

## BOOK REVIEW

**In the Matter of Color.** A. LEON HIGGINBOTHAM, JR. Oxford University Press, New York, 1978. Pp. xiv, 512.

Stung by personal experiences of discrimination and disturbed by the contrast between America's ideals and its treatment of blacks, Judge Higginbotham has produced a book on the interrelationship of race and the legal process in colonial America. It is the first installment of a projected multi-volume effort which will continue the analysis of American law through 1964. Higginbotham asks how a legal system could encourage and sanction cruelty on a scale so vast as that which prevailed in the American colonies. Although he quotes William Goodell with approval—"No people were ever yet found who were better than their laws, though many have been known to be worse"—he recognizes that a study of slavery solely from the perspective of law is bound to be less than comprehensive. Higginbotham justifies his approach, however, arguing that before a full appreciation of the subtleties of slavery and race relations is possible, it is essential that we understand the legal framework of racial discrimination in America. His objective is to question why the law came to be as it was and to document how the courts, state legislatures, and "honest public servants" vacillated in their attempts to determine whether blacks were people—and, if people, in what relation they should stand to whites. He approaches his subject by assessing the evolution of law in six representative colonies: Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania.

The division of his topic into specific colonial segments has considerable merit since the colonies Higginbotham has studied were established by quite dissimilar groups of settlers having different objectives and, in the case of New York, a different national origin. Terrain and climatic distinctions between the colonies were even more profound. Of course, separate treatment of the colonies should not exclude comparative analyses and the identification of important distinctions between geographical zones. If we are to root out the question "why" blacks received the treatment they did, cross-colonial evaluation of the evolution of racial law is important. Regrettably, Higginbotham shrinks from vital inter-regional analysis, producing a decidedly compartmentalized treatment of legal history in the six colonies.

Higginbotham acknowledges that Virginia had no statutory provision for either a racial minority or a slave class when the first blacks arrived in Jamestown in 1619. In conformity with other scholars, he argues that by 1660 blacks had regularly become lifetime bondsmen. He chooses not to speculate on "why" this development might have occurred, giving no more than a few footnote references to the imaginative and penetrating scholarship of Winthrop Jordan on the evolution of American racial prejudice. Instead, Higginbotham concentrates on "how" blacks passed from servants to chattel, examining with critical insight a variety of legal cases which served as milestones in the descent toward perpetual bondage. This technique—that is, documenting the evolution of legal precedents and statutory provisions rather than seeking social, psychological, or other explanations for the creation of those statutes—constitutes the basic mode of operation throughout the book. The result is a useful and coherent unravelling of the historical record. It is also somewhat unfulfilling insofar as the most compelling question—"why"—is rarely confronted head-on.

Higginbotham asserts that colonial America was a white male-dominated culture. In support of this contention, he observes that servants who were "got with child" by their masters were liable to a two year extension of indenture. The males who sired such illegitimate children were not held culpable. It could be argued that in such cases what appeared to be sex discrimination was in large part a recognition of the available facts. It was not always possible to know absolutely who was the father of a child born out of wedlock. It was always possible to know the mother. In those circumstances the labor service lost to a master through a woman's pregnancy and care of her infant was repaid through additional years of indenture. In the case of inter-racial sex, the extent of white male domination is unmistakable: marriage between white partners was occasionally annulled or terminated in divorce when a white female was discovered in sexual liaison with a black. On the other hand, white males could impregnate black women without fear of divorce or annulment. He concludes: "Where inter-racial sex relations were involved, the legal system was operationally effective to the extent that white men maximized their options, dehumanizing blacks, white women—and themselves."<sup>1</sup>

*In the Matter of Color* will appeal more to lawyers with a bent toward history than to historians with an interest in law. For the professional historian, too many critical issues recently examined in sec-

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<sup>1</sup> A. L. HIGGINBOTHAM, *IN THE MATTER OF COLOR* 47 (1978).

ondary literature are omitted or neglected. Higginbotham takes a fairly positive view of the course of race relations under the Dutch in New Netherlands. But his explanation for the better treatment accorded blacks by the Dutch is not compelling, nor does it exhibit an awareness of experience with slavery in Brazil, Surinam, and the Caribbean. The chapters on Massachusetts and New York offer no important analysis of the process by which slavery was terminated at the end of the colonial period, though there is brief acknowledgment that this occurred. The language Higginbotham uses to describe change is sometimes disturbing. For example, in his cursory remarks on abolition in New York, he writes that in 1777 delegates of the general assembly drafting the state's first constitution "did approve, perhaps unintentionally, a constitution giving all free male inhabitants, regardless of race, creed, or previous condition of servitude, the right to vote in all state elections, subject to property qualifications that applied to *all*."<sup>2</sup> A careful reading of that statement makes it clear that such an explicit statement of rights could hardly have been extended "unintentionally."

The historical detail which serves as background to Higginbotham's examination of court rulings and statutory developments is not always well presented or particularly informative. The case of New Netherlands, a fur trading colony, serves as an example. Because of its small population, the Dutch West India Company was confronted with shipping problems: ships proceeding to New Netherlands to collect furs were very lightly freighted. In order to increase its outbound freights it was necessary for the company to develop the colony. The company decided, Higginbotham writes, to import black labor for that purpose: "Thus, in 1626, three years after the colony's establishment, the Dutch West India Company imported eleven black males into the area; black women were imported in 1628."<sup>3</sup> This information constitutes the full extent of Higginbotham's examination of colonial economic development, slave imports, and slave population. For an analysis of the special relations between the Dutch and their slaves one would have to know more about company motives, the ratio of whites to blacks, and the character of their economic interaction. None of this need be offered in great detail. But it should be stated more explicitly than Higginbotham has done.

The final portion of the book offers a survey of the *Sommersett* case<sup>4</sup> in England and a brief essay on the American Declaration of

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<sup>2</sup> *Id.* at 149.

<sup>3</sup> *Id.* at 101.

<sup>4</sup> *Sommersett v. Stuart*, 20 How. St. Tr. 1 (1771-1772).

Independence. In keeping with earlier chapters, Higginbotham is effective when analyzing a case of law; he is less adept at providing a historical framework for legal encounter. The vast and complex character of the British Empire in the 1770's, the extent to which slavery and the slave trade were critical factors in the operation of that empire, and the moral and legal inconsistency between British and imperial practices regarding slavery are not fully or effectively presented. Furthermore, the author's treatment of the legacy of the *Sommersett* case owes too much to the work of Eric Williams—now three decades old—and too little to recent scholarship.

There is much to admire and some things to lament in Higginbotham's work. It is a useful compilation of the legal record; it is perceptive in its analysis of the law; and it is liberally sprinkled with memorable quotations from colonial figures. The book reads easily, and it is beautifully printed by Oxford Press. The bibliography is disappointingly thin, and there is no division between documentary and secondary sources. The index is a good one, and a Table of Cases provides a very handy addition to the index. This is the work of a practical legal mind. Despite some pretense to the contrary, it does not provide much philosophical penetration, nor does it grapple satisfactorily with fundamental questions. Higginbotham's command of secondary literature is limited. He has, however, launched a worthy undertaking which will serve as a convenient reference for attorneys and historians.

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