# Race-ing Justice Proofs



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# RACE-ING JUSTICE, EN-GENDERING POWER

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# RACE-ING JUSTICE, EN-GENDERING POWER

## Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality

*Edited and with an Introduction by*

**TONI MORRISON**

*Pantheon Books, New York*

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TONI MORRISON

# Introduction: Friday on the Potomac

I have never asked to be nominated. . . . Mr. Chairman, I am a victim of this process.

—Clarence Thomas, Friday, October 11, 1991

It would have been more comfortable to remain silent. . . . I took no initiative to inform anyone. . . . I could not keep silent.

—Anita Hill, Friday, October 11, 1991

At last he lays his head flat upon the ground, close to my foot, and sets my other foot upon his head, as he had done before; and after this, made all the signs to me of subjugation, servitude, and submission imaginable, to let me know how he would serve me as long as he lived.

—Daniel Defoe, *Robinson Crusoe*

Clusters of black people pray in front of the White House for the Lord not to abandon them, to intervene and crush the forces that would prevent a black nominee to the Supreme Court from assuming the seat felt by them to be reserved for a member of the race. Other groups of blacks stare at the television set, revolted by the president's nomination of the one candidate they believed obviously unfit to adjudicate legal and policy matters concerning them. Everyone interested in the outcome of this nomination, regardless of race, class, gender, religion, or profession, turns to as many forms of media as are available. They read the *Washington Post* for verification of their dread or their hope, read the *New York Times* as though it were *Pravda*, searching between the lines of the official story for one that most nearly approximates what might really be happening. They read local papers to see if the reaction among their neighbors is similar to their own, or they try to figure out on what information their own response should be based. They have listened to newscasters and anchor people for the bits and bites that pointed to, or deflected attention from, the machinery of campaigns to reject or accept the nominee. They have watched television screens that seem to watch back, that dismiss viewers or call upon them for flavor, reinforcement, or routine dissent. Polls assure and shock, gratify and discredit those who took them into serious account.

But most of all, people talked to one another. There are passionate, sometimes acrimonious discussions between mothers and daughters, fathers and sons, husbands and wives, siblings, friends, acquaintances, colleagues with whom, now, there is reason to embrace or to expel from their close circle. Sophisticated legal debates merge with

locker-room guffaws; poised exchanges about the ethics and moral responsibilities of governance are debased by cold indifference to individual claims and private vulnerabilities. Organizations and individuals call senators and urge friends to do the same—providing opinions and information, threatening, cajoling, explaining positions, or simply saying, Confirm! Reject! Vote yes. Vote no.

These were some of the scenes stirred up by the debates leading to the confirmation of Clarence Thomas, the revelations and evasions within the testimony, and by the irrevocable mark placed on those hearings by Anita Hill's accusations against the nominee. The points of the vector were all the plateaus of power and powerlessness: white men, black men, black women, white women, interracial couples; those with a traditionally conservative agenda, and those representing neoconservative conversions; citizens with radical and progressive programs; the full specter of the "pro" antagonists ("choice" and "life"); there were the publicly elected, the self-elected, the racial supremacists, the racial egalitarians, and nationalists of every stripe.

The intensity as well as the volume of these responses to the hearings were caused by more than the volatile content of the proceedings. The emptiness, the unforthcoming truths that lay at the center of the state's performance contributed much to the frenzy as people grappled for meaning, for substance unavailable through ordinary channels. Michael Rustin has described race as "both an empty category and one of the most destructive and powerful forms of social categorization." This paradox of a powerfully destructive emptiness can be used to illustrate the source of the confusion, the murk, the sense of helpless rage that accompanied the confirmation process.

It became clear, finally, what took place: a black male nominee to the Supreme Court was confirmed amid a controversy that raised and buried issues of profound social significance.

What is less clear is what happened, how it happened, why it happened; what implications may be drawn, what consequences may follow. For what was at stake during these hearings was history. In addition to what was taking place, something was happening. And as is almost always the case, the site of the exorcism of critical national issues was situated in the miasma of black life and inscribed on the bodies of black people.

It was to evaluate and analyze various aspects of what was and is happening that this collection suggested itself. The urgency of this project, an urgency that was overwhelming in November of 1991 when it began, is no less so now in 1992. For a number of reasons the consequences of *not* gathering the thoughts, the insights, the analyses of academics in a variety of disciplines would be too dire. The events surrounding the confirmation could be closed, left to the disappearing act that frequently follows the summing-up process typical of visual and print media. The seismic reactions of women and men in the workplace, in organizations and institutions, could be calmed and a return to "business as usual" made effortless. While the public, deeply concerned with the issues raised by the confirmation, waited for the ultimate historical account or some other text representing the "last word," there might not be available to it a more immediate aid to the reflective sorting out that subsequent and recent events would demand. Furthermore, the advancing siege upon American universities, launched by fears of "relevance" and change,

has fostered an impression and atmosphere of scholarly paralysis, censorship, and intimidation. Yet residing in the academic institutions of the country are not only some of the most knowledgeable citizens, but also those most able to respond quickly with contextualized and intellectually focused insights. And insight—from a range of views and disciplines—seemed to us in low supply.

For insight into the complicated and complicating events that the confirmation of Clarence Thomas became, one needs perspective, not attitudes; context, not anecdotes; analyses, not postures. For any kind of lasting illumination the focus must be on the history routinely ignored or played down or unknown. For the kind of insight that invites reflection, language must be critiqued. Frustrating language, devious calls to arms, and ancient inflammatory codes deployed to do their weary work of obfuscation, short circuiting, evasion, and distortion. The timeless and timely narratives upon which expressive language rests, narratives so ingrained and pervasive they seem inextricable from "reality," require identification. To begin to comprehend exactly what happened, it is important to distinguish between the veneer of interrogatory discourse and its substance; to remain skeptical of topics (such as whether the "system" is "working") which pretend that the restoration of order lies in the question; to be wary of narrow discussions on the effectiveness or defect of the "process" because content, volatile and uncontextualized, cannot be approached, let alone adequately discussed, in sixteen minutes or five hundred words or less. To inaugurate any discovery of what happened is to be conscious of the smooth syruplike and glistening oil poured daily to keep the machine of state from screeching too loudly or

breaking down entirely as it turns the earth of its own rut, digging itself deeper and deeper into the foundation of private life, burying itself for invisibility, for protection, for secrecy. To know what took place summary is enough. To learn what happened requires multiple points of address and analysis.

Nowhere, remarked an historian, nowhere in the debate before and during the confirmation hearings was there any mention, or even the implied idea, of the public good. How could there be, when the word "public" had itself become bankrupt, suffering guilt by association with the word "special," as the confusion of "public interest" with "special interest" proved. How could the notion of union, nation, or state surface when race, gender, and class, separately, paired, matched, and mismatched, collapsed in a heap or swinging a divisive sword, dominated every moment and word of the confirmation process?

For example, the nominee—chosen, the president said, without regard to race—was introduced by his sponsor with a reference to the nominee's laugh. It was, said Senator Danforth, second in his list of "the most fundamental points" about Clarence Thomas. "He is his own person. That is my first point. Second, he laughs. [Laughter] To some, this may seem a trivial matter. To me, it's important because laughter is the antidote to that dread disease, federalitis. The obvious strategy of interest groups trying to defeat a Supreme Court nominee is to suggest that there is something weird about the individual. I concede that there is something weird about Clarence Thomas. It's his laugh. It is the loudest laugh I have ever heard. It comes from deep inside, and it shakes his body. And here is something

at least as weird in this most up-tight of cities: the object of his laughter is most often himself."

Weird? Not at all. Neither the laugh nor Danforth's reference to it. Every black person who heard those words understood. How necessary, how reassuring were both the grin and its being summoned for display. It is the laughter, the chuckle, that invites and precedes any discussion of association with a black person. For whites who require it, it is the gesture of accommodation and obedience needed to open discussion with a black person and certainly to continue it. The ethnic joke is one formulation—the obligatory recognition of race and possible equanimity in the face of it. But in the more polite halls of the Senate, the laugh will do, the willingness to laugh; its power as a sign takes the place of the high sign of perfect understanding. It is difficult to imagine a sponsor introducing Robert Bork or William Gates (or that happy exception, Thurgood Marshall) with a call to this most clearly understood metonym for racial accommodation. Not simply because they may or may not have had a loud, infectious laugh, but because it would have been inappropriate, irrelevant, puzzling to do so.

But what was inappropriate, even startlingly salacious in other circumstances became the habitual text with this candidate. The *New York Times* found it interesting to include in that paper's initial story on the president's nominee a curious spotlight on his body. Weight lifting was among his accomplishments, said the *Times,* presciently, perhaps, since later on the candidate's body came violently into view. Of course, this may be simply a news account that aims to present an attractive image of a man about to

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step onto a national stage, yet a reference to a black person's body is de rigueur in white discourse. Like the unswerving focus on the female body (whether the woman is a judge, an actress, a scholar, or a waitress), the black man's body is voluptuously dwelled upon in biographies about them, journalism on them, remarks about them. "I wanted to find out," said Senator Pete Domenici, "as best I could what his life—from outhouse to the White House . . . has been like." With vulgar remarks like that in print, why wouldn't the public's initial view of this black nominee have an otherwise puzzling, even silly, reference to body-building? Other erstwhile oddities rippled through the media, glancing and stroking black flesh. President Bush probably felt he was being friendly, charmingly informal, when he invited this black man into his bedroom for the interview. "That is where Mr. Bush made the final offer and Judge Thomas accepted." To make Thomas feel at home was more important than to respect him, apparently, and the *Times* agreed, selecting this tidbit to report in an article that ended with a second tantalizing, not so veiled reference to the nominee's body. When asked by reporters whether he expected to play golf, "one of Mr. Bush's favorite sports," Thomas replied, "No. The ball's too small." Thomas's answer is familiar repartee; but the nuanced emphasis gained by the remark's position in the piece is familiar too. What would have been extraordinary would have been to ignore Thomas's body, for in ignoring it, the articles would have had to discuss in some detail that aspect of him more difficult to appraise—his mind.

In a society with a history of trying to accommodate both slavery and freedom, and a present that wishes both to exploit and deny the pervasiveness of racism, black

people are rarely individualized. Even when his supporters were extolling the fierce independence and the "his own man" line about Clarence Thomas, their block and blocked thinking of racial stereotype prevailed. Without individuation, without nonracial perception, black people, as a group, are used to signify the polar opposites of love and repulsion. On the one hand, they signify benevolence, harmless and servile guardianship, and endless love. On the other hand, they have come to represent insanity, illicit sexuality, and chaos. In the confirmation hearings the two fictions were at war and on display. They are interchangeable fictions from a utilitarian menu and can be mixed and matched to suit any racial palette. Furthermore, they do not need logical transition from one set of associations to another. Like Captain Delano in *Benito Cereno,* the racist thinker can jump from the view of the slave, Babo, as "naturally docile, made for servitude" to "savage cannibal" without any gesture toward what may lie in between the two conclusions, or any explanation of the jump from puppy to monster, so the truth of Babo's situation—that he is leading a surreptitious rebellion aboard the slave ship, that he is a clever man who wants to be free—never enters the equation. The confirmation hearings, as it turned out, had two black persons to use to nourish these fictions. Thus, the candidate was cloaked in the garments of loyalty, guardianship, and (remember the laugh) limitless love. Love of God via his Catholic school, of servitude via a patriarchal disciplinarian grandfather, of loyalty to party via his accumulated speeches and the trophies of "America" on his office walls. The interrogator, therefore, the accusing witness Anita Hill, was dressed in the oppositional costume of madness, anarchic sexuality, and explosive ver-

bal violence. There seemed to be no other explanation for her testimony. Even Clarence Thomas was at a loss to explain not her charges but why she would make them. All he could come up with is speculation on Professor Hill's dislike of "lighter-complexioned" women—meaning, one gathers, his marriage to a white woman. No other narrative context could be found for her charges, no motive except fantasy, wanton and destructive, or a jealousy that destabilized her. Since neither the press nor the Senate Judiciary Committee would entertain seriously or exhaustively the truth of her accusations, she could be called any number or pair of discrediting terms and the contradictions would never be called into question, because, as a black woman, she was contradiction itself, irrationality in the flesh. She was portrayed as a lesbian who hated men *and* a vamp who could be ensnared and painfully rejected by them. She was a mixture heretofore not recognized in the glossary of racial tropes: an *intellectual* daughter of black *farmers*; a *black female* taking *offense*; a black *lady* repeating *dirty words*. Anita Hill's description of Thomas's behavior toward her did not ignite a careful search for the truth; her testimony simply produced an exchange of racial tropes. Now it was he, the nominee, who was in danger of moving from "natural servant" to "savage demon," and the force of the balance of the confirmation process was to reorder these signifying fictions. Is he lying or is she? Is he the benevolent one and she the insane one? Or is he the date raper, sexual assaulter, the illicit sexual signal, and she the docile, loyal servant? Those two major fictions, either/or, were blasted and tilted by a factual thing masquerading as a true thing: lynching. Being a fact of both white history and black life, lynching is also the metaphor of itself. While the mythologies

about black personae debauched the confirmation process for all time, the history of black life was appropriated to elevate it.

An accusation of such weight as sexual misconduct would probably have disqualified a white candidate on its face. Rather than any need for "proof," the slightest possibility that it was publicly verifiable would have nullified the candidacy, forced the committee members to insist on another nominee rather than entertain the necessity for public debate on so loathsome a charge. But in a racialized and race-conscious society, standards are changed, facts marginalized, repressed, and the willingness to air such charges, actually to debate them, outweighed the seemliness of a substantive hearing because the actors were black. Rather than claiming how certain feminist interests forced the confrontation, rather than editorializing about how reluctant the committee members were to investigate Anita Hill's charges publicly and how humiliated they were in doing so, it seems blazingly clear that with this unprecedented opportunity to hover over and to cluck at, to meditate and ponder the limits and excesses of black bodies, no other strategies were going to be entertained. There would be no recommendation of withdrawal by sponsor, president, senators, or anybody. No request for or insistence that the executive branch propose another name so that such volatile issues could be taken up in a forum more suitable to their airing, and possibly receive an open and just decision. No. The participants were black, so what could it matter? The participants were black and therefore "known," serviceable, expendable in the interests of limning out one or the other of two mutually antagonistic fabulations. Under the pressure of voyeuristic desire, fueled

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by mythologies that render blacks publicly serviceable instruments of private dread and longing, extraordinary behavior on the part of the state could take place. Anita Hill's witnesses, credible and persuasive as they were, could be dismissed, as one "reporter" said, apparently without shame, because they were too intellectual to be believed(!). Under the pressure of racist mythologies, loyal staff (all female) had more weight than disinterested observers or publicly available documentation. Under such pressure the chairman of the committee could apply criminal court procedure to a confirmation hearing and assure the candidate that the assumption of innocence lay with the nominee. As though innocence—rather than malfeasance or ethical character or fitness to serve—was the charge against which they struggled to judge the judge. As though a rhetorical "I am not a crook" had anything at all to do with the heavy responsibility the committee was under.

Would such accusations have elicited such outsize defense mechanisms if the candidate had been white? Would the committee and many interest groups have considered the suitability of a white candidate untainted by these accusations? Hardly, but with a black candidate, already stained by the figurations of blackness as sexual aggressiveness or rapaciousness or impotence, the stain need only be proved reasonably doubted, which is to say, if he is black, how can you tell if that really is a stain? Which is also to say, blackness is itself a stain, and therefore unstainable. Which is also to say, if he is black and about to ascend to the Supreme Court bench, if the bench is to become stain-free, this newest judge must be bleached, race-free, as his speeches and opinions illustrated. Allegations of sexual misconduct re-raced him, which, in this administration, meant, re-

stained him, dirtied him. Therefore the "dirt" that clung to him following those allegations, "dirt" he spoke of repeatedly, must be shown to have originated elsewhere. In this case the search for the racial stain turned on Anita Hill. Her character. Her motives. Not his.

Clarence Thomas has gone through the nomination process before, and in that connection has been investigated by the FBI before. Nothing is not known about him. And the senators know that nothing about him is not known. But what is known and what is useful to be distributed as knowledge are different things. In these hearings data, not to mention knowledge, had no place. The deliberations became a contest and the point was to win. At stake always was a court: stacked or balanced; irreproachable in its ethical and judicial standards or malleable and compliant in its political agenda; alert to and mindful of the real lives most of us live, as these lives are measured by the good of the republic, or a court that is aloof, delusional, indifferent to any mandate, popular or unpopular, if it is not first vetted by the executive branch.

As in virtually all of this nation's great debates, nonwhites and women figure powerfully, although their presence may be disguised, denied, or obliterated. So it is perhaps predictable that this instance—where serious issues of male prerogative and sexual assault, the issues of racial justice and racial redress, the problematics of governing and controlling women's bodies, the alterations of work space into (sexually) domesticated space—be subsumed into the debate over the candidacy for the Supreme Court. That these issues be worked out, on, and inscribed upon the canvas/

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flesh of black people should come as no surprise to anyone.

The contempt emanating from the White House was palpable—it was not necessary for the candidate to be a first-rate legal scholar (as it had not been necessary for other candidates). Nor was it necessary that he have demonstrated a particular sensitivity to the issues and concerns of a race he belonged to but which "had no bearing" on his selection to fill a seat vacated by the single Supreme Court Justice who both belonged to and did represent the interests of that race. The "race" that "had no bearing" on the president's choice could nevertheless be counted on to support the nominee, since "skin voting" would overwhelm every other consideration. This riskless gamble held almost perfect sway. Many blacks were struck mute by the embarrassing position of agreeing with Klansmen and their sympathizers; others leaped to the defense of the candidate on the grounds that he was "no worse than X," or that any white candidate would be a throwback, or that "who knows what he might do or become in those hallowed halls?" Who knows? Well, his nominators did know, and they were correct, as even the earliest action Clarence Thomas has taken in the cases coming before the court confirms.

Appropriate also was the small, secret swearing-in ceremony once the candidate was confirmed. For secrecy had operated from the beginning. Not only the dismissed and suppressed charges against the candidate, but also deeper, more ancient secrets of males bonding and the demonizing of females who contradict them.

In addition to race, class surfaced in both predictable and unexpected ways. Predictably, the nominee was required to shuck: to convince white men in power that operating

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a trucking business was lowly work in a Georgia where most blacks would have blessed dirt for such work. It wasn't a hard shuck. Because race and class—that is, black equals poor—is an equation that functions usefully if unexamined, it is possible to advance exclusionary and elitist programs by the careful use of race *as* class. It is still possible to cash in on black victimhood (the pain of being a poor innocent black boy), to claim victim status (Thomas called himself a victim of a process he of all people knew was designed to examine a candidate's worth), and to deplore the practice in others all at the same time. It is still possible to say "My father was a doorman" (meaning servant, meaning poor) and get the sympathy of whites who cannot or will not do the arithmetic needed to know the difference between the earnings of a Washington, D.C., doorman and those of a clerk at the census bureau.

In addition to class transformations, there was on display race transcendence. The nominee could be understood as having realized his yearning for and commitment to "racelessness" by having a white spouse at his side. At least their love, we are encouraged to conclude, had transcended race, and this matrimonial love had been more than ecstasy and companionship—it had been for Virginia Thomas an important education on how to feel and think about black people. The *People* magazine lead story, taken with a straight face, proved their devotion, their racelessness, which we already recognized because he shook her hand in public on three occasions. And it was envy of this racially ideal union that was one of the reasons Thomas came up with in trying to explain Anita Hill's charges. Professor Hill, he seemed to be suggesting, harbored reactionary, race-bound opinions about interracial love which,

as everybody knows, can drive a black woman insane and cause her to say wild, incredible things. Expectedly, the nominee called for a transcendence of race, remarked repeatedly on its divisive nature, its costliness, its undeniable degradation of principles of freedom. Unexpectedly, however, race surfaced on the very site of its interment. And it was hard not to murmur "Freddy's back" as the specter of this living corpse broke free of its hastily dug grave. But this resurrection was buoyed and winged by the fact of its gender component. If the forward face of the not-dead was racism, its backward face was sexism. The confirmation procedure held my attention partly because the shape it took, in an effort to hold its explosive contents, was unique—the twists and turns of the public debate and its manipulation, the responses of the senators on the committee. Yet what riveted my attention most during the hearings was not its strangeness but rather its familiarity. The sense that underneath the acrylic in which the political discourse was painted were the outlines of figures so old and so stable as to appear natural, not drawn or man-made at all.

It was trying to penetrate the brilliant, distracting color in which the political argument was painted in order to locate the outlines that informed the argument that led me to focus on the day of the week that both Anita Hill's testimony and Clarence Thomas's response to that testimony were aired. And to select out of all that each said on that day the themes that to me appeared salient: Anita Hill's inability to remain silent; Clarence Thomas's claims to being victimized. Silence and victimization. Broken silence and built victimization. Speech and bondage.

Disobedient speech and the chosen association of bondage. On, and . . . Friday.

On a Friday, Anita Hill graphically articulated points in her accusation of sexual misconduct. On the same Friday Clarence Thomas answered, in a manner of speaking, those charges. And it was on a Friday in 1709 when Alexander Selkirk found an "almost drowned Indian" on the shore of an island upon which he had been shipwrecked. Ten years later Selkirk's story would be immortalized by Daniel Defoe in *Robinson Crusoe*. There the Indian becomes a "savage cannibal"—black, barbarous, stupid, servile, adoring—and although nothing is reported of his sexual behavior, he has an acquired taste for the flesh of his own species. Crusoe's narrative is a success story, one in which a socially, culturally, and biologically handicapped black man is civilized and Christianized—taught, in other words, to be like a white one. From Friday's point of view it is a success story as well. Not only is he alive; he is greatly enabled by his association with his savior. And it should not go unremarked that Crusoe is also greatly enabled—including having his own life saved—by Friday. Yet like all successes, what is earned is mitigated by what one has lost.

