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A Retrospect on Justice Clarence Thomas

A. Leon Higginbotham

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The Mathew O. Tobriner Memorial Lecture

Justice Clarence Thomas in Retrospect

by
A. LEON HIGGINBOTHAM, JR.*

First of all, I want to congratulate the members of the Tobriner family for the significant contributions they have made in bringing scholars and practitioners to this distinguished series of lectures. In view of his extraordinary intellectual breadth, there can be no greater tribute to Chief Justice Tobriner than for lecturers to raise provocative issues so that their views can be challenged and evaluated in the marketplace of ideas. In recognition of the Tobriner legacy of encouraging a great university to welcome robust debate, I have prepared this lecture. However, before starting, I want to congratulate your new dean, Mary Kay Kane, on her appointment. She exemplifies your school's long-standing tradition of excellence. I must also note that there is a special joy in being introduced by my longtime friend and colleague, Chief Judge Thelton Henderson. I still have fond memories of our experiences in South Africa in 1982. At another time I trust that he and I can share with you the visions, the drama, and the challenges that inspired us during our thirteen-year relationship in our efforts to help move South Africa towards democracy.[1]

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* © Copyright A. Leon Higginbotham, Jr., Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit (retired); Public Service Professor of Jurisprudence, John F. Kennedy School of Government, Harvard University; Of Counsel to Paul, Weiss, Rifkind, Wharton & Garrison. This Article is a revised version of Judge Higginbotham's Tobriner Lecture given January 12, 1994 at the University of California, Hastings College of the Law. Judge Higginbotham limits his comments to events and cases that occurred prior to the date of the Lecture.

I would like to acknowledge the substantial research assistance of Aderson B. Francois, Esq., and Rubin M. Sinins in the preparation of this Article.

1. *See* A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993); A. Leon Higginbotham, Jr., et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763 (1991); A. Leon Higgin-

This afternoon I speak about a topic that is in some ways painful to me. Nevertheless, I think it is of great importance in revealing different perceptions of the role of the Supreme Court and different perceptions as to the insights African-Americans can glean from their culture and the historical experiences of their people.

It is appropriate to focus on the topic of "Justice Clarence Thomas in Retrospect" because it is now more than two years since then-President George Bush, at Kennebunkport, Maine, advised the American public that Clarence Thomas was the "best person for [the] position"[2] of Associate Justice of the United States Supreme Court. Now, after all of the hurrahs, all of the critiques, all of the heartaches, and all of the agony, serious scholars must attempt to put those events of the last thirty months pertaining to Justice Clarence Thomas into a broader perspective.

It was George Santayana who once said, "Those who cannot remember the past are condemned to repeat it."[3] If, as a nation, we are going to deal with the enormous challenges of the present, if we are going to attempt to maximize our options for the future, this lecture series is an appropriate forum to ask: Are there insightful lessons that we can learn from the controversial nomination of Clarence Thomas; what were the historical political perspectives, values, and priorities that were so intricately involved in his nomination; and how has he thus far performed as a Justice of the United States Supreme Court?[4]

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botham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990). *See also* A. Leon Higginbotham, Jr., *Introduction* to WILLIAM J. BUTLER ET AL., THE NEW SOUTH AFRICA—THE DAWN OF DEMOCRACY: REPORT OF A MISSION ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS 5 (1994).

2. *The Supreme Court; Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14 (statement of President Bush).

3. GEORGE SANTAYANA, 1 THE LIFE OF REASON 289 (1905).

4. For my more detailed analysis of Justice Thomas's performance in voting rights and cruel and unusual punishment cases, see A. Leon Higginbotham, Jr., et al., Shaw v. Reno: *A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994). *See also id.* at 1645 n.247 ("Of the disheartening factors in *Shaw v. Reno*, none is more so than the decisive vote of Justice Clarence Thomas—who succeeded Thurgood Marshall—in favor of the 5-4 decision. It is inconceivable that Justice Thurgood Marshall would have so interpreted the Fourteenth Amendment, risking a significant setback to African-Americans' recent political progress."); A. Leon Higginbotham, Jr., *Justice Marshall's 'Conversation' with Justice Thomas on the Eighth Amendment*, 68 ST. JOHN'S L. REV (forthcoming 1994).

I. The Nomination of Justice Thomas

Upon the nomination of Clarence Thomas to the United States Supreme Court, many Americans, and particularly African-Americans, were confronted with intensely emotional and divisive issues. As an example, consider the National Bar Association (NBA), the premier organization of African-American lawyers. While Clarence Thomas's nomination was pending in August 1991, the NBA was meeting at its Annual Convention in Indianapolis. After three days of intense debate and deliberations and unenthusiastic recommendations as to his nomination by both the Judicial Selection Committee and the Executive Committee, the general body voted 128 to oppose, 124 to support, and 31 took "no position."[5]

It was a significant event when the national delegates of the premier professional bar association of African-Americans, dedicated to the concept of advancing Black lawyers into positions of power, were so doubtful of Clarence Thomas's worthiness that they would not give a majority vote in favor of his nomination to the United States Supreme Court. Sharon McPhail, then the president of the NBA, summed up her frustrations by asking: "Will the real Clarence Thomas please stand up?" She pondered: "Is Clarence Thomas a 'conservative with a common touch' as Ruth Marcus [of the *Washington Post*] refers to him . . . or [is he] the 'counterfeit hero' he is accused of being by Hayward Burns,"[6] the distinguished dean of CUNY Law School, who also is an African-American, who also is a Yale graduate, and who has known Clarence Thomas for many years?

One writer in the October 1991 *National Bar Association Magazine* observed: "While his strongest supporters are confident that he will be confirmed, his critics accuse him of forgetting where he came from."[7]

During the last two years, I have been involved in a multifaceted research project on Justice Thomas and his impact on the Supreme Court. The first step was to explain why I wrote my *Open Letter to Justice Clarence Thomas*,[8] and the second was to evaluate the significance of the public response to that letter.

5. Monique M. Sadler, *Clarence Thomas—the Right Man at the Right Time?*, NAT'L B. ASS'N MAG., Oct. 1991, at 8.

6. Sharon McPhail, *Will The Real Clarence Thomas Please Stand Up?*, NAT'L B. ASS'N MAG., Oct. 1991, at 1.

7. Sadler, *supra* note 5.

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

Though in my research I am considering many additional aspects of Clarence Thomas's nomination and his impact on the Supreme Court, for this lecture I will focus primarily on the reasons I wrote the *Open Letter to Justice Clarence Thomas* and the public response to my letter. I also will put my remarks in context by discussing my personal reactions both at Justice Thurgood Marshall's funeral and, later, as a member of the Supreme Court's Bar Committee, which presented a resolution to the Supreme Court as a tribute to Justice Marshall.[9] Implicit in my comments will be my views as to whether Justice Thomas's critics were correct in accusing him of "forgetting where he came from."

