bad results do not overshadow good intentions.

95. As Judge Higginbotham has stated:

[J]ust as the stigmatization of blacks that results from racist treatment in the courtroom is a particularly powerful symbol that legitimates and reinforces the general societal perceptions of blacks as inferior, the racial attitudes and behavior of political leaders, ranging from indifference to outright racist behavior, sends a clear signal that validates societal perceptions of the inferiority of blacks. Conversely, political leaders who advocate racial tolerance and the elimination of racial discrimination hasten the pace of social change for racial justice through appointments, policy leadership, pronouncements, and the establishment of a moral tone of harmonious racial attitudes. When leaders advocate these values, it often is irrelevant whether they are acting from enlightened visions for the future or pure political pragmatism.

Supra note 21, at 572.