If we look at the story from Friday's point of view rather than Crusoe's, it becomes clear that Friday had a very complex problem. By sheer luck he had escaped death, annihilation, anonymity, and engulfment by enemies within his own culture. By great and astonishing good fortune he had been rescued. The gift of his own life was so unexpected, so welcome, he felt he could regulate the

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debt only by offering that life to his rescuer, by making the gift exchange literal. But he had a problem.

Before he appeared on the shore, his rescuer, Crusoe, had heard no other voice except a parrot's trained to say his owner's name—Robin, for short. Crusoe wanted to hear it again. For over twenty years he had had only himself for company, and although he has conquered nature and marked time, no human calls his name, acknowledges his presence or his authority. Lucky for him he discovers a refugee escaping certain slaughter. Once rescue has been effected, Crusoe is in a position to have more than unopposed dominion; now he is able to acquire status, to demonstrate and confirm his superiority. So important is status in Crusoe's self-regard he does not ask the refugee what his name is; instead, Crusoe names him. Nor does he tell the refugee his own name; instead, he teaches him the three words that for months will do just fine: "master," "yes," and "no."

Friday's real problem, however, was not to learn the language of repetition, easily, like the parrot, but to learn to internalize it. For longer than necessary the first words he is taught, first "master," then "yes" or "no," remain all he is permitted to say. During the time in which he knows no other English, one has to assume he thinks in his own language, cogitates in it, explains stimuli and phenomena in the language he was born to. But Crusoe's account suggests otherwise, suggests that before his rescue Friday had no language, and even if he did, there was nothing to say in it. After a year Friday is taught some English vocabulary and the grammar to hold it. "This was the pleasantest year of all the life I led in this place; Friday began to talk pretty well, and understand the names of almost everything

I had occasion to call for, and of every place I had to send him to, and talked a great deal to me. . . ."

Had he expected that the life he offered Crusoe would include not just his services, his loyalty, his devotion, but also his language as well? Did he ever wonder why Crusoe did not want to learn *his* language? Or why he could never speak his master's name? In the absence of his master's desire to speak his tongue, did Friday forget completely the language he dreamed in? Think no more of the home he fled before the weapons of those who had conquered and occupied it? On the two or three occasions when Crusoe is curious enough to ask Friday a question about the black man's feelings, the answers are surprising. Yes, he longs for his home. Yes, it is beautiful on his island. Yes, he will refrain from eating human flesh. Yes, if he has the opportunity, he will teach his tribe to eat bread, cattle, and milk instead. (If Crusoe's assumption that Friday's people eat only each other were true, the practice would have decimated them long ago, but no matter—the white man teaches food habits; the black man learns them.) But no, he will not return to his home alone; he will go only if Crusoe accompanies him. So far, Friday can be understood to engage in dialogue with his master, however limited. Eventually, he learns more: he moves from speaking *with* to thinking *as* Crusoe.

The problem of internalizing the master's tongue is the problem of the rescued. Unlike the problems of survivors who may be lucky, fated, etc., the rescued have the problem of debt. If the rescuer gives you back your life, he shares in that life. But, as in Friday's case, if the rescuer saves your life by taking you away from the dangers, the complications, the confusion of home, he may very well

expect the debt to be paid in full. Not "Go your own way and sin no more." Not "Here, take this boat and find your own adventure, in or out of your own tribe." But full payment, forever. Because the rescuer wants to hear his name, not mimicked but adored. This is a serious problem for Friday and gets more complicated the more one thinks about it.

Friday has left and been rescued from not only the culture that threatened him, that wants to kill and engulf him, but also from the culture that loves him. That too he has left behind forever.

Even when he discovers his own father, half dead, in precisely the danger he himself had been in when Crusoe saved his life, his joy is not so reckless as to quarrel with the menial labor he and his father are directed to do, while an also-rescued Spaniard, who has lived among Friday's tribe for years, is given supervisory responsibilities. Nor is his joy so great that he speaks to his father in their mutual tongue for both their delight. Instead, he translates for Crusoe what his father says.

This loss of the mother tongue seems not to disturb Friday, even though he never completely learns the master's. He negotiates a space somewhere in between. He develops a serviceable grammar that will never be eloquent; he learns to shout warnings of advancing, also black, enemies, but he can never dare speak *to* these enemies as his master does. Without a mother tongue, without the language of his original culture, all he can do is recognize his old enemies and, when ordered, kill them. Finally, Friday no longer negotiates space between his own language and Crusoe's. Finally, the *uses* of Crusoe's language,

if not its grammar, become his own. The internationalization is complete.

internalization

In one of the incidents that occur on the island, a band of Spanish mutineers come ashore, holding their captain prisoner. Crusoe and Friday liberate the captain and consider how to dispose of the criminals. Some of the mutineers are singled out by their captain as villains; others are identified as being forced into mutiny. So some are spared, others slaughtered. This discrimination is never applied to Friday's people. With one exception, an old man tied and bound for execution, all of the blacks Friday and Crusoe see are killed or wounded (most of whom, in Crusoe's tallying of the dead, Friday kills). The exception, who turns out to be Friday's father, is not given a name nor, as with his son Friday, is one solicited from him. He becomes part of Crusoe's team, called upon and relied on for all kinds of service. He is sent back to his island on an errand with the Spaniard. The Spaniard returns, Friday's father does not, but most curiously, once his services are no longer needed, there is no mention of him again—by the master or the son. While he was among them, and after he has gone, he is called by Robinson Crusoe "the old savage." We still do not know his name.

Voluntary entrance into another culture, voluntary sharing of more than one culture, has certain satisfactions to mitigate the problems that may ensue. But being rescued into an adversarial culture can carry a huge debt. The debt one feels one owes to the rescuer can be paid, simply, honorably, in lifetime service. But if in that transaction the rescued loses his idiom, the language of his culture, there may be other debts outstanding. Leon Higginbotham has

charted the debt Clarence Thomas owes the culture that fought for and protected him before he arrived out of a turbulent social sea onto the shore of political patronage. In that sea Thomas was teased and humiliated by his own people, called ABC, American's Blackest Child. He was chastened for wanting an education superior to theirs. He was also loved and nurtured by them. As in any and everybody's background, family, culture, race, and region, there are persecutors and providers, kindness and loathing. No culture ever quite measures up to our expectations of it without a generous dose of romanticism, self-delusion, or simple compassion. Sometimes it seems easier, emotionally and professionally, to deny it, ignore it, erase it, even destroy it. And if the language of one's culture is lost or surrendered, one may be forced to describe that culture in the language of the rescuing one. In that way one could feel compelled to dismiss African-American culture by substituting the phrase "culture of the victim" for the critique and redress of systemic racism. Minus one's own idiom it is possible to cry and decry victimization, loathing it when it appears in the discourses of one's own people, but summoning it up for one's expediently deracialized self. It becomes easy to confuse the metaphors embedded in the blood language of one's own culture with the objects they stand for and to call patronizing, coddling, undemanding, rescuing, complicitous white racists a lynch mob. Under such circumstances it is not just easy to speak the master's language, it is necessary. One is obliged to cooperate in the misuse of figurative language, in the reinforcement of cliché, the erasure of difference, the jargon of justice, the evasion of logic, the denial of history, the crowning of patriarchy, the inscription of hegemony; to be

complicit in the vandalizing, sentimentalizing, and trivialization of the torture black people have suffered. Such rhetorical strategies become necessary because, without one's own idiom, there is no other language to speak.

Both Friday and Clarence Thomas accompany their rescuers into the world of power and salvation. But the problem of rescue still exists: both men, black but unrecognizable at home or away, are condemned first to mimic, then to internalize and adore, but never to utter one single sentence understood to be beneficial to their original culture, whether the people of their culture are those who wanted to hurt them or those who loved them to death.

Clarence Thomas once quoted someone who said that dwelling on the horrors of racism invited one of two choices: vengeance or prosperity. He argued for a third choice: "to appeal to that which is good." He did not elaborate on which he had chosen, finally, but the language he speaks, the actions he takes, the Supreme Court decisions he has made or aligned himself with, the foot, as it were, that he has picked up and placed on his head, give us some indication of what his choice has been. The footprint in the sand that so worried Crusoe's nights, that compelled him to build a fortress, and then another to protect his new world order, disappears from his nightmares once Friday embraces, then internalizes, his master's voice and can follow the master's agenda with passion.

It is hard not to think of these events in any way but as unfortunate. And it is difficult to convince anybody that

what happened is over—without serious consequences. For those who looked forward eagerly to Thomas's confirmation, the expectation of a reliably conservative court may be reassuring. Time will have the most to say about that. For those who believe the future of the nation as a democracy is imperiled by this most recent addition to the bench, again, time will speak rather definitively. Yet regardless of political alliances, something positive and liberating has already surfaced. In matters of race and gender, it is now possible and necessary, as it seemed never to have been before, to speak about these matters without the barriers, the silences, the embarrassing gaps in discourse. It is clear to the most reductionist intellect that black people think differently from one another; it is also clear that the time for undiscriminating racial unity has passed. A conversation, a serious exchange between black men and women, has begun in a new arena, and the contestants defy the mold. Nor is it as easy as it used to be to split along racial lines, as the alliances and coalitions between white and black women, and the conflicts among black women, and among black men, during the intense debates regarding Anita Hill's testimony against Clarence Thomas's appointment prove.

This volume is one of the several beginnings of these new conversations in which issues and arguments are taken as seriously as they are. Only through thoughtful, incisive, and far-ranging dialogue will all of us be able to appraise and benefit from Friday's dilemma.

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A. LEON HIGGINBOTHAM, JR.*

# An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague

*November 29, 1991*

Dear Justice Thomas:

The President has signed your Commission and you have now become the 106th Justice of the United States Supreme Court. I congratulate you on this high honor!

It has been a long time since we talked. I believe it was in 1980 during your first year as a Trustee at Holy Cross

*Except for a few minor changes in the footnotes this article is a verbatim copy of the text of the letter sent to Justice Clarence Thomas on November 29, 1991. I would like to thank Judges Nathaniel Jones, Damon Keith, and Louis H. Pollak and Dr. Evelyn Brooks Higginbotham for their very helpful insights. I gratefully acknowledge the very substantial assistance of my law clerk Aderson Belgarde Francois, New York University School of Law, J.D. 1991. Some research assistance was provided by Nelson S. T. Thayer, Sonya Johnson, and Michael Tein from the University of Pennsylvania Law School. What errors remain are mine.

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College. I was there to receive an honorary degree. You were thirty-one years old and on the staff of Senator John Danforth. You had not yet started your meteoric climb through the government and federal judicial hierarchy. Much has changed since then.

At first I thought that I should write you privately—the way one normally corresponds with a colleague or friend. I still feel ambivalent about making this letter public but I do so because your appointment is profoundly important to this country and the world, and because all Americans need to understand the issues you will face on the Supreme Court. In short, Justice Thomas, I write this letter as a public record so that this generation can understand the challenges you face as an Associate Justice to the Supreme Court, and the next can evaluate the choices you have made or will make.

The Supreme Court can be a lonely and insular environment. Eight of the present Justices' lives would not have been very different if the *Brown* case had never been decided as it was. Four attended Harvard Law School, which did not accept women law students until 1950.[1] Two attended Stanford Law School prior to the time when the first Black matriculated there.[2] None has been called a "nigger"[3] or suffered the acute deprivations of poverty.[4] Justice O'Connor is the only other Justice on the Court who at one time was adversely affected by a white-male dominated system that often excludes both women and minorities from equal access to the rewards of hard work and talent.

By elevating you to the Supreme Court, President Bush has suddenly vested in you the option to preserve or dilute the gains this country has made in the struggle for equality.

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This is a grave responsibility indeed. In order to discharge it you will need to recognize what James Baldwin called the "force of history" within you.[5] You will need to recognize that both your public life and your private life reflect this country's history in the area of racial discrimination and civil rights. And, while much has been said about your admirable determination to overcome terrible obstacles, it is also important to remember how you arrived where you are now, because you did not get there by yourself.

When I think of your appointment to the Supreme Court, I see not only the result of your own ambition, but also the culmination of years of heartbreaking work by thousands who preceded you. I know you may not want to be burdened by the memory of their sacrifices. But I also know that you have no right to forget that history. Your life is very different from what it would have been had these men and women never lived. That is why today I write to you about this country's history of civil rights lawyers and civil rights organizations; its history of voting rights; and its history of housing and privacy rights. This history has affected your past and present life. And forty years from now, when your grandchildren and other Americans measure your performance on the Supreme Court, that same history will determine whether you fulfilled your responsibility with the vision and grace of the Justice whose seat you have been appointed to fill: Thurgood Marshall.

### *I. Measures of Greatness or Failure of Supreme Court Justices*

In 1977 a group of one hundred scholars evaluated the first one hundred justices on the Supreme Court.[6] Eight of the justices were categorized as failures, six as below average, fifty-five as average, fifteen as near great and twelve as great.[7] Among those ranked as great were John Marshall, Joseph Story, John M. Harlan, Oliver Wendell Holmes, Jr., Charles E. Hughes, Louis D. Brandeis, Harlan F. Stone, Benjamin N. Cardozo, Hugo L. Black, and Felix Frankfurter.[8] Because you have often criticized the Warren Court,[9] you should be interested to know that the list of great jurists on the Supreme Court also included Earl Warren.[10]

Even long after the deaths of the Justices that I have named, informed Americans are grateful for the extraordinary wisdom and compassion they brought to their judicial opinions. Each in his own way viewed the Constitution as an instrument for justice. They made us a far better people and this country a far better place. I think that Justices Thurgood Marshall, William J. Brennan, Harry Blackmun, Lewis Powell, and John Paul Stevens will come to be revered by future scholars and future generations with the same gratitude. Over the next four decades you will cast many historic votes on issues that will profoundly affect the quality of life for our citizens for generations to come. You can become an exemplar of fairness and the rational interpretation of the Constitution, or you can become an archetype of inequality and the retrogressive evaluation of human rights. The choice as to whether you will build a decisional record of true greatness or of mere mediocrity is yours.

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***II. Our Major Similarity***

My more than twenty-seven years as a federal judge made me listen with intense interest to the many persons who testified both in favor of and against your nomination. I studied the hearings carefully and afterwards pondered your testimony and the comments others made about you. After reading almost every word of your testimony, I concluded that what you and I have most in common is that we are both graduates of Yale Law School. Though our graduation classes are twenty-two years apart, we have both benefitted from our old Eli connections.

If you had gone to one of the law schools in your home state, Georgia, you probably would not have met Senator John Danforth who, more than twenty years ago, served with me as a member of the Yale Corporation. Dean Guido Calabresi mentioned you to Senator Danforth, who hired you right after graduation from law school and became one of your primary sponsors. If I had not gone to Yale Law School, I would probably not have met Justice Curtis Bok, nor Yale Law School alumni such as Austin Norris, a distinguished black lawyer, and Richardson Dilworth, a distinguished white lawyer, who became my mentors and gave me my first jobs. Nevertheless, now that you sit on the Supreme Court, there are issues far more important to the welfare of our nation than our Ivy League connections. I trust that you will not be overly impressed with the fact that all of the other Justices are graduates of what laymen would call the nation's most prestigious law schools.

Black Ivy League alumni in particular should never be too impressed by the educational pedigree of Supreme Court Justices. The most wretched decision ever rendered

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against black people in the past century was *Plessy v. Ferguson.*[11] It was written in 1896 by Justice Henry Billings Brown, who had attended both Yale and Harvard Law Schools. The opinion was joined by Justice George Shiras, a graduate of Yale Law School, as well as by Chief Justice Melville Fuller and Justice Horace Gray, both alumni of Harvard Law School.

If those four Ivy League alumni on the Supreme Court in 1896 had been as faithful in their interpretation of the Constitution as Justice John Harlan, a graduate of Transylvania, a small law school in Kentucky, then the venal precedent of *Plessy v. Ferguson,* which established the federal "separate but equal" doctrine and legitimized the worst forms of race discrimination, would not have been the law of our nation for sixty years. The separate but equal doctrine, also known as Jim Crow, created the foundations of separate and unequal allocation of resources, and oppression of the human rights of Blacks.

During your confirmation hearing I heard you refer frequently to your grandparents and your experiences in Georgia. Perhaps now is the time to recognize that if the four Ivy League alumni—all northerners—of the *Plessy* majority had been as sensitive to the plight of black people as was Justice John Harlan, a former slave holder from Kentucky,[12] the American statutes that sanctioned racism might not have been on the books—and many of the racial injustices that your grandfather, Myers Anderson, and my grandfather, Moses Higginbotham, endured would never have occurred.

The tragedy with *Plessy v. Ferguson,* is not that the Justices had the "wrong" education, or that they attended the "wrong" law schools. The tragedy is that the Justices had

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the wrong *values,* and that these values poisoned this society for decades. Even worse, millions of Blacks today still suffer from the tragic sequelae of *Plessy*—a case which Chief Justice Rehnquist,[13] Justice Kennedy,[14] and most scholars now say was wrongly decided.[15]

As you sit on the Supreme Court confronting the profound issues that come before you, never be impressed with how bright your colleagues are. You must always focus on what *values* they bring to the task of interpreting the Constitution. Our Constitution has an unavoidable—though desirable—level of ambiguity, and there are many interstitial spaces which as a Justice of the Supreme Court you will have to fill in.[16] To borrow Justice Cardozo's elegant phrase: "We do not pick our rules of law full blossomed from the trees."[17] You and the other Justices cannot avoid putting your imprimatur on a set of values. The dilemma will always be which particular values you choose to sanction in law. You can be part of what Chief Justice Warren, Justice Brennan, Justice Blackmun, and Justice Marshall and others have called the evolutionary movement of the Constitution[18]—an evolutionary movement that has benefitted you greatly.

### *III. Your Critiques of Civil Rights Organizations and the Supreme Court During the Last Eight Years*

I have read almost every article you have published, every speech you have given, and virtually every public comment you have made during the past decade. Until your confirmation hearing I could not find one shred of evidence suggesting an insightful understanding on your part on how the evolutionary movement of the Constitution and the work of civil rights organizations have benefitted

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you. Like Sharon McPhail, the President of the National Bar Association, I kept asking myself: Will the Real Clarence Thomas Stand Up?[19] Like her, I wondered: "Is Clarence Thomas a 'conservative with a common touch' as Ruth Marcus refers to him . . . or the 'counterfeit hero' he is accused of being by Haywood Burns . . . ?"[20]

While you were a presidential appointee for eight years, as Chairman of the Equal Opportunity Commission and as an Assistant Secretary at the Department of Education, you made what I would regard as unwarranted criticisms of civil rights organizations,[21] the Warren Court,[22] and even of Justice Thurgood Marshall.[23] Perhaps these criticisms were motivated by what you perceived to be your political duty to the Reagan and Bush administrations. Now that you have assumed what should be the non-partisan role of a Supreme Court Justice, I hope you will take time out to carefully evaluate some of these unjustified attacks.

In October 1987, you wrote a letter to the *San Diego Union & Tribune* criticizing a speech given by Justice Marshall on the 200th anniversary celebration of the Constitution.[24] 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."[25]

Your response dismissed Justice Marshall's "sensitive understanding" as an "exasperating and incomprehensible . . . assault on the Bicentennial, the Founding, and the Constitution itself."[26] Yet, however high and noble the Founders' intentions may have been, Justice Marshall was correct in believing that the men who gathered in Philadelphia in 1787 "could not have imagined, nor would they

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have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[27] That, however, was neither an assault on the Constitution nor an indictment of the Founders. Instead, it was simply a recognition that in the midst of the Bicentennial celebration, "[s]ome may more quietly commemorate the suffering, the struggle and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled."[28]

Justice Marshall's comments, much like his judicial philosophy, were grounded in history and were driven by the knowledge that even today, for millions of Americans, there still remain "hopes not realized and promises not fulfilled." His reminder to the nation that patriotic feelings should not get in the way of thoughtful reflection on this country's continued struggle for equality was neither new nor misplaced.[29] Twenty-five years earlier, in December 1962, while this country was celebrating the 100th anniversary of the Emancipation Proclamation, James Baldwin had written to his young nephew:

> This is your home, my friend, do not be driven from it; great men have done great things here, and will again, and we can make America what America must become. . . . [But y]ou know, and I know that the country is celebrating one hundred years of freedom one hundred years too soon.[30]

Your response to Justice Marshall's speech, as well as your criticisms of the Warren court and civil rights organi-

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zations, may have been nothing more than your expression of allegiance to the conservatives who made you Chairman of the EEOC, and who have now elevated you to the Supreme Court. But your comments troubled me then and trouble me still because they convey a stunted knowledge of history and an unformed judicial philosophy. Now that you sit on the Supreme Court you must sort matters out for yourself and form your own judicial philosophy, and you must reflect more deeply on legal history than you ever have before. You are no longer privileged to offer flashy one-liners to delight the conservative establishment. Now what you write must inform, not entertain. Now your statements and your votes can shape the destiny of the entire nation.