II. Why I Wrote and Published the Letter to Justice Thomas

During the entire nomination and confirmation process involving Clarence Thomas, I made no public statement either supporting or criticizing his nomination. I was then sitting as a federal judge, and I did not want to make any personal statement that would be considered inappropriate, or distorted by the media, or misunderstood by the public. Only after his hearings were finished and he had been confirmed did I publicly express my concerns. On November 29, 1991, I wrote a letter to Justice Thomas stating what I felt his personal obligations were, both as a Justice on the Supreme Court and as an African-American. The following are excerpts from the closing sections of my letter:

> While there are many other equally important issues that you must consider and on which I have not commented, none will determine your place in history as much as your defense of the weak, the poor, minorities, women, the disabled and the powerless .... You, however, must try to remember that the fundamental problems of the disadvantaged, women, minorities, and the powerless have not all been solved simply because you have "moved on up" from Pin Point, Georgia, to the Supreme Court. In your opening remarks to the Judiciary Committee, you described your life in Pin Point, Georgia, as "far removed in space and time from this room, this day and this moment." I have written to tell you that your life today, however, should be not far removed from the visions and struggles of Frederick Douglass, Sojourner Truth, Harriet Tubman, Charles Hamilton Houston, A. Philip Randolph, Mary McLeod Bethune, W.E.B. DuBois, Roy Wilkins, Whitney Young, Martin Luther King, Judge William Henry Hastie, Justices Thurgood Marshall, Earl Warren, and William Brennan, as well as the thousands of others who

9. RESOLUTION OF THE SUPREME COURT BAR IN TRIBUTE TO JUSTICE THURGOOD MARSHALL, 114 S. Ct. CCCXIX (Nov. 15, 1993) [hereinafter RESOLUTION].

dedicated much of their lives to create the America that made your opportunities possible. I hope you have the strength of character to exemplify those values so that the sacrifices of all these men and women will not have been in vain.

I am sixty-three [now sixty-five] years old. In my lifetime I have seen African-Americans denied the right to vote, the opportunities to a proper education, to work, and to live where they choose. I have seen and *known* racial segregation and discrimination. But I have also seen the decision in *Brown* rendered. I have seen the first African-American sit on the Supreme Court. And I have seen brave and courageous people, black and white, give their lives for the civil rights cause. My memory of them has always been without bitterness or nostalgia. But today it is sometimes without hope; for I wonder whether their magnificent achievements are in jeopardy. I wonder whether (and how far) the majority of the Supreme Court will continue to retreat from protecting the rights of the poor, women, the disadvantaged, minorities, and the powerless. And if, tragically, a majority of the Court continues to retreat, I wonder whether you, Justice Thomas, an African-American, will be part of that majority.

No one would be happier than I if the record you will establish on the Supreme Court in years to come demonstrates that my apprehensions were unfounded. You were born into injustice, tempered by the hard reality of what it means to be poor and black in America, and especially to be poor because you are black. You have found a door newly cracked open and you have escaped. I trust you shall not forget that many who preceded you and many who follow you have found, and will find, the door of equal opportunity slammed in their faces through no fault of their own. And I also know that time and the tides of history often call out of men and women qualities that even they did not know lay within them. And so, with hope to balance my apprehensions, I wish you well as a thoughtful and worthy successor to Justice Marshall in the ever ongoing struggle to assure equal justice under law for all persons.

Sincerely,
A. Leon Higginbotham, Jr.[10]

III. The Public Response To My Letter

More than 17,000 reprints of my letter were sold by the *University of Pennsylvania Law Review*.[11]

The letter received such incredible attention that, to my surprise, I received more than 800 letters from an amazing spectrum of Ameri-

10. Higginbotham, *supra* note 8, at 1025-28.

11. In addition, there were thousands of photocopies made, greatly multiplying its impact. As an example, Chief Judge Thelton Henderson told me that he received 28 separate photocopies of it from people throughout the country.

cans. I attempted to classify the responses as: very enthusiastic, enthusiastic, noncommittal, critical, and highly critical. Ninety-eight percent of the letters were enthusiastic or very enthusiastic. But there were two or three highly critical comments, made by thoughtful persons, that require an analytical response from me. I will comment primarily on these latter critiques, without any feeling of paranoia, in this lecture.

One Black federal public official, who had been appointed by a Republican President, included with his letter a number of newspaper clippings, in which he had been very critical of Justice Thurgood Marshall. After taking several verbal swipes at Justice Marshall, he concluded his comments by asking: "*Who gave you the authority to speak for Black people in this country?*"

I was fascinated that he would ask such a question because one could also inquire of him, when he criticized Justice Marshall, who gave *him* the authority to speak for Black people in this country. Obviously, neither of us spoke for anyone other than ourselves. I have never been under any illusion that I have been anointed with some mystical power to speak for all African-Americans.[12]

However, because the official asked who gave me the authority to write the letter to Justice Thomas, I have now decided that I should make a public confession. If he or anyone else really wants a precise and honest answer as to who gave me the authority to write the letter, my answer is simple—my wife. After I had drafted the letter, I showed it to her. She thought it made sense and should be published. She is now a professor at Harvard, and at that time she was a professor at the University of Pennsylvania.[13] She agreed with the substance

12. When I have received various awards, I did not think there was some poll that had been taken among Black citizens to ascertain my "worthiness." My more than 70 honorary degrees do not grant me any "authority to speak for Black people in this country"; they merely symbolize that the faculties of those institutions thought I should receive an honorary degree.

13. She wrote a book, EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880-1920 (1993), published by the Harvard University Press, which has received several book awards from various organizations. The awards she received include the Distinguished Book Award of the Association for Research on Non-Profit Organizations and Voluntary Action (ARNOVA) (Oct. 1994); Joan Kelly Memorial Prize in Women's History of the American Historical Association (Jan. 1994); Award for Excellence of the American Academy of Religion (Nov. 1993); and Letitia Woods Brown Memorial Award of the Association of Black Women Historians (Oct. 1993). Having earned that kind of academic praise, and several other awards, I felt that my wife's "approval" was sufficient.

of the letter and, if approval was necessary, that was where I got my "authority."

IV. A Professor's Reply and Comments

On June 15, 1992, I received a letter from Professor Evelyn Wilson with a draft of an article enclosed. She is an African-American and teaches at Southern University Law Center, a predominantly Black law school, in Baton Rouge, Louisiana. Her article was subsequently published under the title, *Comments on "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague."*[14] She wrote, in part:

> I read Judge Higginbotham's letter quickly the first time and felt embarrassed for Justice Thomas. He had just assumed a lifetime position at the top of his career ladder, one of only nine in the nation, a position from which his thoughts, values, perceptions, and priorities will impact not only this country, but all humanity. Before Justice Thomas rendered a single judgment, Judge Higginbotham seemed to suggest that Judge Thomas is immature and not especially bright. *My head said: Give the boy a chance.* Let him decide what to do with his newly gained power. My heart said: Judge Higginbotham is probably right. I'm glad he expressed our fears.[15]

I was particularly intrigued by Professor Wilson's comment in reference to Justice Thomas: "My head said: Give the *boy* a chance." If Professor Wilson is serious in labeling Justice Thomas a "boy," we may have a fundamental disagreement.[16] Justice Thomas is not a mere boy. Boys play marbles and little league baseball. Men and wo-

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14. Evelyn Wilson, *Comments on 'An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague,'* 20 S.U. L. REV. 141 (1993). The draft that she sent to me is somewhat different than the draft ultimately published. I have quoted from the final version of the article as it was published in the *Southern University Law Review*.

15. *Id.* at 142 (emphasis added) (footnote omitted).

