The John Marshall Law Review

Volume 12 | Issue 3 Article 10

Spring 1979

Book Review: In the Matter of Color: Race & the American Legal Process-The Colonial Period. By Leon Higgenbotham, Jr. , 12 J. Marshall J. Prac. & Proc. 731 (1979)

Robert Kratovil

BOOK REVIEW

IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD. By A. Leon Higginbotham, Jr. New York: Oxford University Press, 1978. Pp. xxiii, 512. $15.00.

REVIEWED BY ROBERT KRATOVIL*

The author of this text is a graduate of Yale Law School, holds sixteen honorary degrees, and has taught at Yale University, the University of Hawaii, and the law schools of the University of Michigan and the University of Pennsylvania. He has been a Commissioner for the Federal Trade Commission, a United States District Court judge for thirteen years and was recently appointed a judge on the United States Court of Appeals for the Third Circuit. He was Vice Chairman of the National Commission for the Causes and Prevention of Violence established by President Lyndon Johnson in response to the murder of Senator Robert Kennedy.

In 1944 he was a 16 year old freshman at Purdue University, one of 12 black civilian students. The 12 of them were forced because of their race to live in the unheated attic of a crowded private house, rather than in the university campus dormitories. The episode that triggered his interest in writing this book occurred one day, when the freezing temperature made life in the house virtually unbearable. He made an appointment to see Edward Charles Elliott, president of the university. On this occasion he put forth a modest request: that the black students of Purdue be allowed to stay in some section of the state-owned dormitories; segregated, if necessary, but at least not humiliated.

Elliott answered, "Higginbotham, the law doesn't require us to let colored students in the dorm, and you either accept things as they are or leave the University immediately."

On that very day the author had heard a lecture on the Declaration of Independence. After his graduation from Yale Law

* J.D., De Paul University. The reviewer is currently Professor at The John Marshall Law School. In addition to his teaching responsibilities, Mr. Kratovil has authored numerous articles as well as several textbooks in the area of real property and mortgage law.

School, he continued to struggle with the implications of his experience. He concluded that he would have to undertake the task of explaining the meaning of the problem of racial discrimination to himself and to the country, and to do this he would have to start at least as far back as the colonial period. This book resulted.

Slavery, as an institution, goes back to pre-history. In historic times it is mentioned in the Old Testament and in the Code of Hammurabi. It was common in Greece and Rome. Aristotle defends the institution. Indeed in a civilization that produced Aeschylus, Aristophanes, Demosthenes, Euripedes, Homar, Phidias, Socrates and Aristotle himself, it is not easy to quarrel with the conclusion many have reached, that without slavery all the giants of Greek civilization would have worn out their brief lives struggling to wring a primitive existence from the rocky hillsides of ancient Greece. Slavery made a great Greek civilization possible. This, however, is the long view one can take if one has never suffered the injustices that the institution visits upon the slaves. Moreover, American slavery produced nothing but a disastrous Civil War with a bitter heritage of racial discrimination.

That slavery visits monstrous indignities and death upon the slaves cannot be doubted. In modern times we have seen the indescribably hideous slavery and slaughter in Nazi Germany and we remain witnesses to the equally hideous slavery of the Gulag Archipelago. Dachau and Auschwitz will live forever in human memory.

What is unique about Judge Higginbotham's book is his painstaking documentation of the institution as reflected in the pages of the law books, particularly the statutes, of the master race.

He examines in detail, from sources painstakingly culled over a period of years, with the help of librarians and colleagues, a vast body of legislation found in the colonies of Virginia, Massachusetts, New York, South Carolina, Georgia and Pennsylvania. In the beginning the status of the black slave was ambiguous. The total horror and pervasive deprivations of racial chattel slavery had not fully evolved during the early seventeenth century. Both white and black runaway slaves were branded, for example.

But as the passage of time made it clear than an agricultural economy could produce great wealth for the masters only if those who toiled in the plantations were slaves, a hardening process occurred. The very laws that one would expect to protect God's children living in a Christian nation stripped the

black slave of right after right, until he stood naked of all protection, at the mercy of his master. Here are the chapter and the verse that reflect the merciless determination of the lawmakers to convert the black slave into a mere beast of burden.

Even in the constitutions, the great charters of liberty, provisions are found designed to keep freedom beyond the black slave's grasp. Though a lower court held that an early Virginia Bill of Rights applied to blacks, that decision was reversed on appeal.

In Massachusetts, on the other hand, slavery appears to have been abolished, either by court decision in the celebrated case of *Quock Walker*[1] or by the Declaration of Rights of 1780.

In New York, also, the wilful killing, maiming or mutilation of a slave was prohibited, though on the complaint of slaveholders this law was modified to permit a slaveholder to use force to bring a recalcitrant slave to heel. Persons wishing to free slaves were required to post bond so that the freed slaves would not become charges upon public funds. This provision was later relaxed in the case of able-bodied slaves. Emancipation occurred in 1817.

South Carolina enacted harsh legislation against the slaves, including provisions that the offspring of slaves must be deemed slaves. Thus the slave was deprived of that last precious hope, that his children might find freedom.

Georgia, like South Carolina, evinced in its legislation a determination to perpetuate slavery, while Pennsylvania abolished slavery in 1780.

Several concepts emerge. Plainly the author feels the origins of slavery in America were economic. The plantation system, it was felt, rested on a secure foundation of slave labor.

However, the very denial of all rights to plantation slaves led to a fear of rebellion so great that the killing of rebellious slaves was legalized in South Carolina. This author's description of the slaveholder's terror squares with the observations of others. "Race war is a nightmare constantly haunting the American imagination."[2] This fear was not unfounded, as evinced in the Nat Turner revolt of 1831, in which fifty-one white persons were killed.

Legislation against sexual contact between white and black was also common, though probably rarely enforced, since some

1. Quock Walker v. Jennison, Proc. Mass. Hist. Soc., 1873-75, 296 (Sept. 1891).

2. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 329 (1966).

rather conspicuous personages had black mistresses and went unpunished.

There was, of course, another side to this picture (that the author fails to mention), that is, the stubbornness of the North toward the fugitive-slave laws and the abolition movement.[3] Laws exiling free slaves were not enforced in the North.[4] Ten Southern Codes made it a crime to mistreat a slave.[5] The Black Code of Louisiana of 1806 made cruel punishment a crime.[6] Many such cross currents can be found.

As the author points out, forces have been unleashed that will inevitably lead the progeny of the slaveholder to a society more just than their own. Judge Cardozo spoke of the tendency of a principle to expand itself to the limit of its logic. This, indeed, is true of the Declaration of Independence, which declares that all men are created equal. In this document all men who truly long for freedom for all can find refuge. Not in our lifetime, but surely in some future time, the last vestiges of racial prejudices will disappear.

3. FRIEDMAN, HISTORY OF AMERICAN LAW 194 (1973).
4. *Id.*
5. *Id.* at 198.
6. *Id.*