Notwithstanding the role you have played in the past, I believe you have the intellectual depth to reflect upon and rethink the great issues the Court has confronted in the past and to become truly your own man. But to be your own man the first in the series of questions you must ask yourself is this: Beyond your own admirable personal drive, what were the primary forces or acts of good fortune that made your major achievements possible? This is a hard and difficult question. Let me suggest that you focus on at least four areas: (1) the impact of the work of civil rights lawyers and civil rights organizations on your life; (2) other than having picked a few individuals to be their favorite colored person, what it is that the conservatives of each generation have done that has been of significant benefit to African-Americans, women, or other minorities; (3) the impact of the eradication of racial barriers in the voting on your own confirmation; and (4) the impact of civil rights victories in the area of housing and privacy on your personal life.

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***IV. The Impact of the Work of Civil Rights Lawyers and Civil Rights Organizations on Your Life***

During the time when civil rights organizations were challenging the Reagan Administration, I was frankly dismayed by some of your responses to and denigrations of these organizations. In 1984, the *Washington Post* reported that you had criticized traditional civil rights leaders because, instead of trying to reshape the Administration's policies, they had gone to the news media to "bitch, bitch, bitch, moan and moan, whine and whine."[31] If that is still your assessment of these civil rights organizations or their leaders, I suggest, Justice Thomas, that you should ask yourself every day what would have happened to you if there had never been a Charles Hamilton Houston, a William Henry Hastie, a Thurgood Marshall, and that small cadre of other lawyers associated with them, who laid the groundwork for success in the twentieth-century racial civil rights cases? Couldn't they have been similarly charged with, as you phrased it, bitching and moaning and whining when they challenged the racism in the administrations of prior presidents, governors, and public officials? If there had never been an effective NAACP, isn't it highly probable that you might still be in Pin Point, Georgia, working as a laborer as some of your relatives did for decades?

Even though you had the good fortune to move to Savannah, Georgia, in 1955, would you have been able to get out of Savannah and get a responsible job if decades earlier the NAACP had not been challenging racial injustice throughout America? If the NAACP had not been lobbying, picketing, protesting, and politicking for a 1964 Civil Rights Act, would Monsanto Chemical Company have opened their doors to you in 1977? If Title VII had

not been enacted might not American companies still continue to discriminate on the basis of race, gender, and national origin?

The philosophy of civil rights protest evolved out of the fact that black people were forced to confront this country's racist institutions without the benefit of equal access to those institutions. For example, in January of 1941, A. Philip Randolph planned a march on Washington, D.C., to protest widespread employment discrimination in the defense industry.[32] In order to avoid the prospect of a demonstration by potentially tens of thousands of Blacks, President Franklin Delano Roosevelt issued Executive Order 8802 barring discrimination in defense industries or government. The order led to the inclusion of anti-discrimination clauses in all government defense contracts and the establishment of the Fair Employment Practices Committee.[33]

In 1940, President Roosevelt appointed William Henry Hastie as civilian aide to Secretary of War Henry L. Stimson. Hastie fought tirelessly against discrimination, but when confronted with an unabated program of segregation in all areas of the armed forces, he resigned on January 31, 1943. His visible and dramatic protest sparked the move towards integrating the armed forces, with immediate and far-reaching results in the army air corps.[34]

A. Philip Randolph and William Hastie understood—though I wonder if you do—what Frederick Douglass meant when he wrote:

> The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have

> been born of earnest struggle. . . . If there is no struggle there is no progress. . . .
>
> This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.[35]

The struggles of civil rights organizations and civil rights lawyers have been both moral and physical, and their victories have been neither easy nor sudden. Though the *Brown* decision was issued only six years after your birth, the road to *Brown* started more than a century earlier. It started when Prudence Crandall was arrested in Connecticut in 1833 for attempting to provide schooling for colored girls.[36] It was continued in 1849 when Charles Sumner, a white lawyer and abolitionist, and Benjamin Roberts, a black lawyer,[37] challenged segregated schools in Boston.[38] It was continued as the NAACP, starting with Charles Hamilton Houston's suit, *Murray v. Pearson*,[39] in 1936, challenged Maryland's policy of excluding Blacks from the University of Maryland Law School. It was continued in *Gaines v. Missouri*,[40] when Houston challenged a 1937 decision of the Missouri Supreme Court. The Missouri courts had held that because law schools in the states of Illinois, Iowa, Kansas, and Nebraska accepted Negroes, a twenty-five-year-old black citizen of Missouri was not being denied his constitutional right to equal protection under the law when he was excluded from the only state supported law school in Missouri. It was continued in *Sweatt v. Painter*[41] in 1946, when Heman Marion Sweatt filed suit for admission to the Law School of the University

of Texas after his application was rejected solely because he was black. Rather than admit him, the University postponed the matter for years and put up a separate and unaccredited law school for Blacks. It was continued in a series of cases against the University of Oklahoma, when, in 1950, in *McLaurin v. Oklahoma*,[42] G. W. McLaurin, a sixty-eight-year-old man, applied to the University of Oklahoma to obtain a Doctorate in education. He had earned his Master's degree in 1948, and had been teaching at Langston University, the state's college for Negroes.[43] Yet he was "required to sit apart at . . . designated desk[s] in an anteroom adjoining the classroom . . . [and] on the mezzanine floor of the library, . . . and to sit at a designated table and to eat at a different time from the other students in the school cafeteria."[44]

The significance of the victory in the *Brown* case cannot be overstated. *Brown* changed the moral tone of America; by eliminating the legitimization of state-imposed racism it implicitly questioned racism wherever it was used. It created a milieu in which private colleges were forced to recognize their failures in excluding or not welcoming minority students. I submit that even your distinguished undergraduate college, Holy Cross, and Yale University were influenced by the milieu created by *Brown* and thus became more sensitive to the need to create programs for the recruitment of competent minority students. In short, isn't it possible that you might not have gone to Holy Cross if the NAACP and other civil rights organizations, Martin Luther King and the Supreme Court, had not recast the racial mores of America? And if you had not gone to Holy Cross, and instead had gone to some underfunded state college for Negroes in Georgia, would you have been

admitted to Yale Law School, and would you have met the alumni who played such a prominent role in maximizing your professional options?

I have cited this litany of NAACP[45] cases because I don't understand why you appeared so eager to criticize civil rights organizations or their leaders. In the 1980s, Benjamin Hooks and John Jacobs worked just as tirelessly in the cause of civil rights as did their predecessors Walter White, Roy Wilkins, Whitney Young, and Vernon Jordan in the 1950s and '60s. As you now start to adjudicate cases involving civil rights, I hope you will have more judicial integrity than to demean those advocates of the disadvantaged who appear before you. If you and I had not gotten many of the positive reinforcements that these organizations fought for and that the post-*Brown* era made possible, probably neither you nor I would be federal judges today.

### *V. What Have the Conservatives Ever Contributed to African-Americans?*

During the last ten years, you have often described yourself as a black conservative. I must confess that, other than their own self-advancement, I am at a loss to understand what is it that the so-called black conservatives are so anxious to conserve. Now that you no longer have to be outspoken on their behalf, perhaps you will recognize that in the past it was the white "conservatives" who screamed "segregation now, segregation forever!" It was primarily the conservatives who attacked the Warren Court relentlessly because of *Brown v. Board of Education* and who stood in the way of almost every measure to ensure gender and racial advancement.

For example, on March 11, 1956, ninety-six members

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of Congress, representing eleven southern states, issued the "Southern Manifesto," in which they declared that the *Brown* decision was an "unwarranted exercise of power by the Court, contrary to the Constitution."[46] Ironically, those members of Congress reasoned that the *Brown* decision was "destroying the amicable relations between the white and negro races,"[47] and that "it had planted hatred and suspicion where there had been heretofore friendship and understanding."[48] They then pledged to use all lawful means to bring about the reversal of the decision, and praised those states which had declared the intention to resist its implementation.[49] The Southern Manifesto was more than mere political posturing by Southern Democrats. It was a thinly disguised racist attack on the constitutional and moral foundations of *Brown*. Where were the conservatives in the 1950s when the cause of equal rights needed every fair-minded voice it could find?

At every turn, the conservatives, either by tacit approbation or by active complicity, tried to derail the struggle for equal rights in this country. In the 1960s, it was the conservatives, including the then-senatorial candidate from Texas, George Bush,[50] the then-Governor from California, Ronald Reagan,[51] and the omnipresent Senator Strom Thurmond,[52] who argued that the 1964 Civil Rights Act was unconstitutional. In fact Senator Thurmond's 24 hour 18 minute filibuster during Senate deliberations on the 1957 Civil Rights Act set an all-time record.[53] He argued on the floor of the Senate that the provisions of the Act guaranteeing equal access to public accommodations amounted to an enslavement of white people.[54] If twenty-seven years ago George Bush, Ronald Reagan, and Strom Thurmond had succeeded, there would have been no posi-

tion for you to fill as Assistant Secretary for Civil Rights in the Department of Education. There would have been no such agency as the Equal Employment Commission for you to chair.

Thus, I think now is the time for you to reflect on the evolution of American constitutional and statutory law, as it has affected your personal options and improved the options for so many Americans, particularly non-whites, women, and the poor. If the conservative agenda of the 1950s, '60s, and '70s had been implemented, what would have been the results of the important Supreme Court cases that now protect your rights and the rights of millions of other Americans who can now no longer be discriminated against because of their race, religion, national origin, or physical disabilities? If, in 1954, the United States Supreme Court had accepted the traditional rationale that so many conservatives then espoused, would the 1896 *Plessy v. Ferguson* case, which announced the nefarious doctrine of "separate but equal," and which allowed massive inequalities, still be the law of the land? In short, if the conservatives of the 1950s had had their way, would there ever have been a *Brown v. Board of Education* to prohibit state-imposed racial segregation?

***VI. The Impact of Eradicating Racial Barriers to Voting***

Of the fifty-two senators who voted in favor of your confirmation, some thirteen hailed from nine southern states. Some may have voted for you because they agreed with President Bush's assessment that you were " 'the best person for the position.' "[55] But, candidly, Justice Thomas, I do not believe that you were indeed the most competent person to be on the Supreme Court. Charles Bowser, a

distinguished African-American Philadelphia lawyer, said, " 'I'd be willing to bet . . . that not one of the senators who voted to confirm Clarence Thomas would hire him as their lawyer.' "[56]

Thus, realistically, many senators probably did not think that you were the most qualified person available. Rather, they were acting solely as politicians, weighing the potential backlash in their states of the black vote that favored you for emotional reasons and the conservative white vote that favored you for ideological reasons. The black voting constituency is important in many states, and today it could make a difference as to whether many senators are or are not re-elected. So here, too, you benefitted from civil rights progress.

No longer could a United States Senator say what Senator Benjamin Tillman of South Carolina said in anger when President Theodore Roosevelt invited a moderate Negro, Booker T. Washington, to lunch at the White House: " 'Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their place.' "[57] Senator Tillman did not have to fear any retaliation by Blacks because South Carolina and most southern states kept Blacks "in their place" by manipulating the ballot box. For example, because they did not have to confront the restraints and prohibitions of later Supreme Court cases, the manipulated "white" primary allowed Tillman and other racist senators to profit from the threat of violence to Blacks who voted, and from the disproportionate electoral power given to rural whites. For years, the NAACP litigated some of the most significant cases attacking racism at the ballot box. That organization almost singlehandedly created the foundation for black po-

litical power that led in part to the 1965 Civil Rights Act.

Moreover, if it had not been for the Supreme Court's opinion in *Smith v. Allright*,[58] a case which Thurgood Marshall argued, most all the southern senators who voted for you would have been elected in what was once called a "white primary"—a process which precluded Blacks from effective voting in the southern primary election, where the real decisions were made on who would run every hamlet, township, city, county and state. The seminal case of *Baker v. Carr*,[59] which articulated the concept of one man-one vote, was part of a series of Supreme Court precedents that caused southern senators to recognize that patently racist diatribes could cost them an election. Thus your success even in your several confirmation votes is directly attributable to the efforts that the "activist" Warren Court and civil rights organizations have made over the decades.

***VII. Housing and Privacy***

If you are willing, Justice Thomas, to consider how the history of civil rights in this country has shaped your public life, then imagine for a moment how it has affected your private life. With some reluctance, I make the following comments about housing and marriage because I hope that reflecting on their constitutional implications may raise your consciousness and level of insight about the dangers of excessive intrusion by the state in personal and family relations.

From what I have seen of your house on television scans and in newspaper photos, it is apparent that you live in a comfortable Virginia neighborhood. Thus I start with Holmes's view that "a page of history is worth a volume

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of logic."[60] The history of Virginia's legislatively and judicially imposed racism should be particularly significant to you now that as a Supreme Court Justice you must determine the limits of a state's intrusion on family and other matters of privacy.

It is worthwhile pondering what the impact on you would have been if Virginia's legalized racism had been allowed to continue as a viable constitutional doctrine. In 1912, Virginia enacted a statute giving cities and towns the right to pass ordinances which would divide the city into segregated districts for black and white residents.[61] Segregated districts were designated white or black depending on the race of the majority of the residents.[62] It became a crime for any black person to move into and occupy a residence in an area known as a white district.[63] Similarly, it was a crime for any white person to move into a black district.[64]

Even prior to the Virginia statute of 1912, the cities of Ashland and Richmond had enacted such segregationist statutes.[65] The ordinances also imposed the same segregationist policies on any "place of public assembly."[66] Apparently schools, churches, and meeting places were defined by the color of their members. Thus, white Christian Virginia wanted to make sure that no black Christian churches were in their white Christian neighborhoods.

The impact of these statutes can be assessed by reviewing the experiences of two African-Americans, John Coleman and Mary Hopkins. Coleman purchased property in Ashland, Virginia in 1911.[67] In many ways he symbolized the American dream of achieving some modest upward mobility by being able to purchase a home earned through initiative and hard work. But shortly after moving to his

home, he was arrested for violating Ashland's segregation ordinance because a majority of the residents in the block were white. Also, in 1911, the City of Richmond prosecuted and convicted a black woman, Mary S. Hopkins, for moving into a predominantly white block.[68]

Coleman and Hopkins appealed their convictions to the Supreme Court of Virginia which held that the ordinances of Ashland and Richmond did not violate the United States Constitution and that the fines and convictions were valid.[69]

If Virginia's law of 1912 still prevailed, and if your community passed laws like the ordinances of Richmond and Ashland, you would not be able to live in your own house. Fortunately, the Virginia ordinances and statutes were in effect nullified by a case brought by the NAACP in 1915, where a similar statute of the City of Louisville was declared unconstitutional.[70] But even if your town council had not passed such an ordinance, the developers would in all probability have incorporated racially restrictive covenants in the title deeds to the individual homes. Thus, had it not been for the vigor of the NAACP's litigation efforts in a series of persistent attacks against racial covenants you would have been excluded from your own home. Fortunately, in 1948, in *Shelley v. Kraemer,*[71] a case argued by Thurgood Marshall, the NAACP succeeded in having such racially restrictive covenants declared unconstitutional.

Yet with all of those litigation victories, you still might not have been able to live in your present house because a private developer might have refused to sell you a home solely because you are an African-American. Again you would be saved because in 1968 the Supreme Court, in

*Jones v. Alfred H. Mayer Co.*, in an opinion by Justice Stewart, held that the 1866 Civil Rights Act precluded such private racial discrimination.[72] It was a relatively close case; the two dissenting justices said that the majority opinion was "ill-considered and ill-advised."[73] It was the values of the majority which made the difference. And it is your values that will determine the vitality of other civil rights acts for decades to come.

Had you overcome all of those barriers to housing and if you and your present wife decided that you wanted to reside in Virginia, you would nonetheless have been violating the Racial Integrity Act of 1924,[74] which the Virginia Supreme Court as late as 1966 said was consistent with the federal constitution because of the overriding state interest in the institution of marriage.[75] Although it was four years after the *Brown* case, Richard Perry Loving and his wife, Mildred Jeter Loving were convicted in 1958 and originally sentenced to one year in jail because of their interracial marriage. As an act of magnanimity the trial court later suspended the sentences, " 'for a period of 25 years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of 25 years.' "[76]

The conviction was affirmed by a unanimous Supreme Court of Virginia, though they remanded the case back as to the re-sentencing phase. Incidentally, the Virginia trial judge justified the constitutionality of the prohibition against interracial marriages as follows:

> "Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents.

> And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."[77]

If the Virginia courts had been sustained by the United States Supreme Court in 1966, and if, after your marriage, you and your wife had, like the Lovings, defied the Virginia statute by continuing to live in your present residence, you could have been in the penitentiary today rather than serving as an Associate Justice of the United States Supreme Court.

I note these pages of record from American legal history because they exemplify the tragedy of excessive intrusion on individual and family rights. The only persistent protector of privacy and family rights has been the United States Supreme Court, and such protection has occurred only when a majority of the Justices has possessed a broad vision of human rights. Will you, in your moment of truth, take for granted that the Constitution protects you and your wife against all forms of deliberate state intrusion into family and privacy matters, and protects you even against some forms of discrimination by other private parties such as the real estate developer, but nevertheless find that it does not protect the privacy rights of others, and particularly women, to make similarly highly personal and private decisions?

***Conclusion***

This letter may imply that I am somewhat skeptical as to what your performance will be as a Supreme Court Justice. Candidly, I and many other thoughtful Americans are very

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concerned about your appointment to the Supreme Court. But I am also sufficiently familiar with the history of the Supreme Court to know that a few of its members (not many) about whom there was substantial skepticism at the time of their appointment became truly outstanding Justices. In that context I think of Justice Hugo Black. I am impressed by the fact that at the very beginning of his illustrious career he articulated his vision of the responsibility of the Supreme Court. In one of his early major opinions he wrote, "courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, out-numbered, or . . . are non-conforming victims of prejudice and public excitement."[78]

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. I trust that you will ponder often the significance of the statement of Justice Blackmun, in a vigorous dissent of two years ago, when he said: "[S]adly . . . one wonders whether the majority [of the Court] still believes that . . . race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[79]

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

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and this moment.' "[80] 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 dedicated much of their lives to create the America that made your opportunities possible.[81] 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 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.[82] I have seen and *known* racial segregation and discrimination.[83] 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.[84] 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.[85] 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.

# NOTES

1. Justices Blackmun, Scalia, Kennedy, and Souter were members of the Harvard Law School Classes of 1932, 1960, 1961, and 1966 respectively. *See* THE AMERICAN BENCH 16, 46, 72, 1566 (Marie T. Hough ed., 1989). The first woman to graduate from Harvard Law School was a member of the Class of 1953. Telephone Interview with Emily Farnam, Alumni Affairs Office, Harvard University (Aug. 8, 1991).
2. Chief Justice Rehnquist and Justice O'Connor were members of the Stanford Law School Class of 1952. *See* THE AMERICAN BENCH, *supra* note 1, at 63, 69. Stanford did not graduate its first black law student until 1968. Telephone interview with Shirley Wedlake, Assistant to the Dean of Student Affairs, Stanford University Law School (Dec. 10, 1991).
3. Even courts have at times tolerated the use of the term "nigger" in one or another of its variations. In the not too distant past, appellate courts have upheld convictions despite prosecutors' references to black defendants and witnesses in such racist terms as "black rascal," "burr-headed nigger," "mean negro," "big nigger," "pickaninny," "mean nigger," "three nigger men," "niggers," and "nothing but just a common Negro, [a] black whore." *See* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U.L. REV. 479, 542–43 (1990).

   In addition, at least one Justice of the Supreme Court, James McReynolds, was a "white supremacist" who referred to Blacks as "niggers." *See* RANDALL KENNEDY, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1641 (1986); *see also* David Burner, *James McReynolds, in 3* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 2023, 2024 (Leon Friedman & Fred L. Israel eds., 1969) (reviewing Justice McReynolds's

numerous lone dissents as evidence of blatant racism). In 1938, a landmark desegregation case was argued before the Supreme Court by Charles Hamilton Houston, the brilliant black lawyer who laid the foundation for *Brown v. Board of Education*. During Houston's oral argument, McReynolds turned his back on the attorney and stared at the wall of the courtroom. Videotaped Statement of Judge Robert Carter to Judge Higginbotham (August 1987) (reviewing his observation of the argument in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)). 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.

WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975, at 14–15 (1980).

4. By contrast, according to the Census Bureau's definition of poverty, in 1991, one in five American children (and one in four preschoolers) is poor. *See* CLIFFORD M. JOHNSON ET AL., CHILD POVERTY IN AMERICA 1 (Children's Defense Fund report, 1991).
5. JAMES BALDWIN, *White Man's Guilt, in* THE PRICE OF THE TICKET 409, 410 (1985).
6. *See* ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES (1978). The published survey included ratings of only the first ninety-six justices, because the four Nixon appointees (Burger, Blackmun, Powell, and Rehnquist) had then been on the Court too short a time for an accurate evaluation to be made. *See id.* at 35–36.

