

December 1991

Judge Higginbotham's Atelier of Scholarship

Barbara K. Kopytoff

Follow this and additional works at: <https://lawandinequality.org/>

Recommended Citation

Barbara K. Kopytoff, *Judge Higginbotham's Atelier of Scholarship*, 9(3) LAW & INEQ. 447 (1991).
Available at: <https://scholarship.law.umn.edu/lawineq/vol9/iss3/8>

Judge Higginbotham's Atelier of Scholarship

Barbara K. Kopytoff*

The scholarly accomplishments of A. Leon Higginbotham, Jr. would be impressive even for a full-time academic who has no other responsibilities and commitments. That he did so many other things at the same time makes his scholarship truly remarkable. But no one can do more than is humanly possible, not even someone with the prodigious energy, talent, and dedication to work of Judge Higginbotham. The fact that he was a full-time judge,¹ with numerous outside teaching commitments and speaking engagements, meant that he needed assistance to produce the volume of scholarship that he has. This has worked to the benefit of scores of people who have been drawn into the production of his scholarly work. Thus, over the years, a large group of people—research associates, legal interns, law students, graduate and undergraduate students, law clerks and, on occasion, high school students—has had the opportunity to participate in Judge Higginbotham's research projects and to learn from them and from him.

Other contributors to this issue of *Law and Inequality* describe the substance of Judge Higginbotham's scholarly work; I shall describe how the work was accomplished. This article is a reflection on Judge Higginbotham's primary research project on the law of race and slavery in pre-Civil War Virginia during the late 1980s when I was closely involved in the project.² I wish to present a picture of the cooperative research enterprise that the judge led and to convey the flavor of its operation by describing my participation in it.

At the outset, Judge Higginbotham welcomed each of us to

* Associate, Schnader, Harrison, Segal & Lewis, Philadelphia, Pennsylvania; B.A., Swarthmore College, 1960; M.A., Ph.D., University of Pennsylvania, 1964, 1973; J.D., Temple University School of Law, 1987; Research Associate to Judge A. Leon Higginbotham, Jr., 1987-89; Judicial Clerk to Judge A. Leon Higginbotham, Jr., 1989-90.

1. Judge Higginbotham stepped down from his position as Chief Judge of the United States Court of Appeals for the Third Circuit on January 31, 1991, and assumed Senior Judge status.

2. The project on Virginia was part of a larger scheme that resulted in Judge Higginbotham's book, *In the Matter of Color: Race & the American Legal Process: The Colonial Period* (1978), as well as articles on race in the United States and in South Africa. See *infra* note 5.

the project, explained his sweeping vision of it, and told us what it was that he wanted to accomplish. He had an extraordinary ability to make each one of us, from those who became his coauthors to the occasional high school student whose primary contribution was photocopying and filing, feel that his or her contribution was appreciated, valued, and essential to the overall project. The part I liked best at these initial meetings was his reassuring encouragement: "If the book turns out to be a success, then you can say, 'I had a part in that.' If it's not so well received, then you can tell people, 'I tried to set Leon straight on that. It's a shame he just wouldn't listen.'"

At my initial meeting with Judge Higginbotham, he said that, because of the time constraints placed on him by other commitments, he saw his primary role as providing guidance and inspiration for the project. He did much more than that, but he never failed in what he saw as his main task. When those of us who were working on the project got bogged down in details and threw up our hands, his vision never faltered. He pushed us through the bad patches until we emerged on the other side, surprised at what we had accomplished.

When I joined the judge's research project, it had been enconced for a number of years in the red brick and glass McNeill Building at the University of Pennsylvania. There, supported by the Rockefeller Foundation, the Ford Foundation, the William Penn Foundation, and the University of Pennsylvania's Sociology Department, a small and ever-changing band of researchers tried to carry the work forward in the direction of Judge Higginbotham's vision. There had been many previous generations of participants in the judge's projects. Some of them I know only from later tales of their contributions and from the acknowledgements in Judge Higginbotham's articles and in his first book, *In the Matter of Color*,³ which dealt with the law of race and slavery during the colonial period. Others, I worked with and came to know personally. I do not doubt that there will be many others to follow.

3. Higginbotham, *supra* note 2. As the judge stated in the preface to his book, the book was "in the writing" for ten years. *Id.* at vii. A small sampling of the names cited in the acknowledgements shows the varied and accomplished careers that many of them had after their departure from the project: Edward Dennis, a partner in the firm of Morgan, Lewis & Bockius, served in the United States Department of Justice as Acting Deputy Attorney General and as Assistant Attorney General; Michael Fitts is a professor at the University of Pennsylvania School of Law; Anne Watley Chain is a United States Attorney in the Eastern District of Pennsylvania; Charisse Lillie-Andrews is the City Solicitor of Philadelphia; Kathryn Streeter Lewis is a Judge of the Court of Common Pleas of Philadelphia County—to name only a few. See *id.* at xii.

In my time there was Laura Farmelo, a lawyer and Ph.D. candidate in sociology, who had for several years directed the day-to-day research, supervising the collection of materials that formed the core of the project. The materials were to be the basis of a book on the law of race and slavery in pre-Civil War Virginia. Laura also coauthored an article⁴ with Judge Higginbotham and assisted on many of his articles and speeches. When I arrived, she was phasing herself out of the project to devote her energies full-time to a project of her own on South Africa, and the mantle of project supervision had passed to Susan Ginsburg. By the time Susan left to work as Judge Higginbotham's law clerk, six months after I had arrived, she had completed the herculean task of indexing the Virginia statutes by year and by subject matter. The index made the job of finding statutes relevant to particular topics much easier for those of us who followed her. In addition, she also researched the common law development of the idea of slaves as property in Virginia.