16. I recognize that Professor Wilson may have used the term "boy" as a familial term of endearment. Sometimes when "we" call each other "boy," we do not mean to suggest that the person is a juvenile, but rather the expression is a part of the in-house humor that African-Americans often use when speaking to each other. Professor Wilson's use of the term in this sense conveys an awareness on her part of the duality of African-American life, of a measure of commonality of experience. She must recognize that Justice Clarence Thomas is a part of this "family," for why otherwise would she use the term "boy," and later acknowledge that my letter to Justice Clarence Thomas expressed "our" fears? Professor Wilson's comments in this regard weaken her further assertion that Clarence Thomas must be allowed "to choose his stance on issues affecting the helpless, the weak, and the out-numbered." *Id.* at 147. Justice Clarence Thomas's destiny is as much or more the result of his experiences as an African-American as those "choices" he makes in developing his jurisprudence. To suggest that they are separate, as Professor Wilson seems to, is to ignore the fact that experience *does*, and properly should, inform a judge. *Cf.* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926):

men sit on the United States Supreme Court. All of the Justices should be mature, bright, and extremely competent. It is because Justice Thomas has the power to determine the plight of all Americans, and particularly the disadvantaged, women, minorities, and the powerless, that I wrote to him. If he were a mere boy, I would have sent him a bag of marbles or a blank pad with crayons on which he could draw fantasies. I would not have feared that the destiny of our nation might in some instances rest on his decisive vote when the Court was evenly divided.

In her article, Professor Wilson noted that she and Justice Thomas were "around the same age,"[17] and that, "[a]s we finished college, graduate school, and professional school, we took advantage of affirmative action opportunities so dearly won for us. We accepted them as we believe they were intended . . . ."[18] Her latter comments underscore a further difference between Professor Wilson's view and mine. If she got these "affirmative action opportunities," I applaud her. But under what rationale does Justice Clarence Thomas, after having had similar opportunities that made his success possible,[19] have the moral basis to become hostile to such options being made available to the present generation of African-Americans, many of whom have found barriers to entry as high and impenetrable as any he encountered?

> The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present.

Id. at 2.

17. Wilson, *supra* note 14, at 142.

18. *Id.* at 143.

19. During his more honest and less conservative days in 1983, Justice Thomas said:

> But for affirmative action laws, God only knows where I would be today. These laws and their proper application are all that stand between the first 17 years of my life and the second 17 years.

Excerpts from some of Supreme Court nominee Clarence Thomas's speeches, CHI. DAILY L. BULL., Sept. 9, 1991, at 2.

As he tried to ingratiate himself with the Reagan Administration, he reversed his position 180 degrees. In 1987 he wrote:

> I firmly insist that the Constitution be interpreted in a colorblind fashion. Hence I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem.

Id.

In 1988 he stated:

> Affirmative action programs have given no substantial benefits to blacks. The term has thus become a mere political buzz word.

Id.

In another portion of her article, Professor Wilson writes:

> What Judge Higginbotham has said to Justice Thomas could and should have been said to all nine of the Justices. Judge Higginbotham could tell all nine that they did not get where they are by themselves. And all nine would acknowledge an indebtedness to some, but not all, of those who have helped them. Judge Higginbotham could tell all nine Justices that nothing "will determine your place in history as much as your defense of the weak, the poor, minorities, women, the disabled, and the powerless." But he does not.
>
> Judge Higginbotham demands something from this Black Justice that he does not demand from a White Justice. He would allow a White Justice to choose to be liberal or conservative, average or great, pro business or pro people, but deny to Justice Thomas the right to choose his stance on issues affecting the helpless, the weak, and the out-numbered. In like fashion, others would deny Judge Higginbotham the right to choose where to live, where to eat, or where to sit on a bus.
>
> We cannot measure Justice Thomas by Justice Marshall. Justice Marshall chose to use his talent and training to fight in the civil rights struggle. He dedicated his life to creating options for Black Americans. Justice Marshall fought for the right of Justice Thomas to determine his own destiny. Perhaps Justice Thomas is a proper heir to Justice Marshall's seat.[20]

My response to Professor Wilson's comments as to the demands I make on Justice Thomas is that I believe all Justices of the Supreme Court should be fair to everyone, and particularly in the "defense of the weak, the poor, minorities, women, the disabled, and the powerless." However, I do believe that it is a tragic irony when a Black Justice adopts the anti-minority position advocated by the most conservative and racially uninformed Justice on the Court, and when even many of his White colleagues demonstrate a far greater insight and concern about the history of the plight of African-Americans in this country.

V. The Duality Standard

I am appreciative of the substantial time that Professor Wilson spent analyzing my letter to Justice Thomas. I respect disagreements, and I think that her comments are quite thoughtful; however, I submit respectfully that her writing suggests some confusion about the unavoidable obligation and status in life one has as an African-American—an obligation and status attributable to historic policies that have at various times been invoked by the overall American society.

20. Wilson, *supra* note 14, at 146-47 (footnotes omitted).

Though written in good faith and with obvious intelligence, she fails to appreciate fully the duality status that one has as an African-American in this society. W.E.B. DuBois in his classic book, *The Souls of Black Folk*, written in 1903, describes this "double consciousness, this sense of always looking at oneself through the eyes of others."[21] He explains:

> One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.
>
> The history of the American Negro is the history of this strife—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the doors of opportunity closed roughly in his face.[22]

Now I don't know whether, at times, in his own mind, Justice Thomas recognizes that he was born *both* Black and American. However, I presume that if he looks in his mirror, with or without his wife's presence, he must recognize that he looks Black. And as much as he might enjoy his present pinnacle of success as a Supreme Court Justice, the truth of the matter is that he has not been able, and will never be able as long as he lives in this nation, to avoid his dual status as both an American and simultaneously an African-American.[23] The

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21. W.E.B. DuBois, The Souls of Black Folk 3 (1903).

22. *Id.*

23. If the resigning Supreme Court Justice had not been African-American, there is no doubt Clarence Thomas would not even have been considered for the appointment. His credentials were as slender as one could find for a Supreme Court nominee, as others have noted:

> Before he became a federal judge, he had never argued a single case in federal court. Indeed, before he joined the D.C. Circuit, his entire career as a litigator consisted of serving his first two and a half years out of law school as an entry-level lawyer on the staff of the Missouri Attorney General.

Jeffery Toobin, *The Burden of Clarence Thomas*, The New Yorker, Sept. 27, 1993, at 38, 46.

Charles Bowser, a distinguished African-American lawyer, opined:

> I'd be willing to bet . . . that not one of the senators who voted to confirm Clarence Thomas would hire him as their lawyer.

Peter Binzer, *Bowser Is an Old Hand at Playing the Political Game in Philadelphia*, Phila. Inquirer, Nov. 13, 1991, at A11 (quoting Charles Bowser).

first sign of emotional maturity in all African-American public officials is the recognition of this duality that we all confront daily.[24]

One of my closest friends is Damon Keith, a great federal judge, who is also an African-American. He was the Chief Judge of the United States District Court for the Eastern District of Michigan, and for the last fifteen years he has been a judge on the United States Court of Appeals for the Sixth Circuit. During the recent Bicentennial period celebrating the founding of our Constitution and the Bill of Rights, he was chairperson of the prestigious committee appointed by Chief Justice Rehnquist and endorsed by the United States Judicial Conference. Their task was to recognize the significance of the Bill of Rights on its two hundredth anniversary. Accordingly, there was a program in Williamsburg, Virginia, for federal judges throughout the country. It was planned brilliantly, with several provocative and insightful substantive addresses, focusing on the challenges that James Madison had confronted as the major draftsperson of the Bill of Rights and, even more important, focusing on the evolution of the Bill of Rights, an evolution that makes our nation a far more ideal democracy than it would be otherwise.