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7. *Id.* at 37–40.
8. *Id.* at 37.
9. You have been particularly critical of its decision in *Brown v. Board of Education*. *See, e.g.*, Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 990–92 (1987) (criticizing the emphasis on social stigma in the *Brown* opinion, which left the Court's decision resting on "feelings" rather than "reason and moral and political principles"); Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, Speech to the Cato Institute (Oct. 2, 1987), *in* Assessing the Reagan Years 391, 392–93 (David Boaz ed., 1986) (arguing that the Court's opinion in *Brown* failed to articulate a clear principle to guide later decisions, leading to opinions in the area of race that overemphasized groups at the expense of individuals, and "argue[d] *against* what was best in the American political tradition"); Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, Speech to the Federalist Society for Law and Policy Studies, University of Virginia School of Law (Mar. 5, 1988), *in* 12 Harv. J.L. & Pub. Pol'y 63, 68 (1989) (asserting that adoption of Justice Harlan's view that the Constitution is "color-blind" would have provided the Court's civil rights opinions with the higher-law foundation necessary for a "just, wise, and *constitutional* decision").
10. *See* Blaustein & Mersky, *supra* note 6, at 37.
11. 163 U.S. 537 (1896).
12. *See* Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 Yale L.J. 637, 638 (1957).
13. Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., joined by Rehnquist, J., dissenting).
14. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3044 (1990) (Kennedy, J., dissenting).
15. For a thorough review of the background of *Plessy v. Ferguson*, and a particularly sharp criticism of the majority opinion, see Loren Miller, The Petitioners: The Story of the Supreme

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COURT OF THE UNITED STATES AND THE NEGRO 165–82 (1966). As an example of scholars who have criticized the opinion and the result in *Plessy*, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1474–75 (2d ed., 1988).

16. *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921) (noting that "judge-made law [is] one of the existing realities of life").
17. *Id.* at 103.
18. The concept of the "evolutionary movement" of the Constitution has been expressed by Justice Brennan in Regents of the University of California v. Bakke, 438 U.S. 312 (1978), and by Justice Marshall in his speech given on the occasion of the bicentennial of the Constitution. In *Bakke*, in a partial dissent joined by Justices White, Marshall, and Blackmun, Justice Brennan discussed how Congress had "eschewed any static definition of discrimination [in Title VI of the 1964 Civil Rights Act] in favor of broad language that could be shaped by experience, administrative necessity and *evolving judicial doctrine.*" *Id.* at 337 (Brennan, J., dissenting in part) (emphasis added). In Justice Brennan's view, Congress was aware of the *"evolutionary change* that constitutional law in the area of racial discrimination was undergoing in 1964." *Id.* at 340. Congress, thus, equated Title VI's prohibition against discrimination with the commands of the Fifth and Fourteenth Amendment to the Constitution so that the meaning of the statute's prohibition would evolve with the interpretations of the command of the Constitution. *See id.* at 340. In another context, during his speech given on the occasion of the bicentennial of the Constitution, Justice Marshall commented that he did "not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention." Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). In Justice Marshall's view, the Constitution had been made far more meaningful through its *"promising evolution* through 200 years of history." *Id.* at 5 (emphasis added).
19. Sharon McPhail, *Will The Real Clarence Thomas Stand Up?*,

NAT'L B. ASS'N MAG., Oct. 1991, at 1.

20. *Id; see* Ruth Marcus, *Self-Made Conservative; Nominee Insists He Be Judged on Merits*, WASH. POST, July 2, 1991, at A1; Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19.
21. *See, e.g*, Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35 (1985) (asserting that the civil rights community is "wallowing in self-delusion and pulling the public with it"); Juan Williams, *EEOC Chairman Blasts Black Leaders*, WASH. POST, Oct. 25, 1984, at A7 ("These guys [black leaders] are sitting there watching the destruction of our race. . . . Ronald Reagan isn't the problem. Former President Jimmy Carter was not the problem. The lack of black leadership is the problem.").
22. *See supra* note 9.
23. *See* Clarence Thomas, *Black Americans Based Claim for Freedom on Constitution*, SAN DIEGO UNION & TRIB., Oct. 6, 1987, at B7 (claiming that Marshall's observation of the deficiencies in some respects of the Framers' constitutional vision "alienates all Americans, and not just black Americans, from their high and noble intention").
24. *See id*.
25. Marshall, *supra* note 18, at 5.
26. Thomas, *supra* note 23, at B7. In the same diatribe, you also quoted out of context excerpts from the works of Frederick Douglass, Martin Luther King, Jr., and John Hope Franklin. *See id*. Their works, however, provide no support for what amounted to a scurrilous attack on Justice Marshall. In fact, John Hope Franklin wrote the epilogue to a report by the NAACP opposing your nomination to the Supreme Court. *See* John Hope Franklin, *Booker T. Washington, Revisited*, N.Y. TIMES, Aug. 1, 1991, at A21. There he quite properly observed that, by adopting a philosophy of alleged self-help without seeking to assure equal opportunities to all persons, you "placed [yourself] in the unseemly position of denying to others the very opportunities and the kind of assistance from public and private quarters that have placed [you] where you are today."

*Id.*

27. Marshall, *supra* note 18, at 5.
28. *Id.*
29. On April 1, 1987, some weeks before Justice Marshall's speech, I gave the Herman Phleger Lecture at Stanford University. I stated in my presentation:

> In this year of the Bicentennial you will hear a great deal that is laudatory about our nation's Constitution and legal heritage. Much of this praise will be justified. The danger is that the current oratory and scholarship may lapse into mere self-congratulatory back-patting, suggesting that everything in America has been, or is, near perfect.
>
> We must not allow our euphoria to cause us to focus solely on our strengths. Somewhat like physicians examining a mighty patient, we also must diagnose and evaluate the pathologies that have disabled our otherwise healthy institutions.
>
> I trust that you will understand that my critiques of our nation's past and present shortcomings do not imply that I am oblivious to its many exceptional virtues. I freely acknowledge the importance of two centuries of our enduring and evolving Constitution, the subsequently enacted Bill of Rights, the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments, and the protections of these rights, more often than not, by federal courts.
>
> Passion for freedom and commitment to liberty are important values in American society. If we can retain this passion and commitment and direct it towards eradicating the remaining significant areas of social injustice on our nation's unfinished agenda, our pride should persist—despite the daily tragic reminders that there are far too many homeless, far too many hungry, and far too many victims of racism, sexism, and pernicious biases against those of different religions and national origins. The truth is that, even with these faults, we have been building a society with increasing levels of social justice embracing more and more Americans each decade.

A. Leon Higginbotham, Jr., *The Bicentennial of the Constitution: A Racial Perspective*, STAN. LAW., Fall 1987, at 8.

30. JAMES BALDWIN, *The Fire Next Time*, *in* THE PRICE OF THE TICKET 336 (1985). In a similar vein, on April 5, 1976, at the dedication of Independence Hall in Philadelphia on the anniversary of the Declaration of Independence, Judge William Hastie told the celebrants that, although there was reason to

salute the nation on its bicentennial, "a nation's beginning is a proper source of reflective pride only to the extent that the subsequent and continuing process of its becoming deserves celebration." GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 242 (1984).

31. *See* Williams, *supra* note 21, at A7 (quoting Clarence Thomas).
32. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 388–89 (1988); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 219 (1975).
33. *See* FRANKLIN & MOSS, *supra* note 32, at 388–89; KLUGER, *supra* note 32, at 219.
34. *See* WARE, *supra* note 30, at 95–98, 124–33.
35. Frederick Douglass, Speech Before The West Indian Emancipation Society (Aug. 4, 1857), *in* 2 PHILIP S. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 437 (1950).
36. *See* Crandall v. State, 10 Conn. 339 (1834).
37. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 147 (1961).
38. *See* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).
39. 182 A. 590 (1936).
40. 305 U.S. 337 (1938).
41. 339 U.S. 629 (1950).
42. 339 U.S. 637 (1950).
43. *See* MILLER, *supra* note 15, at 336.
44. *McLaurin*, 339 U.S. at 640.
45. I have used the term NAACP to include both the NAACP and the NAACP Legal Defense Fund. For examples of civil rights cases, see DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 57–59, 157–62, 186–92, 250–58, 287–300, 477–99 (2d ed. 1980); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 32–61 (1959).
46. 102 CONG. REC. 4255, 4515 (1956).
47. *Id.* at 4516.
48. *Id.*
49. *See id.*

50. *See* Doug Freelander, *The Senate-Bush: The Polls Give Him 'Excellent Chance,'* HOUSTON POST, Oct. 11, 1964, § 17, at 8.
51. *See* David S. Broder, *Reagan Attacks the Great Society*, N.Y. TIMES, June 17, 1966, at 41.
52. *See* CHARLES WHALEN AND BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 143 (1967).
53. *Id.*
54. SENATE COMMERCE COMM., CIVIL RIGHTS—PUBLIC ACCOMMODATIONS, S. REP. NO. 872, 88th Cong., 2d Sess. 62–63, 73–76 (1964) (Individual Views of Senator Strom Thurmond).
55. *The Supreme Court; Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14 (statement of President Bush).
56. Peter Binzer, *Bowser Is an Old Hand at Playing the Political Game in Philadelphia*, PHILA. INQUIRER, Nov. 13, 1991, at A11 (quoting Charles Bowser).
57. WILLIAM A. SINCLAIR, THE AFTERMATH OF SLAVERY: A STUDY OF THE CONDITION AND ENVIRONMENT OF THE AMERICAN NEGRO 187 (Afro-Am Press 1969) (1905) (quoting Senator Benjamin Tillman).
58. 321 U.S. 649 (1944).
59. 369 U.S. 186 (1962).
60. New York Trust Company v. Eisner, 256 U.S. 345, 349 (1921).
61. Act of Mar. 12, 1912, ch. 157, § 1, 1912 Va. Acts 330, 330.
62. *Id.* § 3, at 330–31
63. *Id.* § 4, at 331.
64. *Id.* There were a few statutory exceptions, the most important being that the servants of "the other race" could reside upon the premises that his or her employer owned or occupied. *Id.* § 9, at 332.
65. *See* Ashland, Va., Ordinance (Sept. 12, 1911) [hereinafter, *Ashland Ordinance*]; Richmond, Va., Ordinance (Dec. 5, 1911) [hereinafter, *Richmond Ordinance*].
66. *Ashland Ordinance*, *supra* note 65, §§ 1–3; *Richmond Ordinance*, *supra* note 65, §§ 1, 2.

67. *See* Hopkins v. City of Richmond, 86 S.E. 139, 142 (Va. 1915). At the time of the purchase, the house was occupied by a black tenant who had lived there prior to the enactment of the ordinance, so the purchase precipitated no change in the color composition or racial density of the neighborhood or block.
68. *Id.* at 141.
69. *Id.*
70. *See* Buchanan v. Warley, 245 U.S. 60 (1917).
71. 334 U.S. 1 (1948).
72. 392 U.S. 409 (1968).
73. *Id.* at 449 (Harlan, J., dissenting).
74. *See* Loving v. Virginia, 388 U.S. 1, 4–6 (1967).
75. *See* Loving v. Virginia, 147 S.E. 2d 78 (Va. 1966), *rev'd*, 388 U.S. 1 (1967).
76. *Id.* at 79 (quoting the trial court).
77. *Loving*, 388 U.S. at 3 (quoting the trial judge).
78. Chambers v. Florida, 309 U.S. 227, 241 (1940).
79. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).
80. *The Thomas Hearings; Excerpts from Senate Session on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A1 (opening statement of Clarence Thomas).
81. It is hardly possible to name all the individuals who fought to bring equal rights to all Americans. Some are gone. Others are fighting still. They include Prudence Crandall, Charles Sumner, Robert Morris, William Lloyd Garrison, William T. Coleman, Jr., Jack Greenberg, Judges Louis Pollak, Constance Baker Motley, Robert Carter, Collins Seitz, Justices Hugo Black, Lewis Powell, Harry Blackmun and John Paul Stevens. For those whom I have not named, their contribution to the cause of civil rights may be all the more heroic for at times being unsung. But, to paraphrase Yale Professor Owen Fiss's tribute to Justice Marshall: "As long as there is law, their names should be remembered, and when their stories are told, all the world should listen." Owen Fiss, *A Tribute to Justice Marshall*, 105 HARV. L. REV. 49, 55 (1991).
82. For an analysis of discrimination faced by Blacks in the areas of

voting, education, employment, and housing, see GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 479–86 (9th ed. 1944) (voting); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 360–69 (6th ed. 1988) (education); COMMITTEE ON THE STATUS OF BLACK AMERICANS, NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 88–91, 315–23 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) (housing and employment); *see also* MARY FRANCES BERRY & JOHN W. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA (1982).

83. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR at vii–ix (1978); A. Leon Higginbotham, Jr., *The Dream with Its Back against the Wall*, YALE L. REP., Spring 1990, at 34; A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 61 (1991).

84. As I wrote in a recent tribute to Justice Marshall:

> There appears to be a deliberate retrenchment by a majority of the current Supreme Court on many basic issues of human rights that Thurgood Marshall advocated and that the Warren and Burger Courts vindicated. This retrenchment . . . caused Justice Marshall's dissents to escalate from a total of 19 in his first five years while Earl Warren was Chief Justice, to a total of 225 in the five years since William Rehnquist became Chief Justice.

Higginbotham, *supra* note 83, at 65 n.55 (1991) (citation omitted); *see also* Higginbotham, *supra* note 3, at 587 & n. 526 (citing Justice Marshall's warning that "[i]t is difficult to characterize last term's decisions [of the Supreme Court] as the product of anything other than a deliberate retrenchment of the civil rights agenda"); A. Leon Higginbotham, Jr., F. Michael Higginbotham & Sandile Ngcobo, *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 4 U. ILL. L. REV. 763, 874 n. 612 (1990) (noting the recent tendency of the Supreme Court to ignore race discrimination).

85. In his recent tribute to Justice Marshall, Justice Brennan wrote: "In his twenty-four Terms on the Supreme Court, Justice

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Marshall played a crucial role in enforcing the constitutional protections that distinguish our democracy. Indeed, he leaves behind an enviable record of opinions supporting the rights of the less powerful and less fortunate." William J. Brennan, Jr., *A Tribute to Justice Marshall*, 105 HARV. L. REV. 23 (1991). You may serve on the Supreme Court twenty years longer than Justice Marshall. At the end of your career, I hope that thoughtful Americans may be able to speak similarly of you.

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CORNEL WEST

# Black Leadership and the Pitfalls of Racial Reasoning

The most depressing feature of the Clarence Thomas/Anita Hill hearings was neither the mean-spirited attacks of the Republicans nor the spineless silences of the Democrats—both reveal the predictable inability of most white politicians to talk candidly about race and gender. Rather, what most disturbed me was the low level of political discussion in black America about these hearings—a crude discourse about race and gender that bespeaks a failure of nerve of black leadership.

This failure of nerve was already manifest in the selection and confirmation process of Clarence Thomas. Bush's choice of Thomas caught most black leaders off guard. Few had the courage to say publicly that this was an act of cynical tokenism concealed by outright lies about Thomas being the most qualified candidate regardless of race. The fact that Thomas was simply unqualified for the Court—a

claim warranted by his undistinguished record as a student (mere graduation from Yale Law School does not qualify one for the Supreme Court!); his turbulent eight years at the EEOC, where he left thirteen thousand age-discrimination cases dying on the vine for lack of investigation; and his mediocre performance during a short fifteen months as an appellate court judge—was not even mentioned. The very fact that no black leader could utter publicly that a black appointee for the Supreme Court was *unqualified* shows how captive they are to white-racist stereotypes about black intellectual talent. The point here is not simply that if Thomas were white they would have no trouble uttering this fact from the rooftops, but also that their silence reveals that they may entertain the possibility that the racist stereotype is true. Hence their attempt to cover Thomas's mediocrity with silence. Of course, some privately admit his mediocrity then point out the mediocrity of Judge Souter and other Court judges—as if white mediocrity is a justification for black mediocrity. No double standards here, this argument goes, if a black man is unqualified, one can defend and excuse him by appealing to other unqualified white judges. This chimes well with a cynical tokenism of the lowest common denominator—with little concern about shattering the racist stereotype or furthering the public interest in the nation. It also renders invisible highly qualified black judges who deserve serious consideration for selection to the Court.

How did much of black leadership get in this bind? Why did so many of them capitulate to Bush's cynical strategy? Three reasons loom large. First, Thomas's claim to racial authenticity—his birth in Jim Crow Georgia, his childhood spent as the grandson of a black sharecropper, his

undeniably black phenotype degraded by racist ideals of beauty, and his gallant black struggle for achievement in racist America. Second, the complex relation of this claim to racial authenticity to the increasing closing-ranks mentality in black America. Escalating black-nationalist sentiments—the notion that America's will to racial justice is weak and therefore black people must close ranks for survival in a hostile country—rests principally upon claims to racial authenticity. Third, the way in which black-nationalist sentiments promote and encourage black cultural conservatism, especially black patriarchal (and homophobic) power. The idea of black people closing ranks against hostile white Americans reinforces black male power exercised over black women (e.g., to protect, regulate, subordinate, and hence usually, though not always, use and abuse women) in order to preserve black social order under circumstances of white-literal attack and symbolic assault.

Most black leaders got lost in this thicket of reasoning and thus got caught in a vulgar form of racial reasoning: *black authenticity—black closing-ranks mentality—black male subordination of black women in the interests of the black community in a hostile white-racist country*. This line of racial reasoning leads to such questions as "Is Thomas really black?"; "Is he black enough to be defended?"; "Is he just black on the outside?" et al. In fact, these kinds of questions were asked, debated, and answered throughout black America in barber shops, beauty salons, living rooms, churches, mosques, and schoolrooms.

Unfortunately, the very framework of this line of racial reasoning was not called into question. Yet as long as racial reasoning regulates black thought and action, Clarence Thomases will continue to haunt black America—as Bush

and his ilk sit back, watch, and prosper. How does one undermine the framework of racial reasoning? By dismantling each pillar slowly and systematically. The fundamental aim of this undermining and dismantling is to replace racial reasoning with moral reasoning, to understand the black-freedom struggle not as an affair of skin pigmentation and racial phenotype but rather as a matter of ethical principles and wise politics, and to combat black-nationalist views of subordinating the issues and interests of black women by linking mature black self-love and self-respect to egalitarian relations within and outside black communities. The failure of nerve of black leadership is to refuse to undermine and dismantle the framework of racial reasoning.

Let us begin with the claim to racial authenticity—a claim Bush made about Thomas, Thomas made about himself in the hearings, and black nationalists make about themselves. What is black authenticity? Who is really black? First, blackness has no meaning outside of a system of race-conscious people and practices. After centuries of racist degradation, exploitation, and oppression in America, blackness means being minimally subject to white supremacist abuse and being part of a rich culture and community that has struggled against such abuse. All people with black skin and African phenotype are subject to potential white-supremacist abuse. Hence, all black Americans have some interest in resisting racism—even if their interest is confined solely to themselves as individuals rather than to larger black communities. Yet how this "interest" is defined and how individuals and communities are understood vary. So any claim to black authenticity—beyond being the potential object of racist abuse and heir

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to a grand tradition of black struggle—is contingent on one's political definition of black interest and one's ethical understanding of how this interest relates to individuals and communities in and outside black America. In short, blackness is a political and ethical construct. Appeals to black authenticity ignore this fact; such appeals hide and conceal the political and ethical dimension of blackness. This is why claims to racial authenticity trump political and ethical argument—and why racial reasoning discourages moral reasoning. Every claim to racial authenticity presupposes elaborate conceptions of political and ethical relations of interests, individuals, and communities. Racial reasoning conceals these presuppositions behind a deceptive cloak of racial consensus—yet racial reasoning is seductive because it invokes an undeniable history of racial abuse and racial struggle. This is why Bush's claims to Thomas's black authenticity, Thomas's claims about his own black authenticity, and black-nationalist claims about Black authenticity all highlight histories of black abuse and black struggle.

But if claims to black authenticity are political and ethical conceptions of the relation of black interests, individuals, and communities, then any attempt to confine Black authenticity to black-nationalist politics or black male interests warrants suspicion. For example, black leaders failed to highlight the problematic claims Clarence Thomas made about his sister, Emma Mae, regarding her experience with the welfare system. In front of a conservative audience in San Francisco, Thomas made her out to be a welfare scrounger dependent on state support. Yet, like most black women in American history, Emma Mae is a hardworking person, sensitive enough to take care of her sick aunt, and she was unable to work for a short period of

time. After she got off welfare, she worked two jobs—until three in the morning! This episode reveals not only a lack of integrity and character on Thomas's part; failure to highlight it by black leaders discloses a conception of black authenticity confined to black male interests, individuals, and communities. In short, the refusal to give weight to the interests of black women by most black leaders was already apparent before Anita Hill appeared on the scene.

The claims to black authenticity that feed on the closing-ranks mentality of black people are dangerous precisely because this closing of ranks is usually done at the expense of black women. It also tends to ignore the divisions of class and sexual orientation in black America—divisions that require attention if *all* Black interests, individuals, and communities are to be taken into consideration. Thomas's conservative Republican politics does not promote a closing-ranks mentality; instead, his claim to black authenticity is for the purpose of self-promotion, to gain power and prestige. All his professional life he has championed individual achievement and race-free standards. Yet when he saw his ship sinking, he played the racial card of black victimization and black solidarity at the expense of Anita Hill. Like his sister Emma Mae, Anita Hill could be used and abused for his own self-interested conception of black authenticity and racial solidarity.

