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History and the American legal profession are, of course, not strangers to each other. Lawyers constantly produce histories seeking to convince courts that rulings favorable to their clients best fulfill the intent of past legislators or court precedents now only dimly remembered. Judges also write history in an effort to convince their peers, the bar, and indeed the public that their pronouncements are not peculiar innovations, but instead, are consistent with both the way the law was originally envisioned and its subsequent evolution. This history produced by the bar and bench is often of a mixed quality, frequently suspect as pure history, whatever its persuasiveness as an argument for the direction the law should take. Some attorneys and jurists have taken the study of legal history beyond the usual precincts of courtroom argumentation and decision drafting and have made lasting contributions to the way we see the past and the law's development in the past. Contributions by jurists include writings both from the bench—Associate Justice Benjamin R. Curtis' dissent in *Dred Scott*[1] and Associate Justice Hugo Black's discussion of the intent of the framers of the fourteenth amendment in applying the Bill of Rights to the states[2] come to mind—and for the larger educated public, of which Associate Justice Oliver Wendell Holmes, Jr.'s *The Common Law*[3] is a memorable example.

Despite this intermingling of law and history, it is the rare lawyer or judge whose efforts demonstrate the kind of mastery of both historical insight and historiographical technique that truly expands our understanding of the past. Rarer still is the lawyer or judge, who while acting as an historian, gives us new insights, not

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1. Dred Scott v. Sanford, 60 U.S. 393, 564-633 (1856) (Curtis, J., dissenting).

2. Adamson v. California, 332 U.S. 46, 68-123 (1946) (Black, J., dissenting) (relevant discussion is labeled: Appendix).

3. Oliver Wendell Holmes, Jr., The Common Law (1881).

only into the development of law in the past, but into the evolution of social conditions as well. This has been the important contribution of Judge A. Leon Higginbotham, Jr. whose historical writings, focusing on the development of the law of race in American society, have taught us much about this society's most enduring problem and helped us to see both our legal and social histories in an important new light.

Judge Higginbotham's writings reflect many of the virtues common to good historians: familiarity with the secondary literature, wide exploration of long obscured primary sources, and a clear narrative style that compels the reader's interest. If these were Judge Higginbotham's sole virtues as an historian, they would be enough to make his writings valuable contributions to the existing literature. However, Judge Higginbotham brings something more to his study of the past. He is an historian animated by a passion, motivated by a knowledge of passion denied, and profoundly aware of the importance of that denial in the shaping of the history of our nation. His is a knowledge borne of personal experience. He properly prefaces *In the Matter of Color*,[4] his study of law and race in colonial America, with a personal recollection of his encounter with racial discrimination as a freshman at Purdue University in 1944.[5] By doing so, he identifies himself as one for whom the American dilemma of racism in a normatively egalitarian society is more than just an academic consideration. But his recounting of his personal experience does more; he reminds us of the links between our past and our present and how the search for racial justice in the present must inevitably involve coming to grips with our troubled and troubling history.

It is with this concern—the desire to make sense of the often insensible problem of race in America—that Judge Higginbotham began his sojourn as an historian. His most comprehensive work, *In the Matter of Color*, traces the problem to its origins: colonial America. In that work, as he freely notes at the outset, Judge Higginbotham seeks an answer to the most puzzling and vexing question of American race relations, one posed by Associate Justice Marshall when he argued for the plaintiffs in the landmark case of *Brown v. Board of Education*; that is, why blacks, of the many groups that inhabit the United States, have been subject to the most persistent and enduring discrimination.[6] His is, in short, an

4. A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: the Colonial Period (1978) [hereinafter *In the Matter of Color*.

5. *Id.* at VII-X.

6. 347 U.S. 483 (1954); *supra* note 4, at 4.

inquiry into the origins of the American caste system. And, as his study demonstrates, the answer is by no means a simple one. The English settlers of seventeenth century North America were heirs to a legal and cultural tradition that knew neither slavery[7] nor an especially degraded social position for blacks.[8] Both slavery and a unique pariah status for blacks grew in the American milieu, an early American legacy that endures to the present.