During a session break of the conference, this premier federal judge, Damon Keith, stood outside on the sidewalk of the hotel in Williamsburg, talking with five other federal judges. As always, he was dressed elegantly. He had on a three-piece blue suit with a delicate chalk stripe. Except for the judges in California, if you will excuse the reference, most federal judges dress alike. So here we have

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I sometimes believe that Justice Thomas has forgotten these facts about himself and his lack of experience.

Others have suggested that Clarence Thomas's inexperience will lead him in the future to rethink his ideas on important issues. The distinguished Guido Calabresi, now a judge on the United States Court of Appeals for the Second Circuit, former Dean of Yale Law School, made during the confirmation hearings what he thought was the most favorable comment about Clarence Thomas, that he supported Judge Thomas because of his "capacity for growth." But he also stated:

> I would expect that at least some of his views may change again. I would be less than candid, if I did not tell you that I sincerely hope so, for I disagree with many, perhaps most of the public positions which Judge Thomas has taken in the past few years.

Hearings before the Committee on the Judiciary, United States Senate, Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States, 102d Cong., 1st Sess., S. Hrg. 102-1084, pt. 2, at 249-50.

24. For minority women, there is often a third factor—gender—in addition to those of race and being an American. *See* HIGGINBOTHAM, *supra* note 13, at 8; Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race, reprinted in* 17 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 251-74 (1992).

six people in blue or gray suits, discussing some of the subtle points various scholars had made at the morning session. Suddenly a woman pulled into the driveway, jumped out of her car, walked over to this group of six federal judges, handed her keys to Damon, and said, "Here are my keys. Please park the car carefully." Now, Damon is an individual of exquisite politeness. Many Black people would not have responded with his restraint. He said, "Madame, I am not at the hotel as a service employee. I am here as chairman of the United States Judicial Conference on the Celebration of the Bicentennial of the Bill of Rights, and I cannot help you." She pulled the keys back and then rushed over to a White person who had the traditional garb of a doorman, handed him the keys, and dashed off.

Let me give you one other example as to why I think that healthy African-Americans in public life have to understand the duality of our lives. In January 1964, on my first day of active duty in the federal courts in Philadelphia (as Thelton has noted, I was then 35 years old), I drove to work in my new station wagon. I did some reminiscing and I thought first of my mother, who had worked for decades in other people's kitchens, who for decades had scrubbed other people's floors, who had accepted denigration, and who had been denied an adequate education in rural Virginia. With dignity she tolerated all adversities because, as she said, "Someday, son, I want to see you in a white shirt and a tie, and have an important position." I also thought of my father, who had worked at a factory for decades, never having been promoted. Immigrant laborers would come in unable to speak English. He would teach them how to speak English, how to read the instructions and to make the mathematical calculations for job reports. And then, some years later, some would become his foremen, and he would continue at the lowest job and salary level where he would train another generation of immigrants. As I was reflecting on those events that morning, I said a silent prayer thanking God for my parents, and thanking Him for this extraordinary opportunity, and requesting of Him: Please make me strong so that I will be the type of federal judge who was worthy of the appointment.

I parked in the spot clearly reserved for federal judges, got out of the car, took out my two attaché cases, and proceeded to walk to the street. After I had gone only a few feet, someone yelled to me, "Hey, *boy*, you can't park your car there." I continued to walk, and he said, "Hey, *boy*, didn't you hear me? You can't park your car there." Now at that point a sense of reality came. I knew that I had two attaché cases in my hand, and he had a gun in his holster. So I turned around

and calmly said, "What is the problem, officer?" He said, "That spot is reserved for federal judges only." And I responded, "I know. That is why I parked there." And then, with his face flushed, he said, "Oh! You're Judge Higginbotham. Welcome." And I walked into the courthouse considering it just another typical incident Black people experience as part of their daily duality challenge. I knew that if I had been White, dressed as I was, he would not have called me "boy." The difference between being called "boy" or "sir" was solely the color of my skin, yet for the next few years, whenever the same guard was on duty, he was always excessively deferential. He was supportive to an almost embarrassing extent. When you pulled out of the driveway of the then-U.S. Courthouse, you entered two major traffic lanes going both east and west, and it was somewhat difficult to get in the westbound lane. When I would get in my car, before I had turned on the switch, he would go out and hold up traffic, east and west, and say, "Judge Higginbotham's coming through."

Now, I am not saying that the guard was a racist, and I am not saying that the woman who gave Damon her keys was a racist, but they had certain stereotypical perceptions of Blacks and both of these events reflect the significance of the duality that the African-American experiences. Suffering such indignities is very much a part of the African-American experience, central to our duality. Unless an African-American recognizes that duality which envelops his or her life, he or she will have trouble understanding the struggle of other minorities or the problems of the weak, the poor, and the dispossessed. In the broader context of life, these two incidents involving Damon and me were relatively minor. Damon Keith and I were not denied a job; we were not denied food; we had not been forced on unemployment lines; we had not been denied adequate education, as millions of minorities and poor persons have been. While most African-Americans my age could cite hundreds of far more provocative incidents, I cite these events as the types of typical, daily experiences Black people have had in this country. As an example, Professor William E. Leuchtenburg recently commented on one of the nation's most distinguished historians, John Hope Franklin, as follows:

> He has achieved all of this despite having had to cope with the outrageous indignities that can be visited on a black person in our society. When his father, who was an attorney in Indian Territory before it became Oklahoma, moved to Tulsa, the building in which he had acquired a law office was burned down by a white mob, and for months his father had to work out of a tent. As a boy riding on a Jim Crow train in Oklahoma, John Hope and his mother were put off the coach by a white conductor and left stranded in the dust.

> When as a graduate student he sought to pursue historical research at the archives in Raleigh, he was not permitted to sit with white researchers but was shunted off to an isolated chamber. The Library of Congress was still worse. I recall that when in 1946 I was the only white on the field staff of a civil rights lobby in Washington, I could not eat with my colleagues at any downtown restaurant, not even at the greasiest People's Drug Store counter. Nor, after having fought a victorious war against fascism, was there a downtown movie a black person could go to, or a downtown hotel at which, in the nation's capital, a black person could stay. That was John Hope's experience as a young scholar.
>
> During this same period, on a train journey in North Carolina from Greensboro to Durham, he was compelled to stand even though there were ample seats in an adjacent coach—for those coach seats were reserved for whites, who sat there grinning at his discomfort. They were Nazi prisoners of war.
>
> It would be nice to say, "Thank God, that's all behind us now." But even today this great man—who has recently celebrated his seventy-eighth birthday, who has achieved so much, who has been accorded so many honors, who, anyone can see at one glance, is a courtly gentleman of enormous dignity and imposing presence—cannot, in the cosmopolitan city of New York, hail a cab without apprehension that it may not stop for him—solely because he is black.[25]

In view of the persistent racial duality in this country, I was profoundly concerned about how the mind of Justice Clarence Thomas functioned. Did he recognize that he could not evade the consequence of being an African-American? Regardless of where one lives, regardless of the race of one's spouse,[26] and regardless of the adulation one may get from the conservative press, one cannot avoid the reality of being Black in America. In making this analysis, I am not suggesting some racial political litmus test that Justice Thomas and all African-Americans must meet. Nevertheless, I would hope that no African-American in high public office would become a major voice in the intentional destruction of the potential of his own people. No judge, whatever his race, should do that. And if the person who engages in destructive conduct against a minority is also a member of a minority group that has been historically discriminated against, what is its special significance?