Thomas played this racial card with success—first with appeals to his victimization in Jim Crow Georgia and later to his victimization by a "high-tech lynching"—primarily because of the deep cultural conservatism in white and black America. In white America this cultural conservatism takes the form of a chronic racism, sexism, and homophobia. Hence, only certain kinds of black people deserve

high positions, that is, those who accept the rules of the game played by white America. In black America, this cultural conservatism takes the form of an inchoate xenophobia (e.g., against whites, Jews, and Asian Americans), systemic sexism, and homophobia. Like all conservatisms rooted in a quest for order, the pervasive disorder in white and, especially, black America fans and fuels the channeling of rage toward the most vulnerable and degraded members of the community. For white America this means primarily scapegoating black people, women, gays, and lesbians. For black America the targets are principally black women and black gays and lesbians. In this way black-nationalist and black-male-centered claims to black authenticity reinforce black cultural conservatism. The support of Louis Farrakhan's Nation of Islam for Clarence Thomas—despite Farrakhan's critique of Republican Party racist and conservative policies—highlights this fact. It also shows how racial reasoning leads disparate viewpoints in black America to the same dead end—with substantive ethical principles and savvy, wise politics left out.

The undermining and dismantling of the framework of racial reasoning—especially the basic notions of black authenticity, the closing-ranks mentality, and black cultural conservatism—leads toward a new framework for black thought and method. This new framework should be a *prophetic* one of moral reasoning, with its fundamental ideas of a mature black identity, coalition strategy, and black cultural democracy. Instead of cathartic appeals to black authenticity, a prophetic viewpoint bases mature black self-love and self-respect on the moral quality of black responses to undeniable racist degradation in the American past and present. These responses assume neither

a black essence that all black people share nor one black perspective to which all black people should adhere. Rather, a prophetic framework encourages *moral* assessment of the variety of perspectives held by black people and selects those views based on black dignity and decency that eschew putting any group of people or culture on a pedestal or in the gutter. Instead, blackness is understood to be either the perennial possibility of white-supremacist abuse or the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse—yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups). And all such styles and modes stand in need of ethical evaluation. Mature black identity results from an acknowledgment of the specific black responses to white-supremacist abuses and a moral assessment of these responses such that the humanity of black people does not rest on deifying or demonizing others.

Instead of a closing-ranks mentality, a prophetic framework encourages a coalition strategy that solicits genuine solidarity with those deeply committed to antiracist struggle. This strategy is neither naive nor opportunistic; black suspicion of whites, Latinos, Jews, and Asian Americans runs deep for historical reasons. Yet there are slight though significant antiracist traditions among whites, Asian Americans, and especially Latinos, Jews, and indigenous people that must not be cast aside. Such coalitions are important precisely because they not only enhance the plight of black people but also because they enrich the quality of life in the country.

Lastly, a prophetic framework replaces black cultural conservatism with black cultural democracy. Instead of

authoritarian sensibilities that subordinate women or degrade gays and lesbians, black cultural democracy promotes the equality of black women and men and the humanity of black gays and lesbians. In short, black cultural democracy rejects the pervasive patriarchy and homophobia in black American life.

If most black leaders had adopted a prophetic framework of moral reasoning rather than a narrow framework of racial reasoning, the debate over the Thomas-Hill hearings would have proceeded in a quite different manner in black America. For example, both Thomas and Hill would be viewed as two black conservative supporters of some of the most vicious policies to besiege black working and poor communities since Jim and Jane Crow segregation. Both Thomas and Hill supported an unprecedented redistribution of wealth from working people to well-to-do people in the form of regressive taxation, deregulation policies, cutbacks and slowdowns in public service programs, takebacks at the negotiation table between workers and management, and military buildups at the Pentagon. Both Thomas and Hill supported the unleashing of unbridled capitalist market forces on a level never witnessed before in this country that have devastated black working and poor communities. These market forces took the form principally of unregulated corporative and financial expansion and intense entrepreneurial activity. This tremendous ferment in big and small businesses—including enormous bonanzas in speculation, leveraged buy-outs and mergers, as well as high levels of corruption and graft—contributed to a new kind of culture of consumption in white and black America. Never before has the seductive market way of life held such sway in nearly every sphere of American life.

This market way of life promotes addictions to stimulation and obsessions with comfort and convenience. These addictions and obsessions—centered primarily around bodily pleasures and status rankings—constitute market moralities of various sorts. The common denominator is a rugged and ragged individualism and rapacious hedonism in quest of a perennial "high" in body and mind.

In the hearings Clarence Thomas emerged as the exemplary hedonist, addicted to pornography and captive to a stereotypical self-image of the powerful black man who reveals in sexual prowess in a racist society. Anita Hill appears as the exemplary careerist addicted to job promotion and captive to the stereotypical self-image of the sacrificial black woman who suffers silently and alone. There should be little doubt that Thomas's claims are suspect—those about his sister, his eighteen-year silence about *Roe* v. *Wade,* his intentions in the Heritage Foundation speech praising the antiabortion essay by Lewis Lehrman, and the contours of his conservative political philosophy. Furthermore, his obdurate stonewalling in regard to his private life was symptomatic of all addicts—passionate denial and irrational cover-up. There also should be little doubt that Anita Hill's truth-telling was a break from her careerist ambitions. On the one hand, she strikes me as a person of integrity and honesty. On the other hand, she indeed put a premium on job advancement—even at painful personal cost. Yet her speaking out disrupted this pattern of behavior and she found herself supported only by people who opposed the very conservative policies she otherwise championed, namely, progressive feminists, liberals, and some black folk. How strange she must feel being a hero to her former foes. One wonders whether Judge Bork

supported her as fervently as she did him a few years ago.

A prophetic framework of moral reasoning would have liberated black leaders from the racial guilt of opposing a black man for the highest court in the land and feeling as if one had to choose between a black woman and a black man. Like the Congressional Black Caucus (minus one?), black people could simply oppose Thomas based on qualifications and principle. And one could choose between two black conservatives based on their sworn testimonies in light of the patterns of their behavior in the recent past. Similarly, black leaders could avoid being duped by Thomas's desperate and vulgar appeals to racial victimization by a white male Senate committee who handled him gently (no questions about his private life, no queries about his problematic claims). Like Senator Hollings, who knows racial intimidation when he sees it (given his past experiences with it), black leaders could see through this rhetorical charade and call a moral spade a moral spade.

Unfortunately, most of Black leadership remained caught in a framework of racial reasoning—even when they opposed Thomas and/or supported Hill. Rarely did we have a black leader highlight the moral content of a mature black identity, accent the crucial role of coalition strategy in the struggle for justice, or promote the ideal of black cultural democracy. Instead, the debate evolved around glib formulations of a black "role model" based on mere pigmentation, an atavistic defense of blackness that mirrors the increasing xenophobia in American life and a silence about the ugly authoritarian practices in black America that range from sexual harassment to indescribable violence against women. Hence, a grand opportunity for

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substantive discussion and struggle over race and gender was missed in black America and the larger society. And black leadership must share some of the blame. As long as black leaders remain caught in a framework of racial reasoning, they will not rise above the manipulative language of Bush and Thomas—just as the state of siege (the death, disease, and destruction) raging in much of black America creates more wastelands and combat zones. Where there is no vision, the people perish; where there is no framework of moral reasoning, the people close ranks in a war of all against all. The growing gangsterization of America results in part from a market-driven racial reasoning prevalent from the White House to the projects. In this sense, George Bush, David Duke, and gangster rap artists speak the same language from different social locations—only racial reasoning can save us. Yet I hear a cloud of witnesses from afar—Sojourner Truth, Wendell Phillips, Emma Goldman, A. Philip Randolph, Ella Baker, Fannie Lou Hamer, Michael Harrington, Abraham Joshua Heschel, Tom Hayden, Harvey Milk, Robert Moses, Barbara Ehrenreich, Martin Luther King, Jr., and many anonymous others—who championed the struggle for freedom and justice in a prophetic framework of moral reasoning. They understood that the pitfalls of racial reasoning are too costly in mind, body, and soul—especially for a downtrodden and despised people like black Americans. The best of our leadership have recognized this valuable truth—and more must do so in the future if America is to survive with any moral sense.

# PERMISSIONS/ACKNOWLEDGMENTS

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# RACE-ING JUSTICE, EN-GENDERING POWER

## Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality

*Edited and with an Introduction by*

**TONI MORRISON**

*Pantheon Books, New York*

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Black Leadership and the Pitfalls of Moral Reasoning

-Cornel West

TONI MORRISON

# Introduction: Friday on the Potomac

I have never asked to be nominated. . . . Mr. Chairman, I am a victim of this process.

—Clarence Thomas, Friday, October 11, 1991

It would have been more comfortable to remain silent. . . . I took no initiative to inform anyone. . . . I could not keep silent.

—Anita Hill, Friday, October 11, 1991

At last he lays his head flat upon the ground, close to my foot, and sets my other foot upon his head, as he had done before; and after this, made all the signs to me of subjugation, servitude, and submission imaginable, to let me know how he would serve me as long as he lived.

—Daniel Defoe, *Robinson Crusoe*

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Clusters of black people pray in front of the White House for the Lord not to abandon them, to intervene and crush the forces that would prevent a black nominee to the Supreme Court from assuming the seat felt by them to be reserved for a member of the race. Other groups of blacks stare at the television set, revolted by the president's nomination of the one candidate they believed obviously unfit to adjudicate legal and policy matters concerning them. Everyone interested in the outcome of this nomination, regardless of race, class, gender, religion, or profession, turns to as many forms of media as are available. They read the *Washington Post* for verification of their dread or their hope, read the *New York Times* as though it were *Pravda,* searching between the lines of the official story for one that most nearly approximates what might really be happening. They read local papers to see if the reaction among their neighbors is similar to their own, or they try to figure out on what information their own response should be based. They have listened to newscasters and anchor people for the bits and bites that pointed to, or deflected attention from, the machinery of campaigns to reject or accept the nominee. They have watched television screens that seem to watch back, that dismiss viewers or call upon them for flavor, reinforcement, or routine dissent. Polls assure and shock, gratify and discredit those who took them into serious account.

But most of all, people talked to one another. There are passionate, sometimes acrimonious discussions between mothers and daughters, fathers and sons, husbands and wives, siblings, friends, acquaintances, colleagues with whom, now, there is reason to embrace or to expel from their close circle. Sophisticated legal debates merge with

locker-room guffaws; poised exchanges about the ethics and moral responsibilities of governance are debased by cold indifference to individual claims and private vulnerabilities. Organizations and individuals call senators and urge friends to do the same—providing opinions and information, threatening, cajoling, explaining positions, or simply saying, Confirm! Reject! Vote yes. Vote no.

These were some of the scenes stirred up by the debates leading to the confirmation of Clarence Thomas, the revelations and evasions within the testimony, and by the irrevocable mark placed on those hearings by Anita Hill's accusations against the nominee. The points of the vector were all the plateaus of power and powerlessness: white men, black men, black women, white women, interracial couples; those with a traditionally conservative agenda, and those representing neoconservative conversions; citizens with radical and progressive programs; the full specter of the "pro" antagonists ("choice" and "life"); there were the publicly elected, the self-elected, the racial supremacists, the racial egalitarians, and nationalists of every stripe.

The intensity as well as the volume of these responses to the hearings were caused by more than the volatile content of the proceedings. The emptiness, the unforthcoming truths that lay at the center of the state's performance contributed much to the frenzy as people grappled for meaning, for substance unavailable through ordinary channels. Michael Rustin has described race as "both an empty category and one of the most destructive and powerful forms of social categorization." This paradox of a powerfully destructive emptiness can be used to illustrate the source of the confusion, the murk, the sense of helpless rage that accompanied the confirmation process.

It became clear, finally, what took place: a black male nominee to the Supreme Court was confirmed amid a controversy that raised and buried issues of profound social significance.

What is less clear is what happened, how it happened, why it happened; what implications may be drawn, what consequences may follow. For what was at stake during these hearings was history. In addition to what was taking place, something was happening. And as is almost always the case, the site of the exorcism of critical national issues was situated in the miasma of black life and inscribed on the bodies of black people.

It was to evaluate and analyze various aspects of what was and is happening that this collection suggested itself. The urgency of this project, an urgency that was overwhelming in November of 1991 when it began, is no less so now in 1992. For a number of reasons the consequences of *not* gathering the thoughts, the insights, the analyses of academics in a variety of disciplines would be too dire. The events surrounding the confirmation could be closed, left to the disappearing act that frequently follows the summing-up process typical of visual and print media. The seismic reactions of women and men in the workplace, in organizations and institutions, could be calmed and a return to "business as usual" made effortless. While the public, deeply concerned with the issues raised by the confirmation, waited for the ultimate historical account or some other text representing the "last word," there might not be available to it a more immediate aid to the reflective sorting out that subsequent and recent events would demand. Furthermore, the advancing siege upon American universities, launched by fears of "relevance" and change,

has fostered an impression and atmosphere of scholarly paralysis, censorship, and intimidation. Yet residing in the academic institutions of the country are not only some of the most knowledgeable citizens, but also those most able to respond quickly with contextualized and intellectually focused insights. And insight—from a range of views and disciplines—seemed to us in low supply.

For insight into the complicated and complicating events that the confirmation of Clarence Thomas became, one needs perspective, not attitudes; context, not anecdotes; analyses, not postures. For any kind of lasting illumination the focus must be on the history routinely ignored or played down or unknown. For the kind of insight that invites reflection, language must be critiqued. Frustrating language, devious calls to arms, and ancient inflammatory codes deployed to do their weary work of obfuscation, short circuiting, evasion, and distortion. The timeless and timely narratives upon which expressive language rests, narratives so ingrained and pervasive they seem inextricable from "reality," require identification. To begin to comprehend exactly what happened, it is important to distinguish between the veneer of interrogatory discourse and its substance; to remain skeptical of topics (such as whether the "system" is "working") which pretend that the restoration of order lies in the question; to be wary of narrow discussions on the effectiveness or defect of the "process" because content, volatile and uncontextualized, cannot be approached, let alone adequately discussed, in sixteen minutes or five hundred words or less. To inaugurate any discovery of what happened is to be conscious of the smooth syruplike and glistening oil poured daily to keep the machine of state from screeching too loudly or

breaking down entirely as it turns the earth of its own rut, digging itself deeper and deeper into the foundation of private life, burying itself for invisibility, for protection, for secrecy. To know what took place summary is enough. To learn what happened requires multiple points of address and analysis.

Nowhere, remarked an historian, nowhere in the debate before and during the confirmation hearings was there any mention, or even the implied idea, of the public good. How could there be, when the word "public" had itself become bankrupt, suffering guilt by association with the word "special," as the confusion of "public interest" with "special interest" proved. How could the notion of union, nation, or state surface when race, gender, and class, separately, paired, matched, and mismatched, collapsed in a heap or swinging a divisive sword, dominated every moment and word of the confirmation process?

For example, the nominee—chosen, the president said, without regard to race—was introduced by his sponsor with a reference to the nominee's laugh. It was, said Senator Danforth, second in his list of "the most fundamental points" about Clarence Thomas. "He is his own person. That is my first point. Second, he laughs. [Laughter] To some, this may seem a trivial matter. To me, it's important because laughter is the antidote to that dread disease, federalitis. The obvious strategy of interest groups trying to defeat a Supreme Court nominee is to suggest that there is something weird about the individual. I concede that there is something weird about Clarence Thomas. It's his laugh. It is the loudest laugh I have ever heard. It comes from deep inside, and it shakes his body. And here is something

at least as weird in this most up-tight of cities: the object of his laughter is most often himself."

Weird? Not at all. Neither the laugh nor Danforth's reference to it. Every black person who heard those words understood. How necessary, how reassuring were both the grin and its being summoned for display. It is the laughter, the chuckle, that invites and precedes any discussion of association with a black person. For whites who require it, it is the gesture of accommodation and obedience needed to open discussion with a black person and certainly to continue it. The ethnic joke is one formulation—the obligatory recognition of race and possible equanimity in the face of it. But in the more polite halls of the Senate, the laugh will do, the willingness to laugh; its power as a sign takes the place of the high sign of perfect understanding. It is difficult to imagine a sponsor introducing Robert Bork or William Gates (or that happy exception, Thurgood Marshall) with a call to this most clearly understood metonym for racial accommodation. Not simply because they may or may not have had a loud, infectious laugh, but because it would have been inappropriate, irrelevant, puzzling to do so.

But what was inappropriate, even startlingly salacious in other circumstances became the habitual text with this candidate. The *New York Times* found it interesting to include in that paper's initial story on the president's nominee a curious spotlight on his body. Weight lifting was among his accomplishments, said the *Times*, presciently, perhaps, since later on the candidate's body came violently into view. Of course, this may be simply a news account that aims to present an attractive image of a man about to

step onto a national stage, yet a reference to a black person's body is de rigueur in white discourse. Like the unswerving focus on the female body (whether the woman is a judge, an actress, a scholar, or a waitress), the black man's body is voluptuously dwelled upon in biographies about them, journalism on them, remarks about them. "I wanted to find out," said Senator Pete Domenici, "as best I could what his life—from outhouse to the White House . . . has been like." With vulgar remarks like that in print, why wouldn't the public's initial view of this black nominee have an otherwise puzzling, even silly, reference to body-building? Other erstwhile oddities rippled through the media, glancing and stroking black flesh. President Bush probably felt he was being friendly, charmingly informal, when he invited this black man into his bedroom for the interview. "That is where Mr. Bush made the final offer and Judge Thomas accepted." To make Thomas feel at home was more important than to respect him, apparently, and the *Times* agreed, selecting this tidbit to report in an article that ended with a second tantalizing, not so veiled reference to the nominee's body. When asked by reporters whether he expected to play golf, "one of Mr. Bush's favorite sports," Thomas replied, "No. The ball's too small." Thomas's answer is familiar repartee; but the nuanced emphasis gained by the remark's position in the piece is familiar too. What would have been extraordinary would have been to ignore Thomas's body, for in ignoring it, the articles would have had to discuss in some detail that aspect of him more difficult to appraise—his mind.

In a society with a history of trying to accommodate both slavery and freedom, and a present that wishes both to exploit and deny the pervasiveness of racism, black

people are rarely individualized. Even when his supporters were extolling the fierce independence and the "his own man" line about Clarence Thomas, their block and blocked thinking of racial stereotype prevailed. Without individuation, without nonracial perception, black people, as a group, are used to signify the polar opposites of love and repulsion. On the one hand, they signify benevolence, harmless and servile guardianship, and endless love. On the other hand, they have come to represent insanity, illicit sexuality, and chaos. In the confirmation hearings the two fictions were at war and on display. They are interchangeable fictions from a utilitarian menu and can be mixed and matched to suit any racial palette. Furthermore, they do not need logical transition from one set of associations to another. Like Captain Delano in *Benito Cereno*, the racist thinker can jump from the view of the slave, Babo, as "naturally docile, made for servitude" to "savage cannibal" without any gesture toward what may lie in between the two conclusions, or any explanation of the jump from puppy to monster, so the truth of Babo's situation—that he is leading a surreptitious rebellion aboard the slave ship, that he is a clever man who wants to be free—never enters the equation. The confirmation hearings, as it turned out, had two black persons to use to nourish these fictions. Thus, the candidate was cloaked in the garments of loyalty, guardianship, and (remember the laugh) limitless love. Love of God via his Catholic school, of servitude via a patriarchal disciplinarian grandfather, of loyalty to party via his accumulated speeches and the trophies of "America" on his office walls. The interrogator, therefore, the accusing witness Anita Hill, was dressed in the oppositional costume of madness, anarchic sexuality, and explosive ver-

bal violence. There seemed to be no other explanation for her testimony. Even Clarence Thomas was at a loss to explain not her charges but why she would make them. All he could come up with is speculation on Professor Hill's dislike of "lighter-complexioned" women—meaning, one gathers, his marriage to a white woman. No other narrative context could be found for her charges, no motive except fantasy, wanton and destructive, or a jealousy that destabilized her. Since neither the press nor the Senate Judiciary Committee would entertain seriously or exhaustively the truth of her accusations, she could be called any number or pair of discrediting terms and the contradictions would never be called into question, because, as a black woman, she was contradiction itself, irrationality in the flesh. She was portrayed as a lesbian who hated men *and* a vamp who could be ensnared and painfully rejected by them. She was a mixture heretofore not recognized in the glossary of racial tropes: an *intellectual* daughter of black *farmers*; a *black female* taking *offense*; a black *lady* repeating *dirty words*. Anita Hill's description of Thomas's behavior toward her did not ignite a careful search for the truth; her testimony simply produced an exchange of racial tropes. Now it was he, the nominee, who was in danger of moving from "natural servant" to "savage demon," and the force of the balance of the confirmation process was to reorder these signifying fictions. Is he lying or is she? Is he the benevolent one and she the insane one? Or is he the date raper, sexual assaulter, the illicit sexual signal, and she the docile, loyal servant? Those two major fictions, either/or, were blasted and tilted by a factual thing masquerading as a true thing: lynching. Being a fact of both white history and black life, lynching is also the metaphor of itself. While the mythologies

about black personae debauched the confirmation process for all time, the history of black life was appropriated to elevate it.