In the Matter of Color traces the evolution of law and custom with respect to race in six colonies: Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania. Perhaps the most illuminating of these discussions is the chapter focusing on Virginia.[9] As Judge Higginbotham has noted elsewhere, he claims the legacy of Virginia as his own.[10] And indeed, Virginia presents a compelling paradox for all students of American constitutionalism. If Virginia is widely and justly celebrated for producing statesmen who contributed much to the American constitutional concepts of limited government and individual liberty, Virginia must also be recognized for the major role it played in creating the system of castes and slavery that has cast a long shadow on American life.[11]

In his examination of Virginia's evolution as a slave society, Higginbotham begins with the murky origins of Virginia's racial history, the importation of "twenty Negers" into Jamestown in 1619. The status of the earliest black involuntary immigrants in Virginia has been the subject of historiographical controversy for generations. Statutory enslavement was not formally enacted until 1660.[12] The earliest Africans in Virginia appear to have been treated as indentured servants, occupying a status not that different from their white counterparts. In time, that status changed. The singling out of blacks from other temporarily unfree persons, namely, indentured servants, apprentices, seamen, and others; and the creation of a class permanently in bondage who would live out unfree lives and who knew that their children would meet the

7. 1 Frederick Pollock & Frederick Maitland, The History of English Law 35-37, 412, 424, 472, 529 (2d ed. 1898).

8. Robert J. Cottrol & Raymond T. Diamond, Book Review 56 Tul. L. Rev. 1107, 1112-18 (1982) (reviewing *In the Matter of Color*).

9. *See generally supra* note 4.

10. A. Leon Higginbotham, Jr., *West Virginia's Racial Heritage: Not Always Free*, 86 W. Va. L. Rev. 3, 5 (1983) [hereinafter *West Virginia's Racial Heritage*].

11. Historian Edmund S. Morgan explores this paradox at great length in Edmund S. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia (1975).

12. *Supra* note 4, at 21.

same fate, is one of the most important stories of colonial Virginia and indeed, colonial America.

Judge Higginbotham's able rendition of that story is significant both for the intrinsic value of the story and for the important methodological lesson that he teaches legal and social historians. Much has been made in the last two decades or so of the need to expand the historian's horizon, to relate the past experiences not only of the major figures who participated in the great political struggles of their day, but to also tell the stories of the often inarticulate poor who left few written records of their experiences. In the last generation, significant steps have been made towards that end. Practitioners of the new social history have done much to tell us about demographic conditions, aggregate property ownership, crime and litigation rates, and migration patterns among the ordinary persons of the past. A considerable amount of this work has focused on the colonial era.[13] *In the Matter of Color* reminds us of the people and their individual triumphs and tragedies; people who would otherwise be lost to history. Judge Higginbotham demonstrates that individual cases, the raw material or primary sources of legal history, can tell us not only of the development of law, but also about the day to day lives of ordinary people who lived under, and sometimes outside, the law. Judge Higginbotham uses the cases and statutes from early Virginia, and those of the other colonies, to introduce us to real people living out their lives against the backdrop of increasing racial restriction. We learn of one Hugh Davis, a white man, who is ordered whipped for having sexual relations with a black woman.[14] We learn of statutes which provide strong evidence that Virginia planters were afraid that black slaves and white servants would make common cause.[15] Also we learn of the fear of interracial sexual unions and the origins of one of the nation's oldest and most persistent taboos.[16]

But Judge Higginbotham's most important contribution in *In the Matter of Color* is to show how the early American experience with race and law set the stage for the large and tragic drama that was nineteenth century American slavery and abolition. He traces

13. *See e.g.*, Phillip J. Greven, Jr., Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts (1970); David T. Konig, Law and Society in Puritan Massachusetts: Essex County, 1629-92 (1979); William E. Nelson, Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825 (1981).

14. *Supra* note 4, at 23.

15. *Id.* at 34-35.