25. William E. Leuchtenburg, *Tribute: John Hope Franklin*, 42 DUKE L.J. 1022, 1023-24 (1993).

26. For the significance of Justice Clarence Thomas's spouse, *see* Higginbotham, *supra* note 8, at 1022-25. *Cf.* A. Leon Higginbotham, Jr., & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989).

The Holocaust was a brutal, devastating, inhumane, unjustifiable tragedy. Everyone, be they Jew or Gentile, Protestant or Catholic, Muslim or atheist, White or Black, should condemn the Holocaust. However, I think that it would be even more disturbing if persons who were the heirs of the individuals who died or were brutalized in Auschwitz and other concentration camps spoke tolerantly of religious cruelty, religious oppression, and genocide. I also feel the same way about those African-Americans who disavow their roots on fundamental matters and become participants in unjustified efforts to limit rational Black aspirations.

To further illustrate my concerns, I suggest two hypothetical American analogies. In the *Dred Scott*[27] case, the United States Supreme Court decided an important issue: whether a Black person could be a citizen of the United States. Chief Justice Roger Brooke Taney, writing for the Court, declared that, by the United States Constitution, a Black man had "no rights which the white man was bound to respect."[28] That racist view became federal constitutional law. However, two Justices—Benjamin R. Curtis of Massachusetts and John McLean of Ohio—dissented. They asserted that the majority opinion was erroneous constitutional doctrine. The high court of history tells us that the dissenters were correct.[29] But think of what an even greater tragedy it would have been if, in 1857, a Black had been on the Supreme Court and had joined in the majority opinion.

Perhaps an even more apt hypothetical would be based on the 1896 *Plessy v. Ferguson*[30] decision, the other of the two most devastating racial "civil rights" cases ever written. Seven Justices of the Supreme Court declared that a Louisiana statute that segregated passengers solely on the basis of race did not violate the Thirteenth or Fourteenth Amendments.[31] Counsel for Homer Plessy had argued that if the state could intrude in such a pervasive fashion on matters pertaining to race, then the state could require segregation of other groups without any violation of their constitutional rights. He suggested that, under such a rationale, states would even be able to require the segregation of blondes from redheads, or Irish from Italians,

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

28. *Id.* at 407.

29. *See also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 580 (1978) (exploring the history of the *Dred Scott* decision and how it became the "most frequently overturned decision in history").

30. 163 U.S. 537 (1896).

31. *Id.* at 542, 550-51.

or Jews from Catholics.[32] To avoid the "traditions of the people"[33] that sanctioned racial discrimination during the *Plessy* era, some Blacks with mixed heritage sought to highlight the "white" aspect of their lineage. Indeed, counsel for the plaintiff had argued that Plessy, who was seven-eighths White, was deprived of his reputation of being White by the conductor's power to order him to sit in the colored section. Counsel also contended that being considered a White man was property "which [had] an actual pecuniary value" that could not be taken without due process of law.[34] To prove his point, he asked the Court:

> How much would it be *worth* to a young man entering upon the practice of law to be regarded as a *white* man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man. Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that the reputation of being white is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?[35]

Because of the broad range attack by Plessy's counsel, the Court was faced with several issues. First, it had to decide whether there was a property right in being "white,"[36] and, if there were such a property right, could that right have been breached by the conductor treating a "white" man as if he were colored, and whether, under state law, the "victim" might be entitled to a damage award. In effect, the Court

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32. The Supreme Court categorized his argument as follows:

> In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.

Id. at 549-50.

33. *Id.* at 550.

34. Brief for Plaintiff in Error at 9, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210).

35. *Id.*

36. For a more detailed discussion of the legal processes used to define whether one was or was not white, *see* Higginbotham & Kopytoff, *supra* note 26, at 1969-2000.

decided that, if someone who was "white" had been treated as if she or he were colored, then the "white" person would have sustained a breach of a property right, for which, under certain state laws, she or he might be entitled to compensatory financial damages for such humiliation.[37] Additionally, the Court was confronted with the difficulty of articulating a rationale that would justify a state's intrusion on the basis of race but, at the same time, not implicitly sanction such state-imposed segregation of various White religious groups or any other Whites on the basis of their national origin, or even the segregation of "people whose hair is of a certain color" (*e.g.*, segregating redheads from blondes). Justice Brown sought to put implicit limitations on the power of the state. Speaking for the majority, he said:

> The reply to all this is that every exercise of the police power must be *reasonable*, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class .... So far, then, as a conflict with the [F]ourteenth [A]mendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of *reasonableness*, it is at liberty to act with reference to the established *usages, customs, and traditions of the people*, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is *unreasonable* ....[38]

In effect, the majority's decision meant that it was "reasonable" for the State of Louisiana to segregate Blacks and, therefore, do to Black people what would be unreasonable if done to any sub-group of Whites—such as requiring segregation of all Jews, or of all Catholics, or of all Irish, or of all redheads, or of all blondes. It is inconceivable that the majority would ever have sanctioned as "reasonable" the segregation of any of the latter groups. The Supreme Court in *Plessy*

37. *See Plessy*, 163 U.S. at 549. The majority added:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States; some holding that any visible admixture of black blood stamps the person as belonging to the colored race (citations omitted). But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

Id. at 552.

38. *Id.* at 550-51 (emphasis added).

placed its imprimatur on state-imposed racial segregation and left to the "large discretion . . . of the legislature"[39] the determination whether the state would separate and treat Black people differently than it did any other group—majority or minority—in American society. In the context of the times, the Court's reference to the "established usages, customs and traditions of the people"[40] was nothing less than a mandate for states to revert to the past biases, prejudices, and discrimination that had provided the rationale for slavery and America's earlier legitimization of racism—the very racism that was the target of the Thirteenth, Fourteenth, and Fifteenth Amendments. The majority's thinly veiled reversion to a slavery-type jurisprudence, despite its invocation of the Fourteenth Amendment, was revealed by its frequent citations to and reliance upon many cases that predated the enactment of the Fourteenth Amendment.[41]

Fortunately, one great Justice, John Marshall Harlan, wrote a mighty dissent.[42] But imagine if, in 1896, a Black had been on the Supreme Court, how much more devastating it would have been if the Black Justice had joined with the majority, rather than joining in Harlan's dissent. These hypothetical analogies based on the *Dred Scott* and *Plessy* cases are my answer to Professor Wilson's complaint that I "would allow a White Justice to choose to be liberal or conservative, average or great, pro business or pro people, but deny to Justice Thomas the right to choose his stance on issues affecting the helpless, the weak, and the out-numbered."[43]

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39. *Id.* at 550.

40. *Id.*

41. *See id.* at 544 (citing Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849)); *id.* at 548 (citing West Chester & Philadelphia R.R. v. Miles, 55 Pa. 209 (1867). In *West Chester*, a pre-Fourteenth Amendment case involving segregation on a public carrier, the court stated:

> Why the Creator made one [race] black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races.

West Chester, 55 Pa. at 213.

42. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

43. Wilson, *supra* note 14, at 147.

The relevance of the majority opinions in *Dred Scott* and *Plessy* to Justice Clarence Thomas is that, at times, in his opinions, he is as conservative for this generation of the Supreme Court as were the majority of Justices who acted so hostilely to Blacks in *Dred Scott* and *Plessy*. I think such extreme conservatism is a compounded irony when advocated by an African-American. At another time, I will discuss the many cases in which Justice Clarence Thomas supported either a racist or a wretchedly conservative position, but here I will discuss only two cases, and primarily *Hudson v. McMillian*.[44] They implicitly raise the questions: What goes on in Justice Thomas's mind; has Justice Thomas "forgotten where he came from;"[45] is there some similarity between his conservative views in the 1990s and those of the majorities in *Plessy* and *Dred Scott* in the 19th century?[46]

The devastating consequences of Justice Thomas's conservative decisions on the Court reach beyond the legal effects. In *Presley v. Etowah County Commission*,[47] the Court considered the legality of a County Commission's action stripping power from the first Black County Commissioner elected in that county since the Reconstruction era. Until the County Commission's action, the undeviated tradition had been that the Commissioner residing in a district exercised control over a road shop, equipment, and road crew for that district. That Commissioner exercised control over spending decisions within the district. When Presley, the first Black Commissioner in recent history, was elected, the Commission transferred the decision-making power from the local commissioner and placed it with the majority of the

44. 112 S. Ct. 995 (1992).

45. Sadler, *supra* note 5.

46. Jeffery Toobin, in THE NEW YORKER, describes Justice Clarence Thomas's conservatism as follows:

> Thomas is unique partly because his jurisprudential philosophy, as reflected in his votes and opinions, appears to be more than simply conservative: he looks well on his way to being ranked as one of the most conservative Justices of the late-twentieth century. This was foreshadowed by his service in the Reagan and Bush Administrations, when Thomas portrayed himself in his speeches as a zealot of the hard right. Confronted with those speeches during his confirmation hearings, however, Thomas dismissed them as the musings of a 'part-time political theorist.' As a Justice, he promised the senators, he would 'strip down, like a runner, to eliminate ideologies.' Instead, in his first two years he has worn his ideological convictions like a full-length parka. Perhaps more that any other person who might have been named to the Court, Thomas repudiates everything that his predecessor, Thurgood Marshall, stood for. Thomas's every vote—even his every public utterance, written or spoken—seems designed to outrage the liberal establishment that so venerated Marshall.

Toobin, *supra* note 23, at 41-42.

47. 502 U.S. 491 (1992).

County Commission. The resolution deprived Presley of any singular control. The Court upheld the Commission's action, holding that such a change did not implicate the preclearance requirements of Section 5 of the Voting Rights Act of 1965.[48] As related by Alice Presley, wife of the late Lawrence Presley, the plaintiff in the case, the fact that Justice Thomas joined the majority opinion against Blacks left the most pain and frustration:

> Early on, he said maybe we ought to give the guy [Thomas] a chance . . . . But after the Supreme Court hearing on his case, he said it was a mistake. That really hurt him more than the decision itself, because this black man voted no. He would walk around saying, "I can't believe Thomas voted against me."[49]

In this sense, Justice Thomas's views are just as extreme and harmful as the conservative views in *Plessy* and *Dred Scott.* His identity as an African-American deepens the wounds. In the words of Professor Grover Hankins: "There was no reason for him to support a conservative point of view in those cases; it would not have cost him anything to vote right."[50]

Justice Thomas willfully crippled African-American interests, just as Chief Justice Taney declared unnecessarily that Black persons had "no rights which the white man was bound to respect."[51]

VI. Justice Thomas's Dissent in *Hudson v. McMillian*[52]

Hudson v. McMillian involved a case in which a Black prisoner was taken out of his cell, put into a holding room with his feet shackled and hands cuffed in back of him, and beaten by two guards.[53] His teeth were loosened, his dental plate broken, his lips burst, eye blacked, and he was kicked in his back.[54] The issue before the United States Supreme Court was whether that beating violated the Eighth Amendment's prohibition against cruel and unusual punishment.[55] Seven Justices declared, and I think it took no great courage to say so, that in a civilized society you cannot allow law enforcement officials, without any provocation or justification, to beat and brutalize citizens,

48. *Id.*
49. Trevor W. Coleman, *Doubting Thomas*, EMERGE, Nov. 1993, at 39, 40 (quoting Alice Presley).
50. *Id.* at 42 (quoting Grover Hankins).
51. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).
52. 112 S. Ct. 995, 1004-11 (1992).
53. *Id.* at 997.
54. *Id.*
55. *Id.* at 998.

even if those citizens are prisoners. In *Hudson*, only one person, Justice Clarence Thomas, wrote a dissent criticizing the very rational and civilized opinion of the majority; he was joined in his opinion only by Justice Scalia.[56] After the opinion came down on February 27, 1992, the *New York Times* wrote an editorial that called Justice Thomas "the youngest, cruelest justice."[57] Other commentators were not quite as polite.

To put this case in perspective, I will quote extensively from William Raspberry's column in *The Washington Post*.[58] He had supported Justice Thomas's nomination to the Supreme Court, but on February 28, 1992, Raspberry wrote the following:

> Clarence:
> I know I'm supposed to call you Justice Thomas, but I don't want to be quite that formal. I want to talk straight to a guy I thought I knew a little.
>
> You know what I want to talk about. It's that dissent of yours in the matter of *Hudson v. McMillian*. Come on, Clarence. Conservative is one thing; bizarre is another.

After discussing the prisoner's injuries, Raspberry noted:

> What was truly bizarre is that when the conservative-dominated U.S. Supreme Court reversed the appellate decision this week, yours was one of only two dissenting voices.
>
> To tell you the truth, Clarence, I'm personally embarrassed. You know you weren't my choice to succeed Thurgood Marshall on the nation's highest court. You were too conservative for my taste and, more significant, I thought you lacked the requisite judicial experience. But I thought I understood your conservatism as a sort of harsh pragmatism that most of us harbor to some degree. I cautioned black America not to let your conservatism blind them to your intellectual honesty. Conservatism, I insisted, isn't the same thing as stupidity—even in a black man. And since Bush was going to name a conservative to Thurgood's seat, I said, better he should appoint a conservative who has known deprivation and unfairness and racism at first hand.
>
> As a matter of fact, you encouraged that view. I mean, wasn't that the whole point of your recital of your underprivileged background, of your but-for-the-grace-of-God musings about society's losers?
>
> Look, guy, I never expected you to do a Hugo Black and become a court liberal. But I was prepared to see you put a compassionate face on conservatism. When it became clear that you would be confirmed to the court, I told my friends (your critics) that they should

56. *Id.* at 1004.

57. *The Youngest, Cruelest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24 (editorial).

58. William Raspberry, *Confounding One's Supporters*, WASH. POST, Feb. 28, 1992, at A23.

> just watch while you surprised your right-wing supporters and confounded our enemies.
>
> But your high-falutin' angels-on-a-pinhead opinion the other day that for prison guards to beat the hell out of a handcuffed and shackled inmate does not constitute "cruel and unusual punishment" (unless the victim winds up in intensive care) confounded only those who tried to cut you some slack.[59]

Raspberry concluded: "Of course, I don't expect that you will always do what strikes the rest of us as 'the right thing.' But why go out of your way to do wrong?"[60]

His dissent in the *Hudson* case, and his votes in a series of other cases, demonstrate that Justice Thomas has often taken wretchedly reactionary positions. I believe that his views are for the 1990s at times the moral equivalent of the views of the shameful majorities in the nineteenth century Supreme Court cases of *Dred Scott* and *Plessy*. Ninety-eight years ago, the United States Supreme Court decided *Plessy*, legitimizing racism and retarding racial progress for almost a century. Last year, Justices Kennedy, O'Connor, and Souter said, "[W]e think *Plessy* was wrong the day it was decided."[61] Other justices, including Chief Justice Rehnquist, have agreed.[62] In short, I submit that, like the majority in *Plessy*, Justice Thomas's dissent in *Hudson* "was wrong the day" it was written.