An accusation of such weight as sexual misconduct would probably have disqualified a white candidate on its face. Rather than any need for "proof," the slightest possibility that it was publicly verifiable would have nullified the candidacy, forced the committee members to insist on another nominee rather than entertain the necessity for public debate on so loathsome a charge. But in a racialized and race-conscious society, standards are changed, facts marginalized, repressed, and the willingness to air such charges, actually to debate them, outweighed the seemliness of a substantive hearing because the actors were black. Rather than claiming how certain feminist interests forced the confrontation, rather than editorializing about how reluctant the committee members were to investigate Anita Hill's charges publicly and how humiliated they were in doing so, it seems blazingly clear that with this unprecedented opportunity to hover over and to cluck at, to meditate and ponder the limits and excesses of black bodies, no other strategies were going to be entertained. There would be no recommendation of withdrawal by sponsor, president, senators, or anybody. No request for or insistence that the executive branch propose another name so that such volatile issues could be taken up in a forum more suitable to their airing, and possibly receive an open and just decision. No. The participants were black, so what could it matter? The participants were black and therefore "known," serviceable, expendable in the interests of limning out one or the other of two mutually antagonistic fabulations. Under the pressure of voyeuristic desire, fueled

by mythologies that render blacks publicly serviceable instruments of private dread and longing, extraordinary behavior on the part of the state could take place. Anita Hill's witnesses, credible and persuasive as they were, could be dismissed, as one "reporter" said, apparently without shame, because they were too intellectual to be believed(!). Under the pressure of racist mythologies, loyal staff (all female) had more weight than disinterested observers or publicly available documentation. Under such pressure the chairman of the committee could apply criminal court procedure to a confirmation hearing and assure the candidate that the assumption of innocence lay with the nominee. As though innocence—rather than malfeasance or ethical character or fitness to serve—was the charge against which they struggled to judge the judge. As though a rhetorical "I am not a crook" had anything at all to do with the heavy responsibility the committee was under.

Would such accusations have elicited such outsize defense mechanisms if the candidate had been white? Would the committee and many interest groups have considered the suitability of a white candidate untainted by these accusations? Hardly, but with a black candidate, already stained by the figurations of blackness as sexual aggressiveness or rapaciousness or impotence, the stain need only be proved reasonably doubted, which is to say, if he is black, how can you tell if that really is a stain? Which is also to say, blackness is itself a stain, and therefore unstainable. Which is also to say, if he is black and about to ascend to the Supreme Court bench, if the bench is to become stain-free, this newest judge must be bleached, race-free, as his speeches and opinions illustrated. Allegations of sexual misconduct re-raced him, which, in this administration, meant, re-

stained him, dirtied him. Therefore the "dirt" that clung to him following those allegations, "dirt" he spoke of repeatedly, must be shown to have originated elsewhere. In this case the search for the racial stain turned on Anita Hill. Her character. Her motives. Not his.

Clarence Thomas has gone through the nomination process before, and in that connection has been investigated by the FBI before. Nothing is not known about him. And the senators know that nothing about him is not known. But what is known and what is useful to be distributed as knowledge are different things. In these hearings data, not to mention knowledge, had no place. The deliberations became a contest and the point was to win. At stake always was a court: stacked or balanced; irreproachable in its ethical and judicial standards or malleable and compliant in its political agenda; alert to and mindful of the real lives most of us live, as these lives are measured by the good of the republic, or a court that is aloof, delusional, indifferent to any mandate, popular or unpopular, if it is not first vetted by the executive branch.

As in virtually all of this nation's great debates, nonwhites and women figure powerfully, although their presence may be disguised, denied, or obliterated. So it is perhaps predictable that this instance—where serious issues of male prerogative and sexual assault, the issues of racial justice and racial redress, the problematics of governing and controlling women's bodies, the alterations of work space into (sexually) domesticated space—be subsumed into the debate over the candidacy for the Supreme Court. That these issues be worked out, on, and inscribed upon the canvas/

flesh of black people should come as no surprise to anyone.

The contempt emanating from the White House was palpable—it was not necessary for the candidate to be a first-rate legal scholar (as it had not been necessary for other candidates). Nor was it necessary that he have demonstrated a particular sensitivity to the issues and concerns of a race he belonged to but which "had no bearing" on his selection to fill a seat vacated by the single Supreme Court Justice who both belonged to and did represent the interests of that race. The "race" that "had no bearing" on the president's choice could nevertheless be counted on to support the nominee, since "skin voting" would overwhelm every other consideration. This riskless gamble held almost perfect sway. Many blacks were struck mute by the embarrassing position of agreeing with Klansmen and their sympathizers; others leaped to the defense of the candidate on the grounds that he was "no worse than X," or that any white candidate would be a throwback, or that "who knows what he might do or become in those hallowed halls?" Who knows? Well, his nominators did know, and they were correct, as even the earliest action Clarence Thomas has taken in the cases coming before the court confirms.

Appropriate also was the small, secret swearing-in ceremony once the candidate was confirmed. For secrecy had operated from the beginning. Not only the dismissed and suppressed charges against the candidate, but also deeper, more ancient secrets of males bonding and the demonizing of females who contradict them.

In addition to race, class surfaced in both predictable and unexpected ways. Predictably, the nominee was required to shuck: to convince white men in power that operating

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a trucking business was lowly work in a Georgia where most blacks would have blessed dirt for such work. It wasn't a hard shuck. Because race and class—that is, black equals poor—is an equation that functions usefully if unexamined, it is possible to advance exclusionary and elitist programs by the careful use of race *as* class. It is still possible to cash in on black victimhood (the pain of being a poor innocent black boy), to claim victim status (Thomas called himself a victim of a process he of all people knew was designed to examine a candidate's worth), and to deplore the practice in others all at the same time. It is still possible to say "My father was a doorman" (meaning servant, meaning poor) and get the sympathy of whites who cannot or will not do the arithmetic needed to know the difference between the earnings of a Washington, D.C., doorman and those of a clerk at the census bureau.

In addition to class transformations, there was on display race transcendence. The nominee could be understood as having realized his yearning for and commitment to "racelessness" by having a white spouse at his side. At least their love, we are encouraged to conclude, had transcended race, and this matrimonial love had been more than ecstasy and companionship—it had been for Virginia Thomas an important education on how to feel and think about black people. The *People* magazine lead story, taken with a straight face, proved their devotion, their racelessness, which we already recognized because he shook her hand in public on three occasions. And it was envy of this racially ideal union that was one of the reasons Thomas came up with in trying to explain Anita Hill's charges. Professor Hill, he seemed to be suggesting, harbored reactionary, race-bound opinions about interracial love which,

as everybody knows, can drive a black woman insane and cause her to say wild, incredible things. Expectedly, the nominee called for a transcendence of race, remarked repeatedly on its divisive nature, its costliness, its undeniable degradation of principles of freedom. Unexpectedly, however, race surfaced on the very site of its interment. And it was hard not to murmur "Freddy's back" as the specter of this living corpse broke free of its hastily dug grave. But this resurrection was buoyed and winged by the fact of its gender component. If the forward face of the not-dead was racism, its backward face was sexism. The confirmation procedure held my attention partly because the shape it took, in an effort to hold its explosive contents, was unique—the twists and turns of the public debate and its manipulation, the responses of the senators on the committee. Yet what riveted my attention most during the hearings was not its strangeness but rather its familiarity. The sense that underneath the acrylic in which the political discourse was painted were the outlines of figures so old and so stable as to appear natural, not drawn or man-made at all.

It was trying to penetrate the brilliant, distracting color in which the political argument was painted in order to locate the outlines that informed the argument that led me to focus on the day of the week that both Anita Hill's testimony and Clarence Thomas's response to that testimony were aired. And to select out of all that each said on that day the themes that to me appeared salient: Anita Hill's inability to remain silent; Clarence Thomas's claims to being victimized. Silence and victimization. Broken silence and built victimization. Speech and bondage.

Disobedient speech and the chosen association of bondage. On, and . . . Friday.

On a Friday, Anita Hill graphically articulated points in her accusation of sexual misconduct. On the same Friday Clarence Thomas answered, in a manner of speaking, those charges. And it was on a Friday in 1709 when Alexander Selkirk found an "almost drowned Indian" on the shore of an island upon which he had been shipwrecked. Ten years later Selkirk's story would be immortalized by Daniel Defoe in *Robinson Crusoe*. There the Indian becomes a "savage cannibal"—black, barbarous, stupid, servile, adoring—and although nothing is reported of his sexual behavior, he has an acquired taste for the flesh of his own species. Crusoe's narrative is a success story, one in which a socially, culturally, and biologically handicapped black man is civilized and Christianized—taught, in other words, to be like a white one. From Friday's point of view it is a success story as well. Not only is he alive; he is greatly enabled by his association with his savior. And it should not go unremarked that Crusoe is also greatly enabled—including having his own life saved—by Friday. Yet like all successes, what is earned is mitigated by what one has lost.

If we look at the story from Friday's point of view rather than Crusoe's, it becomes clear that Friday had a very complex problem. By sheer luck he had escaped death, annihilation, anonymity, and engulfment by enemies within his own culture. By great and astonishing good fortune he had been rescued. The gift of his own life was so unexpected, so welcome, he felt he could regulate the

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debt only by offering that life to his rescuer, by making the gift exchange literal. But he had a problem.

Before he appeared on the shore, his rescuer, Crusoe, had heard no other voice except a parrot's trained to say his owner's name—Robin, for short. Crusoe wanted to hear it again. For over twenty years he had had only himself for company, and although he has conquered nature and marked time, no human calls his name, acknowledges his presence or his authority. Lucky for him he discovers a refugee escaping certain slaughter. Once rescue has been effected, Crusoe is in a position to have more than unopposed dominion; now he is able to acquire status, to demonstrate and confirm his superiority. So important is status in Crusoe's self-regard he does not ask the refugee what his name is; instead, Crusoe names him. Nor does he tell the refugee his own name; instead, he teaches him the three words that for months will do just fine: "master," "yes," and "no."

Friday's real problem, however, was not to learn the language of repetition, easily, like the parrot, but to learn to internalize it. For longer than necessary the first words he is taught, first "master," then "yes" or "no," remain all he is permitted to say. During the time in which he knows no other English, one has to assume he thinks in his own language, cogitates in it, explains stimuli and phenomena in the language he was born to. But Crusoe's account suggests otherwise, suggests that before his rescue Friday had no language, and even if he did, there was nothing to say in it. After a year Friday is taught some English vocabulary and the grammar to hold it. "This was the pleasantest year of all the life I led in this place; Friday began to talk pretty well, and understand the names of almost everything

I had occasion to call for, and of every place I had to send him to, and talked a great deal to me. . . ."

Had he expected that the life he offered Crusoe would include not just his services, his loyalty, his devotion, but also his language as well? Did he ever wonder why Crusoe did not want to learn *his* language? Or why he could never speak his master's name? In the absence of his master's desire to speak his tongue, did Friday forget completely the language he dreamed in? Think no more of the home he fled before the weapons of those who had conquered and occupied it? On the two or three occasions when Crusoe is curious enough to ask Friday a question about the black man's feelings, the answers are surprising. Yes, he longs for his home. Yes, it is beautiful on his island. Yes, he will refrain from eating human flesh. Yes, if he has the opportunity, he will teach his tribe to eat bread, cattle, and milk instead. (If Crusoe's assumption that Friday's people eat only each other were true, the practice would have decimated them long ago, but no matter—the white man teaches food habits; the black man learns them.) But no, he will not return to his home alone; he will go only if Crusoe accompanies him. So far, Friday can be understood to engage in dialogue with his master, however limited. Eventually, he learns more: he moves from speaking *with* to thinking *as* Crusoe.

The problem of internalizing the master's tongue is the problem of the rescued. Unlike the problems of survivors who may be lucky, fated, etc., the rescued have the problem of debt. If the rescuer gives you back your life, he shares in that life. But, as in Friday's case, if the rescuer saves your life by taking you away from the dangers, the complications, the confusion of home, he may very well

expect the debt to be paid in full. Not "Go your own way and sin no more." Not "Here, take this boat and find your own adventure, in or out of your own tribe." But full payment, forever. Because the rescuer wants to hear his name, not mimicked but adored. This is a serious problem for Friday and gets more complicated the more one thinks about it.

Friday has left and been rescued from not only the culture that threatened him, that wants to kill and engulf him, but also from the culture that loves him. That too he has left behind forever.

Even when he discovers his own father, half dead, in precisely the danger he himself had been in when Crusoe saved his life, his joy is not so reckless as to quarrel with the menial labor he and his father are directed to do, while an also-rescued Spaniard, who has lived among Friday's tribe for years, is given supervisory responsibilities. Nor is his joy so great that he speaks to his father in their mutual tongue for both their delight. Instead, he translates for Crusoe what his father says.

This loss of the mother tongue seems not to disturb Friday, even though he never completely learns the master's. He negotiates a space somewhere in between. He develops a serviceable grammar that will never be eloquent; he learns to shout warnings of advancing, also black, enemies, but he can never dare speak *to* these enemies as his master does. Without a mother tongue, without the language of his original culture, all he can do is recognize his old enemies and, when ordered, kill them. Finally, Friday no longer negotiates space between his own language and Crusoe's. Finally, the *uses* of Crusoe's language,

if not its grammar, become his own. The internationalization is complete.

In one of the incidents that occur on the island, a band of Spanish mutineers come ashore, holding their captain prisoner. Crusoe and Friday liberate the captain and consider how to dispose of the criminals. Some of the mutineers are singled out by their captain as villains; others are identified as being forced into mutiny. So some are spared, others slaughtered. This discrimination is never applied to Friday's people. With one exception, an old man tied and bound for execution, all of the blacks Friday and Crusoe see are killed or wounded (most of whom, in Crusoe's tallying of the dead, Friday kills). The exception, who turns out to be Friday's father, is not given a name nor, as with his son Friday, is one solicited from him. He becomes part of Crusoe's team, called upon and relied on for all kinds of service. He is sent back to his island on an errand with the Spaniard. The Spaniard returns, Friday's father does not, but most curiously, once his services are no longer needed, there is no mention of him again—by the master or the son. While he was among them, and after he has gone, he is called by Robinson Crusoe "the old savage." We still do not know his name.

Voluntary entrance into another culture, voluntary sharing of more than one culture, has certain satisfactions to mitigate the problems that may ensue. But being rescued into an adversarial culture can carry a huge debt. The debt one feels one owes to the rescuer can be paid, simply, honorably, in lifetime service. But if in that transaction the rescued loses his idiom, the language of his culture, there may be other debts outstanding. Leon Higginbotham has

charted the debt Clarence Thomas owes the culture that fought for and protected him before he arrived out of a turbulent social sea onto the shore of political patronage. In that sea Thomas was teased and humiliated by his own people, called ABC, American's Blackest Child. He was chastened for wanting an education superior to theirs. He was also loved and nurtured by them. As in any and everybody's background, family, culture, race, and region, there are persecutors and providers, kindness and loathing. No culture ever quite measures up to our expectations of it without a generous dose of romanticism, self-delusion, or simple compassion. Sometimes it seems easier, emotionally and professionally, to deny it, ignore it, erase it, even destroy it. And if the language of one's culture is lost or surrendered, one may be forced to describe that culture in the language of the rescuing one. In that way one could feel compelled to dismiss African-American culture by substituting the phrase "culture of the victim" for the critique and redress of systemic racism. Minus one's own idiom it is possible to cry and decry victimization, loathing it when it appears in the discourses of one's own people, but summoning it up for one's expediently deracialized self. It becomes easy to confuse the metaphors embedded in the blood language of one's own culture with the objects they stand for and to call patronizing, coddling, undemanding, rescuing, complicitous white racists a lynch mob. Under such circumstances it is not just easy to speak the master's language, it is necessary. One is obliged to cooperate in the misuse of figurative language, in the reinforcement of cliché, the erasure of difference, the jargon of justice, the evasion of logic, the denial of history, the crowning of patriarchy, the inscription of hegemony; to be

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complicit in the vandalizing, sentimentalizing, and trivialization of the torture black people have suffered. Such rhetorical strategies become necessary because, without one's own idiom, there is no other language to speak.

Both Friday and Clarence Thomas accompany their rescuers into the world of power and salvation. But the problem of rescue still exists: both men, black but unrecognizable at home or away, are condemned first to mimic, then to internalize and adore, but never to utter one single sentence understood to be beneficial to their original culture, whether the people of their culture are those who wanted to hurt them or those who loved them to death.

Clarence Thomas once quoted someone who said that dwelling on the horrors of racism invited one of two choices: vengeance or prosperity. He argued for a third choice: "to appeal to that which is good." He did not elaborate on which he had chosen, finally, but the language he speaks, the actions he takes, the Supreme Court decisions he has made or aligned himself with, the foot, as it were, that he has picked up and placed on his head, give us some indication of what his choice has been. The footprint in the sand that so worried Crusoe's nights, that compelled him to build a fortress, and then another to protect his new world order, disappears from his nightmares once Friday embraces, then internalizes, his master's voice and can follow the master's agenda with passion.

It is hard not to think of these events in any way but as unfortunate. And it is difficult to convince anybody that

what happened is over—without serious consequences. For those who looked forward eagerly to Thomas's confirmation, the expectation of a reliably conservative court may be reassuring. Time will have the most to say about that. For those who believe the future of the nation as a democracy is imperiled by this most recent addition to the bench, again, time will speak rather definitively. Yet regardless of political alliances, something positive and liberating has already surfaced. In matters of race and gender, it is now possible and necessary, as it seemed never to have been before, to speak about these matters without the barriers, the silences, the embarrassing gaps in discourse. It is clear to the most reductionist intellect that black people think differently from one another; it is also clear that the time for undiscriminating racial unity has passed. A conversation, a serious exchange between black men and women, has begun in a new arena, and the contestants defy the mold. Nor is it as easy as it used to be to split along racial lines, as the alliances and coalitions between white and black women, and the conflicts among black women, and among black men, during the intense debates regarding Anita Hill's testimony against Clarence Thomas's appointment prove.

This volume is one of the several beginnings of these new conversations in which issues and arguments are taken as seriously as they are. Only through thoughtful, incisive, and far-ranging dialogue will all of us be able to appraise and benefit from Friday's dilemma.

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A. LEON HIGGINBOTHAM, JR.*

# An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague

*November 29, 1991*

Dear Justice Thomas:

The President has signed your Commission and you have now become the 106th Justice of the United States Supreme Court. I congratulate you on this high honor!

It has been a long time since we talked. I believe it was in 1980 during your first year as a Trustee at Holy Cross

*Except for a few minor changes in the footnotes this article is a verbatim copy of the text of the letter sent to Justice Clarence Thomas on November 29, 1991. I would like to thank Judges Nathaniel Jones, Damon Keith, and Louis H. Pollak and Dr. Evelyn Brooks Higginbotham for their very helpful insights. I gratefully acknowledge the very substantial assistance of my law clerk Aderson Belgarde Francois, New York University School of Law, J.D. 1991. Some research assistance was provided by Nelson S. T. Thayer, Sonya Johnson, and Michael Tein from the University of Pennsylvania Law School. What errors remain are mine.

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College. I was there to receive an honorary degree. You were thirty-one years old and on the staff of Senator John Danforth. You had not yet started your meteoric climb through the government and federal judicial hierarchy. Much has changed since then.

At first I thought that I should write you privately—the way one normally corresponds with a colleague or friend. I still feel ambivalent about making this letter public but I do so because your appointment is profoundly important to this country and the world, and because all Americans need to understand the issues you will face on the Supreme Court. In short, Justice Thomas, I write this letter as a public record so that this generation can understand the challenges you face as an Associate Justice to the Supreme Court, and the next can evaluate the choices you have made or will make.

The Supreme Court can be a lonely and insular environment. Eight of the present Justices' lives would not have been very different if the *Brown* case had never been decided as it was. Four attended Harvard Law School, which did not accept women law students until 1950.[1] Two attended Stanford Law School prior to the time when the first Black matriculated there.[2] None has been called a "nigger"[3] or suffered the acute deprivations of poverty.[4] Justice O'Connor is the only other Justice on the Court who at one time was adversely affected by a white-male dominated system that often excludes both women and minorities from equal access to the rewards of hard work and talent.

By elevating you to the Supreme Court, President Bush has suddenly vested in you the option to preserve or dilute the gains this country has made in the struggle for equality.

This is a grave responsibility indeed. In order to discharge it you will need to recognize what James Baldwin called the "force of history" within you.[5] You will need to recognize that both your public life and your private life reflect this country's history in the area of racial discrimination and civil rights. And, while much has been said about your admirable determination to overcome terrible obstacles, it is also important to remember how you arrived where you are now, because you did not get there by yourself.

When I think of your appointment to the Supreme Court, I see not only the result of your own ambition, but also the culmination of years of heartbreaking work by thousands who preceded you. I know you may not want to be burdened by the memory of their sacrifices. But I also know that you have no right to forget that history. Your life is very different from what it would have been had these men and women never lived. That is why today I write to you about this country's history of civil rights lawyers and civil rights organizations; its history of voting rights; and its history of housing and privacy rights. This history has affected your past and present life. And forty years from now, when your grandchildren and other Americans measure your performance on the Supreme Court, that same history will determine whether you fulfilled your responsibility with the vision and grace of the Justice whose seat you have been appointed to fill: Thurgood Marshall.

### *I. Measures of Greatness or Failure of Supreme Court Justices*

In 1977 a group of one hundred scholars evaluated the first one hundred justices on the Supreme Court.[6] Eight of the justices were categorized as failures, six as below average, fifty-five as average, fifteen as near great and twelve as great.[7] Among those ranked as great were John Marshall, Joseph Story, John M. Harlan, Oliver Wendell Holmes, Jr., Charles E. Hughes, Louis D. Brandeis, Harlan F. Stone, Benjamin N. Cardozo, Hugo L. Black, and Felix Frankfurter.[8] Because you have often criticized the Warren Court,[9] you should be interested to know that the list of great jurists on the Supreme Court also included Earl Warren.[10]

Even long after the deaths of the Justices that I have named, informed Americans are grateful for the extraordinary wisdom and compassion they brought to their judicial opinions. Each in his own way viewed the Constitution as an instrument for justice. They made us a far better people and this country a far better place. I think that Justices Thurgood Marshall, William J. Brennan, Harry Blackmun, Lewis Powell, and John Paul Stevens will come to be revered by future scholars and future generations with the same gratitude. Over the next four decades you will cast many historic votes on issues that will profoundly affect the quality of life for our citizens for generations to come. You can become an exemplar of fairness and the rational interpretation of the Constitution, or you can become an archetype of inequality and the retrogressive evaluation of human rights. The choice as to whether you will build a decisional record of true greatness or of mere mediocrity is yours.