16. *Id.* at 36-47. Judge Higginbotham explored this area in greater depth in a collaborative article done with lawyer and anthropologist Barbara Kopytoff. *See* A. Leon Higginbotham, Jr. & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967 (1989).

the histories of his selected states to the end of the eighteenth century, looking towards the end of legal slavery that would take place in the three northern states and the strengthening of the institution that would take place in the three southern ones. His examination of the *Declaration of Independence* reminds us of the only partially fulfilled promise of that document and the flawed idealism it represented. His discussion of the English case *Somersett v. Stuart*[17] is used to contrast, not only English and American jurisprudence with regard to slavery, but the fortunes of the English anti-slavery movement with its American counterpart as well.[18]

Judge Higginbotham's concern with the irony and lost promise of the revolutionary era is continued in his study of race and law in West Virginia: *West Virginia's Racial Heritage: Not Always Free*.[19] West Virginia's racial history has been less well studied than that of the "Older Dominion" from which it seceded. Judge Higginbotham places West Virginia's racial heritage against the background of the larger Virginian racial culture from which it sprang. In this essay, he again forces the reader to confront the paradox of revolutionary Virginia, raising the disturbing question of whether we should regard the Commonwealth that produced Jefferson and Madison as the mother of statesmen, or the mother of slavery?[20] This profoundly important question, raised at the beginning of the discussion, helps Judge Higginbotham frame his examination of the western part of Virginia, the region that ultimately broke away to form a new state. Although West Virginia had few slaves and a small black population, the Virginia racial legacy exerted a profound influence on the state. If the nonslaveholding whites of West Virginia disliked the peculiar institution that had developed in the plantation South, they were also hostile to a free black presence in their state.[21] Judge Higginbotham's detailing of West Virginia's Civil War era legislation prohibiting both free black settlement and slavery relates an important chapter in the history of American race relations. The hostility in many parts of the country to any black presence is moving testimony to the extent to which colonial era decisions regarding race impacted large segments of the country, even those

17. *Supra* note 4, at 313 (citing King's Bench: 12 George III A.D. (1771-1772) Lofft, 20 Howell's State Trials).

18. *Id.* at 313-68.

19. *See supra* note 10.

20. *Id.* at 6.

21. *Id.* at 22.

areas free or largely free of a slave presence.[22]

Judge Higginbotham's way of viewing the continuity between our distant racial past and our more recent racial history can also be seen in his examination of the law of race as it developed in another border state: Missouri. His work, *Race, Sex, Education and Missouri Jurisprudence:* Shelley v. Kraemer *in a Historical Perspective*,[23] examines the jurisprudence of race and slavery in a state whose racially restrictive practices gave the modern civil rights movement two of its earliest Supreme Court victories, *Shelley v. Kraemer*[24] and *Missouri ex rel. Gaines v. Canada*.[25] Like his other explorations in legal history, *Missouri Jurisprudence* illustrates the often tragic path of America's racial history by humanizing its subjects. We are introduced in this article to Celia, an antebellum Missouri slave woman executed for killing her owner while resisting his efforts to rape her. Celia's is a story that at once educates and horrifies us, illustrating with one stark illuminating example both the perversion of justice and the abject subjugation of a people that was slavery in the United States. It is with this background that Judge Higginbotham prepares us for the subsequent interaction of law and race in Missouri's history.

Judge Higginbotham's historical writings are not those of a detached observer perusing the archives merely to settle academic controversies. His writings are part of a passionate search for justice, part of a realization that law, whether past or present, is ultimately about the people, the individuals who live under enacted statutes and court pronouncements. That Judge Higginbotham has managed to combine this passion with the professional rigor of the legal historian more than vindicates the intellectual odyssey of the former sixteen year old Purdue University freshman who asked himself why blacks were singled out for special ignominy.[26] I hope his journey and the writings about his discoveries continue for some time to come, for he has much to teach historians, lawyers, and indeed, all concerned with the nation's most difficult problem.

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22. *Id.*

23. A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 Wash. U.L.Q. 673 (1989) [hereinafter *Missouri Jurisprudence*].

24. 334 U.S. 1 (1948).

25. 305 U.S. 337 (1938).

26. *Supra* note 4, at VIII.