I have often pondered how it is that Justice Thomas, an African-American, could be so insensitive to the plight of the powerless. Why is he no different or probably even worse than many of the most conservative Supreme Court Justices of this century? I can think of only one Supreme Court Justice during this century who was worse than Justice Clarence Thomas—James McReynolds, a white supremacist[63] who referred to Blacks as "niggers."[64] In 1938 a landmark desegregation case was argued before the Supreme Court by Charles Hamilton

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59. *Id.*

60. *Id.*

61. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2813 (1992).

62. In *Fullilove v. Klutznick*, Justice Rehnquist joined Justice Stewart's view that "*Plessy v. Ferguson* was wrong" when decided. 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting).

63. *See* A. Leon Higginbotham, Jr., & William C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099, 1109-11 (1992). *See also* Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1641 (1986); David Burner, *James C. McReynolds*, *in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2023, 2023 (Leon Friedman & Fred L. Israel eds., 1969) (noting Justice McReynolds's "racist streak").

64. *See infra* text accompanying note 68.

Houston,[65] the brilliant Black lawyer who laid the foundation for *Brown v. Board of Education.*[66] During Houston's oral argument, McReynolds turned his back on the attorney and stared at the wall of the courtroom.[67] In his autobiography, Justice William O. Douglas described how McReynolds received a rare, but well deserved, comeuppance when he made a disparaging comment about Howard University:

> One day McReynolds went to the barbershop in the Court. Gates, the black barber, put the sheet around his neck and over his lap, and as he was pinning it behind him McReynolds said, "Gates, tell me, where is this nigger university in Washington, D.C.?" Gates removed the white cloth from McReynolds, walked around and faced him, and said in a very calm and dignified manner, "Mr. Justice, I am shocked that any Justice would call a Negro a nigger. There is a Negro college in Washington, D.C. Its name is Howard University and we are very proud of it." McReynolds muttered some kind of apology and Gates resumed his work in silence.[68]

VII. The Mind of Justice Clarence Thomas—Is It Entangled With "Racial Self-Hatred"?

One day during the summer of 1993, I was in my study with a number of constitutional law books and Supreme Court advance sheets scattered about. It was soon after the end of the Supreme Court Term, and I was marking up various opinions Justice Thomas had authored. As my daughter entered the study, I said, "Justice Thomas is incredible—absolutely unbelievable." During the ensuing days, I had extensive conversations with my daughter, who has her doctorate in clinical psychology, and with her friends,[69] who are trained in clinical psychology and social work. Their conclusions and basic comments could be summarized as follows:

> Though, at times you can get some insights on Clarence Thomas merely by looking at his behavior as expressed through his judicial opinions, the stilted language used in judicial opinions often does not reveal some of the underlying motivations in the author's mind. Of course, the very fact that he so consistently votes against the best interest of African-Americans reveals a great deal about his sense of racial identity and his lack of racial self-esteem. Those votes sug-

65. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 338 (1938).

66. 347 U.S. 483 (1954).

67. Videotaped Statement of Judge Robert Carter to Judge Higginbotham (Aug. 1987) (reviewing his observation of the argument in *Gaines*, 305 U.S. at 337).

68. William O. Douglas, The Court Years: 1939-1975, at 14-15 (1980).

69. Karen L. Higginbotham, Psy. D., Clinical Psychologist; Jacqui Cunningham, L.C.S.W. Clinical Social Worker; Charlene M. Smith, Psy. D., Clinical Psychologist.

gest that there are many aspects of racial self-hatred that sometimes trigger the perverse conclusions he reaches.

They recalled that in my *Open Letter to Justice Clarence Thomas*, I had chided Justice Thomas for his condemnation in 1987 of Justice Thurgood Marshall. During the year of the Bicentennial celebration of the Constitution, Justice Marshall had cautioned all Americans not to overlook the momentous events that followed the drafting of that document and to "seek . . . a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history."[70] Justice Marshall had argued that it was the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments that made America greater than it otherwise would have been.[71] Justice Thomas had claimed that Marshall's observations on the deficiencies of the framers' constitutional vision "alienates all Americans, and not just Black Americans, from their high and noble intention."[72] Justice Thomas wrote op-ed pieces condemning Justice Marshall for his critical comments on the Bicentennial celebration.[73] He asserted that by his critique of the forefathers, Justice Marshall had disgraced Black people.

My daughter and her friends suggested that Clarence Thomas's response to Marshall's critique of the "founding fathers" was a classic profile of a victim's identification with the aggressor. They suggested that Clarence Thomas condemned Thurgood Marshall for criticizing the founders because, in Thomas's mind, he has been so close to Reagan and Bush, that he is, as he admitted in his article, "alienated" from Marshall's commentary. In short, he doesn't see himself as one of the potential victims. In his confused mind, he sees himself as one who would be a confidant of Jefferson, assisting Jefferson with the Declaration of Independence. He sees himself as one who would be a friend of James Madison, assisting James Madison with the writing of the Constitution and the Bill of Rights, and that is the only reason why, in 1987, Clarence Thomas would have said that Justice Marshall's criticism of the forefathers "alienates all Americans, and not just Black Americans, from their high and noble intention."

They suggested that you can read all of his opinions, but you will never have the insights offered by his developmental history, which

70. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

71. *Id.* at 2-4.

72. Clarence Thomas, *Black Americans Based Claim for Freedom on Constitution*, SAN DIEGO UNION & TRIB., Oct. 6, 1987, at B7.

73. *See id.*

would explain the inner workings of a mind that is entangled with racial self-hatred. His overwhelming racial self-hatred will never be revealed in the traditional, muted language and abstractions that judges customarily use in judicial opinions. They concluded that it was their hunch that the ambiguous and institutional language of the law often masks the motivations that triggered the conclusions reached.

I had hoped that my daughter was wrong as to Justice Thomas's mind. But after having read several other opinions that Justice Thomas either wrote or joined in, I would now say to my daughter that she and her colleagues have persuaded me that there must be some mystical force or, as they phrase it, "internal drive" that compels Justice Thomas to some of his persistently absurd and hostile anti-minority decisions, and it may very well be attributable to factors of a racial self-hatred that not even he fully comprehends. My daughter and her friends' analysis of Clarence Thomas's racial self-hatred is not far from other thinkers' conclusions on the subject. William E. Nelson, a political science and Black Studies professor at Ohio State University, observed:

> From the time he was chair of the EEOC, I always considered Clarence Thomas to be the worst kind of racist—a black man who hates himself.... He seemed to have no sense of history of commitment to black liberation and progress. Politically, he established networks with some of the biggest white racists in the country, and helped to develop a political machine that stifled some of the social, economic, and political progress of blacks as a whole.[74]

Oliver Wendell Holmes once wrote:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[75]

Could it be that many of Justice Thomas's adjudications on race relations result from his own "prejudices" and hostilities to African-Americans? Could it be that this prejudice stemming from racial self-hatred has, to paraphrase Justice Holmes's statement, "a good deal more to do than the syllogism"[76] published in the opinion that announces "the rules by which [persons] should be governed"?[77]