***II. Our Major Similarity***

My more than twenty-seven years as a federal judge made me listen with intense interest to the many persons who testified both in favor of and against your nomination. I studied the hearings carefully and afterwards pondered your testimony and the comments others made about you. After reading almost every word of your testimony, I concluded that what you and I have most in common is that we are both graduates of Yale Law School. Though our graduation classes are twenty-two years apart, we have both benefitted from our old Eli connections.

If you had gone to one of the law schools in your home state, Georgia, you probably would not have met Senator John Danforth who, more than twenty years ago, served with me as a member of the Yale Corporation. Dean Guido Calabresi mentioned you to Senator Danforth, who hired you right after graduation from law school and became one of your primary sponsors. If I had not gone to Yale Law School, I would probably not have met Justice Curtis Bok, nor Yale Law School alumni such as Austin Norris, a distinguished black lawyer, and Richardson Dilworth, a distinguished white lawyer, who became my mentors and gave me my first jobs. Nevertheless, now that you sit on the Supreme Court, there are issues far more important to the welfare of our nation than our Ivy League connections. I trust that you will not be overly impressed with the fact that all of the other Justices are graduates of what laymen would call the nation's most prestigious law schools.

Black Ivy League alumni in particular should never be too impressed by the educational pedigree of Supreme Court Justices. The most wretched decision ever rendered

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against black people in the past century was *Plessy v. Ferguson.*[11] It was written in 1896 by Justice Henry Billings Brown, who had attended both Yale and Harvard Law Schools. The opinion was joined by Justice George Shiras, a graduate of Yale Law School, as well as by Chief Justice Melville Fuller and Justice Horace Gray, both alumni of Harvard Law School.

If those four Ivy League alumni on the Supreme Court in 1896 had been as faithful in their interpretation of the Constitution as Justice John Harlan, a graduate of Transylvania, a small law school in Kentucky, then the venal precedent of *Plessy v. Ferguson,* which established the federal "separate but equal" doctrine and legitimized the worst forms of race discrimination, would not have been the law of our nation for sixty years. The separate but equal doctrine, also known as Jim Crow, created the foundations of separate and unequal allocation of resources, and oppression of the human rights of Blacks.

During your confirmation hearing I heard you refer frequently to your grandparents and your experiences in Georgia. Perhaps now is the time to recognize that if the four Ivy League alumni—all northerners—of the *Plessy* majority had been as sensitive to the plight of black people as was Justice John Harlan, a former slave holder from Kentucky,[12] the American statutes that sanctioned racism might not have been on the books—and many of the racial injustices that your grandfather, Myers Anderson, and my grandfather, Moses Higginbotham, endured would never have occurred.

The tragedy with *Plessy v. Ferguson,* is not that the Justices had the "wrong" education, or that they attended the "wrong" law schools. The tragedy is that the Justices had

the wrong *values*, and that these values poisoned this society for decades. Even worse, millions of Blacks today still suffer from the tragic sequelae of *Plessy*—a case which Chief Justice Rehnquist,[13] Justice Kennedy,[14] and most scholars now say was wrongly decided.[15]

As you sit on the Supreme Court confronting the profound issues that come before you, never be impressed with how bright your colleagues are. You must always focus on what *values* they bring to the task of interpreting the Constitution. Our Constitution has an unavoidable—though desirable—level of ambiguity, and there are many interstitial spaces which as a Justice of the Supreme Court you will have to fill in.[16] To borrow Justice Cardozo's elegant phrase: "We do not pick our rules of law full blossomed from the trees."[17] You and the other Justices cannot avoid putting your imprimatur on a set of values. The dilemma will always be which particular values you choose to sanction in law. You can be part of what Chief Justice Warren, Justice Brennan, Justice Blackmun, and Justice Marshall and others have called the evolutionary movement of the Constitution[18]—an evolutionary movement that has benefitted you greatly.

### *III. Your Critiques of Civil Rights Organizations and the Supreme Court During the Last Eight Years*

I have read almost every article you have published, every speech you have given, and virtually every public comment you have made during the past decade. Until your confirmation hearing I could not find one shred of evidence suggesting an insightful understanding on your part on how the evolutionary movement of the Constitution and the work of civil rights organizations have benefitted

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you. Like Sharon McPhail, the President of the National Bar Association, I kept asking myself: Will the Real Clarence Thomas Stand Up?[19] Like her, I wondered: "Is Clarence Thomas a 'conservative with a common touch' as Ruth Marcus refers to him . . . or the 'counterfeit hero' he is accused of being by Haywood Burns . . . ?"[20]

While you were a presidential appointee for eight years, as Chairman of the Equal Opportunity Commission and as an Assistant Secretary at the Department of Education, you made what I would regard as unwarranted criticisms of civil rights organizations,[21] the Warren Court,[22] and even of Justice Thurgood Marshall.[23] Perhaps these criticisms were motivated by what you perceived to be your political duty to the Reagan and Bush administrations. Now that you have assumed what should be the non-partisan role of a Supreme Court Justice, I hope you will take time out to carefully evaluate some of these unjustified attacks.

In October 1987, you wrote a letter to the *San Diego Union & Tribune* criticizing a speech given by Justice Marshall on the 200th anniversary celebration of the Constitution.[24] 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."[25]

Your response dismissed Justice Marshall's "sensitive understanding" as an "exasperating and incomprehensible . . . assault on the Bicentennial, the Founding, and the Constitution itself."[26] Yet, however high and noble the Founders' intentions may have been, Justice Marshall was correct in believing that the men who gathered in Philadelphia in 1787 "could not have imagined, nor would they

have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[27] That, however, was neither an assault on the Constitution nor an indictment of the Founders. Instead, it was simply a recognition that in the midst of the Bicentennial celebration, "[s]ome may more quietly commemorate the suffering, the struggle and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled."[28]

Justice Marshall's comments, much like his judicial philosophy, were grounded in history and were driven by the knowledge that even today, for millions of Americans, there still remain "hopes not realized and promises not fulfilled." His reminder to the nation that patriotic feelings should not get in the way of thoughtful reflection on this country's continued struggle for equality was neither new nor misplaced.[29] Twenty-five years earlier, in December 1962, while this country was celebrating the 100th anniversary of the Emancipation Proclamation, James Baldwin had written to his young nephew:

> This is your home, my friend, do not be driven from it; great men have done great things here, and will again, and we can make America what America must become. . . . [But y]ou know, and I know that the country is celebrating one hundred years of freedom one hundred years too soon.[30]

Your response to Justice Marshall's speech, as well as your criticisms of the Warren court and civil rights organi-

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zations, may have been nothing more than your expression of allegiance to the conservatives who made you Chairman of the EEOC, and who have now elevated you to the Supreme Court. But your comments troubled me then and trouble me still because they convey a stunted knowledge of history and an unformed judicial philosophy. Now that you sit on the Supreme Court you must sort matters out for yourself and form your own judicial philosophy, and you must reflect more deeply on legal history than you ever have before. You are no longer privileged to offer flashy one-liners to delight the conservative establishment. Now what you write must inform, not entertain. Now your statements and your votes can shape the destiny of the entire nation.

Notwithstanding the role you have played in the past, I believe you have the intellectual depth to reflect upon and rethink the great issues the Court has confronted in the past and to become truly your own man. But to be your own man the first in the series of questions you must ask yourself is this: Beyond your own admirable personal drive, what were the primary forces or acts of good fortune that made your major achievements possible? This is a hard and difficult question. Let me suggest that you focus on at least four areas: (1) the impact of the work of civil rights lawyers and civil rights organizations on your life; (2) other than having picked a few individuals to be their favorite colored person, what it is that the conservatives of each generation have done that has been of significant benefit to African-Americans, women, or other minorities; (3) the impact of the eradication of racial barriers in the voting on your own confirmation; and (4) the impact of civil rights victories in the area of housing and privacy on your personal life.

### *IV. The Impact of the Work of Civil Rights Lawyers and Civil Rights Organizations on Your Life*

During the time when civil rights organizations were challenging the Reagan Administration, I was frankly dismayed by some of your responses to and denigrations of these organizations. In 1984, the *Washington Post* reported that you had criticized traditional civil rights leaders because, instead of trying to reshape the Administration's policies, they had gone to the news media to "bitch, bitch, bitch, moan and moan, whine and whine."[31] If that is still your assessment of these civil rights organizations or their leaders, I suggest, Justice Thomas, that you should ask yourself every day what would have happened to you if there had never been a Charles Hamilton Houston, a William Henry Hastie, a Thurgood Marshall, and that small cadre of other lawyers associated with them, who laid the groundwork for success in the twentieth-century racial civil rights cases? Couldn't they have been similarly charged with, as you phrased it, bitching and moaning and whining when they challenged the racism in the administrations of prior presidents, governors, and public officials? If there had never been an effective NAACP, isn't it highly probable that you might still be in Pin Point, Georgia, working as a laborer as some of your relatives did for decades?

Even though you had the good fortune to move to Savannah, Georgia, in 1955, would you have been able to get out of Savannah and get a responsible job if decades earlier the NAACP had not been challenging racial injustice throughout America? If the NAACP had not been lobbying, picketing, protesting, and politicking for a 1964 Civil Rights Act, would Monsanto Chemical Company have opened their doors to you in 1977? If Title VII had

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not been enacted might not American companies still continue to discriminate on the basis of race, gender, and national origin?

The philosophy of civil rights protest evolved out of the fact that black people were forced to confront this country's racist institutions without the benefit of equal access to those institutions. For example, in January of 1941, A. Philip Randolph planned a march on Washington, D.C., to protest widespread employment discrimination in the defense industry.[32] In order to avoid the prospect of a demonstration by potentially tens of thousands of Blacks, President Franklin Delano Roosevelt issued Executive Order 8802 barring discrimination in defense industries or government. The order led to the inclusion of anti-discrimination clauses in all government defense contracts and the establishment of the Fair Employment Practices Committee.[33]

In 1940, President Roosevelt appointed William Henry Hastie as civilian aide to Secretary of War Henry L. Stimson. Hastie fought tirelessly against discrimination, but when confronted with an unabated program of segregation in all areas of the armed forces, he resigned on January 31, 1943. His visible and dramatic protest sparked the move towards integrating the armed forces, with immediate and far-reaching results in the army air corps.[34]

A. Philip Randolph and William Hastie understood—though I wonder if you do—what Frederick Douglass meant when he wrote:

> The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have

> been born of earnest struggle. . . . If there is no struggle there is no progress. . . .
>
> This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.[35]

The struggles of civil rights organizations and civil rights lawyers have been both moral and physical, and their victories have been neither easy nor sudden. Though the *Brown* decision was issued only six years after your birth, the road to *Brown* started more than a century earlier. It started when Prudence Crandall was arrested in Connecticut in 1833 for attempting to provide schooling for colored girls.[36] It was continued in 1849 when Charles Sumner, a white lawyer and abolitionist, and Benjamin Roberts, a black lawyer,[37] challenged segregated schools in Boston.[38] It was continued as the NAACP, starting with Charles Hamilton Houston's suit, *Murray v. Pearson*,[39] in 1936, challenged Maryland's policy of excluding Blacks from the University of Maryland Law School. It was continued in *Gaines v. Missouri*,[40] when Houston challenged a 1937 decision of the Missouri Supreme Court. The Missouri courts had held that because law schools in the states of Illinois, Iowa, Kansas, and Nebraska accepted Negroes, a twenty-five-year-old black citizen of Missouri was not being denied his constitutional right to equal protection under the law when he was excluded from the only state supported law school in Missouri. It was continued in *Sweatt v. Painter*[41] in 1946, when Heman Marion Sweatt filed suit for admission to the Law School of the University

of Texas after his application was rejected solely because he was black. Rather than admit him, the University postponed the matter for years and put up a separate and unaccredited law school for Blacks. It was continued in a series of cases against the University of Oklahoma, when, in 1950, in *McLaurin v. Oklahoma*,[42] G. W. McLaurin, a sixty-eight-year-old man, applied to the University of Oklahoma to obtain a Doctorate in education. He had earned his Master's degree in 1948, and had been teaching at Langston University, the state's college for Negroes.[43] Yet he was "required to sit apart at . . . designated desk[s] in an anteroom adjoining the classroom . . . [and] on the mezzanine floor of the library, . . . and to sit at a designated table and to eat at a different time from the other students in the school cafeteria."[44]

The significance of the victory in the *Brown* case cannot be overstated. *Brown* changed the moral tone of America; by eliminating the legitimization of state-imposed racism it implicitly questioned racism wherever it was used. It created a milieu in which private colleges were forced to recognize their failures in excluding or not welcoming minority students. I submit that even your distinguished undergraduate college, Holy Cross, and Yale University were influenced by the milieu created by *Brown* and thus became more sensitive to the need to create programs for the recruitment of competent minority students. In short, isn't it possible that you might not have gone to Holy Cross if the NAACP and other civil rights organizations, Martin Luther King and the Supreme Court, had not recast the racial mores of America? And if you had not gone to Holy Cross, and instead had gone to some underfunded state college for Negroes in Georgia, would you have been

admitted to Yale Law School, and would you have met the alumni who played such a prominent role in maximizing your professional options?

I have cited this litany of NAACP[45] cases because I don't understand why you appeared so eager to criticize civil rights organizations or their leaders. In the 1980s, Benjamin Hooks and John Jacobs worked just as tirelessly in the cause of civil rights as did their predecessors Walter White, Roy Wilkins, Whitney Young, and Vernon Jordan in the 1950s and '60s. As you now start to adjudicate cases involving civil rights, I hope you will have more judicial integrity than to demean those advocates of the disadvantaged who appear before you. If you and I had not gotten many of the positive reinforcements that these organizations fought for and that the post-*Brown* era made possible, probably neither you nor I would be federal judges today.

### *V. What Have the Conservatives Ever Contributed to African-Americans?*

During the last ten years, you have often described yourself as a black conservative. I must confess that, other than their own self-advancement, I am at a loss to understand what is it that the so-called black conservatives are so anxious to conserve. Now that you no longer have to be outspoken on their behalf, perhaps you will recognize that in the past it was the white "conservatives" who screamed "segregation now, segregation forever!" It was primarily the conservatives who attacked the Warren Court relentlessly because of *Brown v. Board of Education* and who stood in the way of almost every measure to ensure gender and racial advancement.

For example, on March 11, 1956, ninety-six members

of Congress, representing eleven southern states, issued the "Southern Manifesto," in which they declared that the *Brown* decision was an "unwarranted exercise of power by the Court, contrary to the Constitution."[46] Ironically, those members of Congress reasoned that the *Brown* decision was "destroying the amicable relations between the white and negro races,"[47] and that "it had planted hatred and suspicion where there had been heretofore friendship and understanding."[48] They then pledged to use all lawful means to bring about the reversal of the decision, and praised those states which had declared the intention to resist its implementation.[49] The Southern Manifesto was more than mere political posturing by Southern Democrats. It was a thinly disguised racist attack on the constitutional and moral foundations of *Brown*. Where were the conservatives in the 1950s when the cause of equal rights needed every fair-minded voice it could find?

At every turn, the conservatives, either by tacit approbation or by active complicity, tried to derail the struggle for equal rights in this country. In the 1960s, it was the conservatives, including the then-senatorial candidate from Texas, George Bush,[50] the then-Governor from California, Ronald Reagan,[51] and the omnipresent Senator Strom Thurmond,[52] who argued that the 1964 Civil Rights Act was unconstitutional. In fact Senator Thurmond's 24 hour 18 minute filibuster during Senate deliberations on the 1957 Civil Rights Act set an all-time record.[53] He argued on the floor of the Senate that the provisions of the Act guaranteeing equal access to public accommodations amounted to an enslavement of white people.[54] If twenty-seven years ago George Bush, Ronald Reagan, and Strom Thurmond had succeeded, there would have been no posi-

tion for you to fill as Assistant Secretary for Civil Rights in the Department of Education. There would have been no such agency as the Equal Employment Commission for you to chair.

Thus, I think now is the time for you to reflect on the evolution of American constitutional and statutory law, as it has affected your personal options and improved the options for so many Americans, particularly non-whites, women, and the poor. If the conservative agenda of the 1950s, '60s, and '70s had been implemented, what would have been the results of the important Supreme Court cases that now protect your rights and the rights of millions of other Americans who can now no longer be discriminated against because of their race, religion, national origin, or physical disabilities? If, in 1954, the United States Supreme Court had accepted the traditional rationale that so many conservatives then espoused, would the 1896 *Plessy v. Ferguson* case, which announced the nefarious doctrine of "separate but equal," and which allowed massive inequalities, still be the law of the land? In short, if the conservatives of the 1950s had had their way, would there ever have been a *Brown v. Board of Education* to prohibit state-imposed racial segregation?

***VI. The Impact of Eradicating Racial Barriers to Voting***

Of the fifty-two senators who voted in favor of your confirmation, some thirteen hailed from nine southern states. Some may have voted for you because they agreed with President Bush's assessment that you were " 'the best person for the position.' "[55] But, candidly, Justice Thomas, I do not believe that you were indeed the most competent person to be on the Supreme Court. Charles Bowser, a

distinguished African-American Philadelphia lawyer, said, " 'I'd be willing to bet . . . that not one of the senators who voted to confirm Clarence Thomas would hire him as their lawyer.' "[56]

Thus, realistically, many senators probably did not think that you were the most qualified person available. Rather, they were acting solely as politicians, weighing the potential backlash in their states of the black vote that favored you for emotional reasons and the conservative white vote that favored you for ideological reasons. The black voting constituency is important in many states, and today it could make a difference as to whether many senators are or are not re-elected. So here, too, you benefitted from civil rights progress.

No longer could a United States Senator say what Senator Benjamin Tillman of South Carolina said in anger when President Theodore Roosevelt invited a moderate Negro, Booker T. Washington, to lunch at the White House: " 'Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their place.' "[57] Senator Tillman did not have to fear any retaliation by Blacks because South Carolina and most southern states kept Blacks "in their place" by manipulating the ballot box. For example, because they did not have to confront the restraints and prohibitions of later Supreme Court cases, the manipulated "white" primary allowed Tillman and other racist senators to profit from the threat of violence to Blacks who voted, and from the disproportionate electoral power given to rural whites. For years, the NAACP litigated some of the most significant cases attacking racism at the ballot box. That organization almost singlehandedly created the foundation for black po-

litical power that led in part to the 1965 Civil Rights Act.

Moreover, if it had not been for the Supreme Court's opinion in *Smith v. Allright*,[58] a case which Thurgood Marshall argued, most all the southern senators who voted for you would have been elected in what was once called a "white primary"—a process which precluded Blacks from effective voting in the southern primary election, where the real decisions were made on who would run every hamlet, township, city, county and state. The seminal case of *Baker v. Carr*,[59] which articulated the concept of one man-one vote, was part of a series of Supreme Court precedents that caused southern senators to recognize that patently racist diatribes could cost them an election. Thus your success even in your several confirmation votes is directly attributable to the efforts that the "activist" Warren Court and civil rights organizations have made over the decades.

***VII. Housing and Privacy***

If you are willing, Justice Thomas, to consider how the history of civil rights in this country has shaped your public life, then imagine for a moment how it has affected your private life. With some reluctance, I make the following comments about housing and marriage because I hope that reflecting on their constitutional implications may raise your consciousness and level of insight about the dangers of excessive intrusion by the state in personal and family relations.

From what I have seen of your house on television scans and in newspaper photos, it is apparent that you live in a comfortable Virginia neighborhood. Thus I start with Holmes's view that "a page of history is worth a volume

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of logic."[60] The history of Virginia's legislatively and judicially imposed racism should be particularly significant to you now that as a Supreme Court Justice you must determine the limits of a state's intrusion on family and other matters of privacy.

It is worthwhile pondering what the impact on you would have been if Virginia's legalized racism had been allowed to continue as a viable constitutional doctrine. In 1912, Virginia enacted a statute giving cities and towns the right to pass ordinances which would divide the city into segregated districts for black and white residents.[61] Segregated districts were designated white or black depending on the race of the majority of the residents.[62] It became a crime for any black person to move into and occupy a residence in an area known as a white district.[63] Similarly, it was a crime for any white person to move into a black district.[64]

Even prior to the Virginia statute of 1912, the cities of Ashland and Richmond had enacted such segregationist statutes.[65] The ordinances also imposed the same segregationist policies on any "place of public assembly."[66] Apparently schools, churches, and meeting places were defined by the color of their members. Thus, white Christian Virginia wanted to make sure that no black Christian churches were in their white Christian neighborhoods.