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74. Coleman, *supra* note 49, at 39, 41.
75. Oliver Wendell Holmes, The Common Law 1 (1881).
76. *Id.*
77. *Id.*

VIII. Personal Reflections on Justice Marshall's Last Year and His Death

Justice Thomas's performance on the Court stands in stark contrast to that of his predecessor—Justice Thurgood Marshall. The impact upon me of the transition is probably best put in context with some of my personal reflections and emotions about Justice Marshall during the last year of his life and about the public response to his funeral. Six months before his death, I spoke at a ceremony outside of Independence Hall in Philadelphia where Justice Marshall received the coveted Liberty Bell Award. In his earlier years, I had known Thurgood Marshall as a strong, physically imposing man whom I saw argue seminal cases before the Supreme Court. My tribute to him in the *Harvard Law Review*[78] conveyed the profound impression he had on me throughout my career. In many ways, the July 4, 1992 presentation was a most poignant setting. Thurgood Marshall was too frail to even walk up the steps to the podium. Instead, they put him in his wheelchair on a platform on a forklift truck, and the forklift driver, with Thurgood's son Goody holding onto the wheelchair, brought him up to the podium. They moved him forward ever so gently, and then we rolled the wheelchair to the microphone so that he could speak to receive the award. It was one of his last two speeches to the public. He said:

> I wish I could say that racism and prejudice were only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity. But as I look around, I see not a nation of unity but of division—Afro and white, indigenous and immigrant, rich and poor, educated and illiterate. Even many educated whites and successful Negroes have given up on integration and lost hope in equality. They see nothing in common—except the need to flee as fast as they can from our inner cities. But there is a price to be paid for division and isolation, as recent events in California indicate.[79]

Although Justice Marshall looked frail in the beginning of the speech, it was amazing to observe that, at the end, his voice was as booming as I had heard it at those magnificent times when he argued before the Supreme Court. He said:

78. A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55 (1991).

79. *See* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 453-54 (1993).

> Look around. Can't you see the tensions in Watts? Can't you feel the fear in Scarsdale? Can't you sense the alienation in Simi Valley? The despair in the South Bronx? The rage in Brooklyn?
>
> We cannot play ostrich. Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. We must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better. . . . Take a chance, won't you? Knock down the fences that divide. Tear apart the walls that imprison. Reach out; freedom lies just on the other side.[80]

As he concluded, I saw a few tears trickle down the faces of people, like me, who knew him well. We knew then that we may have witnessed his last significant public appearance.

Then they wheeled him back on the forklift platform, and the driver gently lowered him down in the wheelchair. When the event was over, I walked over to the forklift driver and said, "Thank you." He said, "Judge, it's the most important thing I have ever done in my life."

Six months later, I am at the Supreme Court to pay my last respects to my hero. On January 24, 1993, Thurgood died. My wife and I could have used my judicial privilege to go in through the side door, view him, and leave. Some judges took advantage of that option. But Evelyn and I went to the end of the line, and for two-and-a-half or three hours, we waited for the opportunity to observe him. A book called *The Supreme Court Justices*, recently published by the Supreme Court Historical Society, says: "Marshall died of heart failure . . . . Thousands—all ages, all races—spent hours waiting in the cold to show their respect to this hero as he lay in state in the Supreme Court. Thousands more came the next day to the National Cathedral to honor him . . . ."[81] It then describes how warmly he was eulogized.

One aspect of the Supreme Court's viewing that I remember particularly clearly was that in front of me were two men, inadequately dressed for cold weather. One was blind. The other man said to the person who was blind, "The casket is closed." He started to describe the picture of Thurgood above the casket, and the flowers and other

80. *Id.*

81. Susan Low Bloch, *Thurgood Marshall*, *in* THE SUPREME COURT JUSTICES 476, 488 (Claire Cushman ed., 1993).

mementos people had placed there. As he described the scene, he also mentioned what Thurgood stood for to minorities and poor people, and the blind man said, "I see." You can't imagine what an emotional impact these two people, in tattered clothing, had on me.

Then, some months later, I am again at the Supreme Court. Drew Days, the Solicitor General of the United States, is presenting the resolution to the Supreme Court honoring Thurgood Marshall. It was a resolution that Karen Hastie Williams, I, and a few others, as members of a Supreme Court Bar Committee, had prepared.[82] At that time, Justice Thomas was sitting on the Court. As I looked at Justice Thomas, I thought of *Hudson v. McMillian* and a series of other cases that he had participated in since Justice Marshall resigned. It was absolutely wrenching to hear that resolution read to the Court, and at the same time see Justice Thomas on that Court as Justice Marshall's successor. I kept saying to myself, "Look, the tension is not mine alone; many others present also viewed Justice Marshall as their mentor, the nation's friend, and the people's advocate." Then, in some curious way, my mind wandered to reflect on the recently released *The Supreme Court Justices*.[83] It describes all of the 106 Justices, and it includes pictures. It shows Thurgood Marshall on significant cases that he argued, including the *Brown* case. And it includes a great picture of him when he was sworn in.

For Justice Thomas, they chose one picture that is relevant to my analysis. I suppose the editors were trying to think of what Justice Thomas would be most famous for when the high court of history writes a judgment about him. In this biography on Supreme Court Justices, in the section on Justice Thomas, there is a picture of a Louisiana prison cell.[84] The caption describes a Louisiana prison inmate, beaten by guards while he was handcuffed and shackled. It notes that Justice Thomas dissented from the majority decision that ruled in favor of the prisoner. As my mind reflected on these ironies, the pain that I thought I had gotten rid of was haunting me again. Think of it: Objective biographers for the Supreme Court Historical Society have chosen for Thurgood Marshall pictures of him opening the doors for everyone, such as his advocacy in the *Brown* case; in that same volume, they have provided a picture of Justice Thomas slamming the door of justice so that, had his views prevailed in *Hudson v. McMil-*

82. *See* RESOLUTION, *supra* note 9.

83. *See supra* note 81.

84. *Id.* at 530.

lian, the weak and impotent, cruelly beaten prisoner would not be able to get relief in a federal court as a matter of constitutional law.

After the *Hudson* case, I knew that it would be futile for anyone to write another open letter to Justice Thomas, asking him to be fair. In the future, I will merely describe some of his other decisions and votes that are just as inhumane as was his dissent in the *Hudson* case.

Let me close with what I pray that Justice Clarence Thomas will someday understand. This is a message that all of us must understand, academician or unlearned, Black or White, Jew or Gentile, rich or poor. It is a poem written by Langston Hughes, the great poet, who happened to be Black. He wrote:

DREAM OF FREEDOM

There's a dream in the land
With its back against the wall.
By muddled names and strange
Sometimes the dream is called.

There are those who claim
This dream for theirs alone—
A sin for which, we know,
They must atone.

Unless shared in common
Like sunlight and like air,
The dream will die for lack
Of substance anywhere.

The dream knows no frontier or tongue,
The dream no class or race.
The dream cannot be kept secure
In any *one* locked place.

This dream today embattled,
With its back against the wall—
To save the dream for one
It must be saved for ALL.[85]

85. LANGSTON HUGHES, *Dream of Freedom, in* GOOD MORNING REVOLUTION: UNCOLLECTED WRITINGS OF SOCIAL PROTEST BY LANGSTON HUGHES 170 (Faith Berry ed., 1992).