The impact of these statutes can be assessed by reviewing the experiences of two African-Americans, John Coleman and Mary Hopkins. Coleman purchased property in Ashland, Virginia in 1911.[67] In many ways he symbolized the American dream of achieving some modest upward mobility by being able to purchase a home earned through initiative and hard work. But shortly after moving to his

home, he was arrested for violating Ashland's segregation ordinance because a majority of the residents in the block were white. Also, in 1911, the City of Richmond prosecuted and convicted a black woman, Mary S. Hopkins, for moving into a predominantly white block.[68]

Coleman and Hopkins appealed their convictions to the Supreme Court of Virginia which held that the ordinances of Ashland and Richmond did not violate the United States Constitution and that the fines and convictions were valid.[69]

If Virginia's law of 1912 still prevailed, and if your community passed laws like the ordinances of Richmond and Ashland, you would not be able to live in your own house. Fortunately, the Virginia ordinances and statutes were in effect nullified by a case brought by the NAACP in 1915, where a similar statute of the City of Louisville was declared unconstitutional.[70] But even if your town council had not passed such an ordinance, the developers would in all probability have incorporated racially restrictive covenants in the title deeds to the individual homes. Thus, had it not been for the vigor of the NAACP's litigation efforts in a series of persistent attacks against racial covenants you would have been excluded from your own home. Fortunately, in 1948, in *Shelley v. Kraemer*,[71] a case argued by Thurgood Marshall, the NAACP succeeded in having such racially restrictive covenants declared unconstitutional.

Yet with all of those litigation victories, you still might not have been able to live in your present house because a private developer might have refused to sell you a home solely because you are an African-American. Again you would be saved because in 1968 the Supreme Court, in

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*Jones v. Alfred H. Mayer Co.*, in an opinion by Justice Stewart, held that the 1866 Civil Rights Act precluded such private racial discrimination.[72] It was a relatively close case; the two dissenting justices said that the majority opinion was "ill-considered and ill-advised."[73] It was the values of the majority which made the difference. And it is your values that will determine the vitality of other civil rights acts for decades to come.

Had you overcome all of those barriers to housing and if you and your present wife decided that you wanted to reside in Virginia, you would nonetheless have been violating the Racial Integrity Act of 1924,[74] which the Virginia Supreme Court as late as 1966 said was consistent with the federal constitution because of the overriding state interest in the institution of marriage.[75] Although it was four years after the *Brown* case, Richard Perry Loving and his wife, Mildred Jeter Loving were convicted in 1958 and originally sentenced to one year in jail because of their interracial marriage. As an act of magnanimity the trial court later suspended the sentences, " 'for a period of 25 years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of 25 years.' "[76]

The conviction was affirmed by a unanimous Supreme Court of Virginia, though they remanded the case back as to the re-sentencing phase. Incidentally, the Virginia trial judge justified the constitutionality of the prohibition against interracial marriages as follows:

> "Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents.

> And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."[77]

If the Virginia courts had been sustained by the United States Supreme Court in 1966, and if, after your marriage, you and your wife had, like the Lovings, defied the Virginia statute by continuing to live in your present residence, you could have been in the penitentiary today rather than serving as an Associate Justice of the United States Supreme Court.

I note these pages of record from American legal history because they exemplify the tragedy of excessive intrusion on individual and family rights. The only persistent protector of privacy and family rights has been the United States Supreme Court, and such protection has occurred only when a majority of the Justices has possessed a broad vision of human rights. Will you, in your moment of truth, take for granted that the Constitution protects you and your wife against all forms of deliberate state intrusion into family and privacy matters, and protects you even against some forms of discrimination by other private parties such as the real estate developer, but nevertheless find that it does not protect the privacy rights of others, and particularly women, to make similarly highly personal and private decisions?

***Conclusion***

This letter may imply that I am somewhat skeptical as to what your performance will be as a Supreme Court Justice. Candidly, I and many other thoughtful Americans are very

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concerned about your appointment to the Supreme Court. But I am also sufficiently familiar with the history of the Supreme Court to know that a few of its members (not many) about whom there was substantial skepticism at the time of their appointment became truly outstanding Justices. In that context I think of Justice Hugo Black. I am impressed by the fact that at the very beginning of his illustrious career he articulated his vision of the responsibility of the Supreme Court. In one of his early major opinions he wrote, "courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, out-numbered, or . . . are non-conforming victims of prejudice and public excitement."[78]

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. I trust that you will ponder often the significance of the statement of Justice Blackmun, in a vigorous dissent of two years ago, when he said: "[S]adly . . . one wonders whether the majority [of the Court] still believes that . . . race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[79]

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.' "[80] 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 dedicated much of their lives to create the America that made your opportunities possible.[81] 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 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.[82] I have seen and *known* racial segregation and discrimination.[83] 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.[84] 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

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establish on the Supreme Court in years to come demonstrates that my apprehensions were unfounded.[85] 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.

# NOTES

1. Justices Blackmun, Scalia, Kennedy, and Souter were members of the Harvard Law School Classes of 1932, 1960, 1961, and 1966 respectively. *See* THE AMERICAN BENCH 16, 46, 72, 1566 (Marie T. Hough ed., 1989). The first woman to graduate from Harvard Law School was a member of the Class of 1953. Telephone Interview with Emily Farnam, Alumni Affairs Office, Harvard University (Aug. 8, 1991).
2. Chief Justice Rehnquist and Justice O'Connor were members of the Stanford Law School Class of 1952. *See* THE AMERICAN BENCH, *supra* note 1, at 63, 69. Stanford did not graduate its first black law student until 1968. Telephone interview with Shirley Wedlake, Assistant to the Dean of Student Affairs, Stanford University Law School (Dec. 10, 1991).
3. Even courts have at times tolerated the use of the term "nigger" in one or another of its variations. In the not too distant past, appellate courts have upheld convictions despite prosecutors' references to black defendants and witnesses in such racist terms as "black rascal," "burr-headed nigger," "mean negro," "big nigger," "pickaninny," "mean nigger," "three nigger men," "niggers," and "nothing but just a common Negro, [a] black whore." *See* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U.L. REV. 479, 542–43 (1990).

   In addition, at least one Justice of the Supreme Court, James McReynolds, was a "white supremacist" who referred to Blacks as "niggers." *See* RANDALL KENNEDY, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1641 (1986); *see also* David Burner, *James McReynolds*, *in 3* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 2023, 2024 (Leon Friedman & Fred L. Israel eds., 1969) (reviewing Justice McReynolds's

numerous lone dissents as evidence of blatant racism). In 1938, a landmark desegregation case was argued before the Supreme Court by Charles Hamilton Houston, the brilliant black lawyer who laid the foundation for *Brown v. Board of Education*. During Houston's oral argument, McReynolds turned his back on the attorney and stared at the wall of the courtroom. Videotaped Statement of Judge Robert Carter to Judge Higginbotham (August 1987) (reviewing his observation of the argument in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)). 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.

WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975, at 14–15 (1980).

4. By contrast, according to the Census Bureau's definition of poverty, in 1991, one in five American children (and one in four preschoolers) is poor. *See* CLIFFORD M. JOHNSON ET AL., CHILD POVERTY IN AMERICA 1 (Children's Defense Fund report, 1991).
5. JAMES BALDWIN, *White Man's Guilt, in* THE PRICE OF THE TICKET 409, 410 (1985).
6. *See* ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES (1978). The published survey included ratings of only the first ninety-six justices, because the four Nixon appointees (Burger, Blackmun, Powell, and Rehnquist) had then been on the Court too short a time for an accurate evaluation to be made. *See id.* at 35–36.

7. *Id.* at 37–40.
8. *Id.* at 37.
9. You have been particularly critical of its decision in *Brown v. Board of Education*. *See, e.g.*, Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 990–92 (1987) (criticizing the emphasis on social stigma in the *Brown* opinion, which left the Court's decision resting on "feelings" rather than "reason and moral and political principles"); Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, Speech to the Cato Institute (Oct. 2, 1987), *in* ASSESSING THE REAGAN YEARS 391, 392–93 (David Boaz ed., 1986) (arguing that the Court's opinion in *Brown* failed to articulate a clear principle to guide later decisions, leading to opinions in the area of race that overemphasized groups at the expense of individuals, and "argue[d] *against* what was best in the American political tradition"); Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, Speech to the Federalist Society for Law and Policy Studies, University of Virginia School of Law (Mar. 5, 1988), *in* 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989) (asserting that adoption of Justice Harlan's view that the Constitution is "color-blind" would have provided the Court's civil rights opinions with the higher-law foundation necessary for a "just, wise, and *constitutional* decision").
10. *See* BLAUSTEIN & MERSKY, *supra* note 6, at 37.
11. 163 U.S. 537 (1896).
12. *See* Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 638 (1957).
13. Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., joined by Rehnquist, J., dissenting).
14. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3044 (1990) (Kennedy, J., dissenting).
15. For a thorough review of the background of *Plessy v. Ferguson*, and a particularly sharp criticism of the majority opinion, see LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME

COURT OF THE UNITED STATES AND THE NEGRO 165–82 (1966). As an example of scholars who have criticized the opinion and the result in *Plessy*, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1474–75 (2d ed., 1988).

16. *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921) (noting that "judge-made law [is] one of the existing realities of life").
17. *Id.* at 103.
18. The concept of the "evolutionary movement" of the Constitution has been expressed by Justice Brennan in Regents of the University of California v. Bakke, 438 U.S. 312 (1978), and by Justice Marshall in his speech given on the occasion of the bicentennial of the Constitution. In *Bakke*, in a partial dissent joined by Justices White, Marshall, and Blackmun, Justice Brennan discussed how Congress had "eschewed any static definition of discrimination [in Title VI of the 1964 Civil Rights Act] in favor of broad language that could be shaped by experience, administrative necessity and *evolving judicial doctrine.*" *Id.* at 337 (Brennan, J., dissenting in part) (emphasis added). In Justice Brennan's view, Congress was aware of the *"evolutionary change* that constitutional law in the area of racial discrimination was undergoing in 1964." *Id.* at 340. Congress, thus, equated Title VI's prohibition against discrimination with the commands of the Fifth and Fourteenth Amendment to the Constitution so that the meaning of the statute's prohibition would evolve with the interpretations of the command of the Constitution. *See id.* at 340. In another context, during his speech given on the occasion of the bicentennial of the Constitution, Justice Marshall commented that he did "not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention." Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). In Justice Marshall's view, the Constitution had been made far more meaningful through its *"promising evolution* through 200 years of history." *Id.* at 5 (emphasis added).
19. Sharon McPhail, *Will The Real Clarence Thomas Stand Up?*,

NAT'L B. ASS'N MAG., Oct. 1991, at 1.

20. *Id; see* Ruth Marcus, *Self-Made Conservative; Nominee Insists He Be Judged on Merits*, WASH. POST, July 2, 1991, at A1; Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19.
21. *See, e.g*, Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35 (1985) (asserting that the civil rights community is "wallowing in self-delusion and pulling the public with it"); Juan Williams, *EEOC Chairman Blasts Black Leaders*, WASH. POST, Oct. 25, 1984, at A7 ("These guys [black leaders] are sitting there watching the destruction of our race. . . . Ronald Reagan isn't the problem. Former President Jimmy Carter was not the problem. The lack of black leadership is the problem.").
22. *See supra* note 9.
23. *See* Clarence Thomas, *Black Americans Based Claim for Freedom on Constitution*, SAN DIEGO UNION & TRIB., Oct. 6, 1987, at B7 (claiming that Marshall's observation of the deficiencies in some respects of the Framers' constitutional vision "alienates all Americans, and not just black Americans, from their high and noble intention").
24. *See id*.
25. Marshall, *supra* note 18, at 5.
26. Thomas, *supra* note 23, at B7. In the same diatribe, you also quoted out of context excerpts from the works of Frederick Douglass, Martin Luther King, Jr., and John Hope Franklin. *See id*. Their works, however, provide no support for what amounted to a scurrilous attack on Justice Marshall. In fact, John Hope Franklin wrote the epilogue to a report by the NAACP opposing your nomination to the Supreme Court. *See* John Hope Franklin, *Booker T. Washington, Revisited*, N.Y. TIMES, Aug. 1, 1991, at A21. There he quite properly observed that, by adopting a philosophy of alleged self-help without seeking to assure equal opportunities to all persons, you "placed [yourself] in the unseemly position of denying to others the very opportunities and the kind of assistance from public and private quarters that have placed [you] where you are today."

*Id.*

27. Marshall, *supra* note 18, at 5.
28. *Id.*
29. On April 1, 1987, some weeks before Justice Marshall's speech, I gave the Herman Phleger Lecture at Stanford University. I stated in my presentation:

> In this year of the Bicentennial you will hear a great deal that is laudatory about our nation's Constitution and legal heritage. Much of this praise will be justified. The danger is that the current oratory and scholarship may lapse into mere self-congratulatory back-patting, suggesting that everything in America has been, or is, near perfect.
>
> We must not allow our euphoria to cause us to focus solely on our strengths. Somewhat like physicians examining a mighty patient, we also must diagnose and evaluate the pathologies that have disabled our otherwise healthy institutions.
>
> I trust that you will understand that my critiques of our nation's past and present shortcomings do not imply that I am oblivious to its many exceptional virtues. I freely acknowledge the importance of two centuries of our enduring and evolving Constitution, the subsequently enacted Bill of Rights, the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments, and the protections of these rights, more often than not, by federal courts.
>
> Passion for freedom and commitment to liberty are important values in American society. If we can retain this passion and commitment and direct it towards eradicating the remaining significant areas of social injustice on our nation's unfinished agenda, our pride should persist—despite the daily tragic reminders that there are far too many homeless, far too many hungry, and far too many victims of racism, sexism, and pernicious biases against those of different religions and national origins. The truth is that, even with these faults, we have been building a society with increasing levels of social justice embracing more and more Americans each decade.

A. Leon Higginbotham, Jr., *The Bicentennial of the Constitution: A Racial Perspective*, STAN. LAW., Fall 1987, at 8.

30. JAMES BALDWIN, *The Fire Next Time*, *in* THE PRICE OF THE TICKET 336 (1985). In a similar vein, on April 5, 1976, at the dedication of Independence Hall in Philadelphia on the anniversary of the Declaration of Independence, Judge William Hastie told the celebrants that, although there was reason to

salute the nation on its bicentennial, "a nation's beginning is a proper source of reflective pride only to the extent that the subsequent and continuing process of its becoming deserves celebration." GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 242 (1984).

31. *See* Williams, *supra* note 21, at A7 (quoting Clarence Thomas).
32. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 388–89 (1988); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 219 (1975).
33. *See* FRANKLIN & MOSS, *supra* note 32, at 388–89; KLUGER, *supra* note 32, at 219.
34. *See* WARE, *supra* note 30, at 95–98, 124–33.
35. Frederick Douglass, Speech Before The West Indian Emancipation Society (Aug. 4, 1857), *in* 2 PHILIP S. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 437 (1950).
36. *See* Crandall v. State, 10 Conn. 339 (1834).
37. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 147 (1961).
38. *See* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).
39. 182 A. 590 (1936).
40. 305 U.S. 337 (1938).
41. 339 U.S. 629 (1950).
42. 339 U.S. 637 (1950).
43. *See* MILLER, *supra* note 15, at 336.
44. *McLaurin*, 339 U.S. at 640.
45. I have used the term NAACP to include both the NAACP and the NAACP Legal Defense Fund. For examples of civil rights cases, see DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 57–59, 157–62, 186–92, 250–58, 287–300, 477–99 (2d ed. 1980); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 32–61 (1959).
46. 102 CONG. REC. 4255, 4515 (1956).
47. *Id.* at 4516.
48. *Id.*
49. *See id.*

50. *See* Doug Freelander, *The Senate-Bush: The Polls Give Him 'Excellent Chance,'* HOUSTON POST, Oct. 11, 1964, § 17, at 8.
51. *See* David S. Broder, *Reagan Attacks the Great Society*, N.Y. TIMES, June 17, 1966, at 41.
52. *See* CHARLES WHALEN AND BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 143 (1967).
53. *Id.*
54. SENATE COMMERCE COMM., CIVIL RIGHTS—PUBLIC ACCOMMODATIONS, S. REP. NO. 872, 88th Cong., 2d Sess. 62–63, 73–76 (1964) (Individual Views of Senator Strom Thurmond).
55. *The Supreme Court; Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14 (statement of President Bush).
56. Peter Binzer, *Bowser Is an Old Hand at Playing the Political Game in Philadelphia*, PHILA. INQUIRER, Nov. 13, 1991, at A11 (quoting Charles Bowser).
57. WILLIAM A. SINCLAIR, THE AFTERMATH OF SLAVERY: A STUDY OF THE CONDITION AND ENVIRONMENT OF THE AMERICAN NEGRO 187 (Afro-Am Press 1969) (1905) (quoting Senator Benjamin Tillman).
58. 321 U.S. 649 (1944).
59. 369 U.S. 186 (1962).
60. New York Trust Company v. Eisner, 256 U.S. 345, 349 (1921).
61. Act of Mar. 12, 1912, ch. 157, § 1, 1912 Va. Acts 330, 330.
62. *Id.* § 3, at 330–31
63. *Id.* § 4, at 331.
64. *Id.* There were a few statutory exceptions, the most important being that the servants of "the other race" could reside upon the premises that his or her employer owned or occupied. *Id.* § 9, at 332.
65. *See* Ashland, Va., Ordinance (Sept. 12, 1911) [hereinafter, *Ashland Ordinance*]; Richmond, Va., Ordinance (Dec. 5, 1911) [hereinafter, *Richmond Ordinance*].
66. *Ashland Ordinance*, *supra* note 65, §§ 1–3; *Richmond Ordinance*, *supra* note 65, §§ 1, 2.

67. *See* Hopkins v. City of Richmond, 86 S.E. 139, 142 (Va. 1915). At the time of the purchase, the house was occupied by a black tenant who had lived there prior to the enactment of the ordinance, so the purchase precipitated no change in the color composition or racial density of the neighborhood or block.
68. *Id.* at 141.
69. *Id.*
70. *See* Buchanan v. Warley, 245 U.S. 60 (1917).
71. 334 U.S. 1 (1948).
72. 392 U.S. 409 (1968).
73. *Id.* at 449 (Harlan, J., dissenting).
74. *See* Loving v. Virginia, 388 U.S. 1, 4–6 (1967).
75. *See* Loving v. Virginia, 147 S.E. 2d 78 (Va. 1966), *rev'd*, 388 U.S. 1 (1967).
76. *Id.* at 79 (quoting the trial court).
77. *Loving*, 388 U.S. at 3 (quoting the trial judge).
78. Chambers v. Florida, 309 U.S. 227, 241 (1940).
79. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).
80. *The Thomas Hearings; Excerpts from Senate Session on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A1 (opening statement of Clarence Thomas).
81. It is hardly possible to name all the individuals who fought to bring equal rights to all Americans. Some are gone. Others are fighting still. They include Prudence Crandall, Charles Sumner, Robert Morris, William Lloyd Garrison, William T. Coleman, Jr., Jack Greenberg, Judges Louis Pollak, Constance Baker Motley, Robert Carter, Collins Seitz, Justices Hugo Black, Lewis Powell, Harry Blackmun and John Paul Stevens. For those whom I have not named, their contribution to the cause of civil rights may be all the more heroic for at times being unsung. But, to paraphrase Yale Professor Owen Fiss's tribute to Justice Marshall: "As long as there is law, their names should be remembered, and when their stories are told, all the world should listen." Owen Fiss, *A Tribute to Justice Marshall*, 105 HARV. L. REV. 49, 55 (1991).
82. For an analysis of discrimination faced by Blacks in the areas of

voting, education, employment, and housing, see GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 479–86 (9th ed. 1944) (voting); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 360–69 (6th ed. 1988) (education); COMMITTEE ON THE STATUS OF BLACK AMERICANS, NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 88–91, 315–23 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) (housing and employment); *see also* MARY FRANCES BERRY & JOHN W. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA (1982).

83. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR at vii–ix (1978); A. Leon Higginbotham, Jr., *The Dream with Its Back against the Wall*, YALE L. REP., Spring 1990, at 34; A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 61 (1991).

84. As I wrote in a recent tribute to Justice Marshall:

> There appears to be a deliberate retrenchment by a majority of the current Supreme Court on many basic issues of human rights that Thurgood Marshall advocated and that the Warren and Burger Courts vindicated. This retrenchment . . . caused Justice Marshall's dissents to escalate from a total of 19 in his first five years while Earl Warren was Chief Justice, to a total of 225 in the five years since William Rehnquist became Chief Justice.

Higginbotham, *supra* note 83, at 65 n.55 (1991) (citation omitted); *see also* Higginbotham, *supra* note 3, at 587 & n. 526 (citing Justice Marshall's warning that "[i]t is difficult to characterize last term's decisions [of the Supreme Court] as the product of anything other than a deliberate retrenchment of the civil rights agenda"); A. Leon Higginbotham, Jr., F. Michael Higginbotham & Sandile Ngcobo, *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 4 U. ILL. L. REV. 763, 874 n. 612 (1990) (noting the recent tendency of the Supreme Court to ignore race discrimination).

85. In his recent tribute to Justice Marshall, Justice Brennan wrote: "In his twenty-four Terms on the Supreme Court, Justice

Marshall played a crucial role in enforcing the constitutional protections that distinguish our democracy. Indeed, he leaves behind an enviable record of opinions supporting the rights of the less powerful and less fortunate." William J. Brennan, Jr., *A Tribute to Justice Marshall*, 105 HARV. L. REV. 23 (1991). You may serve on the Supreme Court twenty years longer than Justice Marshall. At the end of your career, I hope that thoughtful Americans may be able to speak similarly of you.