A separate branch of the project engaged Michael Higginbotham and Sandile Ngcobo, a South African attorney, who brought to it his extensive knowledge of South African law. They both worked with the judge on several studies comparing the law of race in the United States and South Africa.⁵ Mike also began work on a chapter on manumission in Virginia. He left to begin teaching at the University of Baltimore School of Law, where he continued his research.

Later two more research associates—first, Anne Jacobs and, then, Greer Bosworth—joined the Virginia project. Anne worked on the criminal justice system, and her research formed the basis of a chapter on that topic for the book. Greer worked on free blacks, and her research went into a law review article,⁶ as well as into a chapter. I stayed throughout Anne's tenure and left midway through Greer's to become Judge Higginbotham's law clerk.

In addition to our work on the project, we also participated in the judge's courses on race and the American legal process given

4. A. Leon Higginbotham, Jr. & Laura B. Farmelo, *Racial Justice and the Priorities of American Leadership*, in *Social Class and Democratic Leadership: Essays in Honor of E. Digby Baltzell* 276 (Harold J. Bershad ed. 1989).

5. A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. Rev. 479 (1990); A. Leon Higginbotham, Jr., F. Michael Higginbotham & S. Sandile Ngcobo, *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. Ill. L. Rev. 763.

6. A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 Harv. C.R.-C.L. L. Rev. 17 (1991).

at the Sociology Department of the University of Pennsylvania, by the University of Pennsylvania Law School, and by the New York University Law School. The courses were closely tied to Judge Higginbotham's research, and his first book was used as a text. In addition, work in progress was regularly presented in classes. The judge sought and valued the students' opinion on the work of the project. Since I had never taken a course with Judge Higginbotham, attending the lectures was an eye opener for me. His vast knowledge, his extraordinarily effective presentation, and his respect for the students made his courses very popular and regularly oversubscribed.

Besides those of us who were full-time research associates, paid by grants, there was a stream of short-term legal interns and work-study students who performed many of the routine but indispensable tasks. Sometimes they worked directly with Judge Higginbotham on other articles or speeches. Sometimes they worked under the direction of the research associates at the university. Most of the research associates moved on after a year or so, enriched by the experience of working with Judge Higginbotham and of delving into Virginia legal history. The project was run on a bare-bones budget, and few recent law school graduates could afford to work on it for more than a year. To a large extent, we each trained our successors in the details of the work, and we sometimes lost track of things in the process. It was not the most efficient way to carry on a research project, but it was what was available, and Judge Higginbotham has been a genius at adapting what is available to the steady goals of his scholarship. The turnover in staffing had a special payoff: it meant that many more people had the opportunity to rub shoulders with black and white Virginians of the seventeenth, eighteenth, and nineteenth centuries, to try to understand the impact of the law on their lives, to participate in Leon Higginbotham's vision of legal history, and to work to realize some part of it.

Most of the time we worked at the university, making excursions to the courthouse when Judge Higginbotham had time in his busy schedule to meet with us. Then we would discuss shaping the project around the ten precepts of racial inequality that he had formulated to provide the framework for the book.⁷

The collection of basic materials was largely completed by the

7. The precepts underwent continuous revision as we worked on them. A recent version is as follows:

[1] Inferiority—Presume, preserve, protect and defend the ideal of the superiority of whites and the inferiority of blacks;

[2] Property—Define the slave as the master's property, disregard

time I joined the project. Each of the research associates was to select one precept, locate materials in the project files that related to it, and begin drafting a chapter on it. Until we produced a draft, or at least an outline for a draft, the judge kept his distance from what we were actually doing in our daily research. That was probably all to the good, for it meant that the discussions were necessarily abstract while we were formulating how to approach a particular topic and were selecting materials for it. Our discussions focused on the forest rather than the trees, and if there was one thing we needed to keep us from getting bogged down in the hundreds of statutes and cases, and the reams of secondary materials, it was a view of the forest. These discussions usually included everyone on the project.

Once a first draft was on paper, the more detailed work with

the humanity of the slave except where it serves the master's interests and deny slaves the fruits of their labor;

[3] Powerlessness—Keep blacks—whether slave or free—as powerless as possible so that they will be submissive and dependent in every respect, not only to the master, but to whites in general. Subject blacks to a secondary system of justice with lesser rights and protections and greater punishments than for whites;

[4] Racial purity—Always preserve white male sexual dominance. Draw an arbitrary racial line and preserve white purity as thus defined. Tolerate sexual relations between white men and black women; punish them severely between white women and non-white men;

[5] Family—Recognize no rights of the black family, destroy the unity of the black family, deny slaves the right of marriage; demean and degrade black women, black men, black parents and black children, and then condemn them for their conduct and state of mind;

[6] Manumission and Free Blacks—Limit and discourage manumission, minimize the number of free blacks in the state, confine free blacks to a status as close as possible to slavery;

[7] Education—Deny blacks any education, including a knowledge of their culture, and make it a crime to teach those who are slaves how to read or to write;

[8] Religion—Recognize no rights of slaves to define and practice their own religion, to choose their own religious leaders, or to worship with other blacks, encourage them to adopt the religion of the white master, teach them that God is white and will reward the slave who obeys the commands of his master here on earth, use religion to justify the slave's status on earth;

[9] Liberty-Resistance—Limit blacks' opportunity to resist, rebel or flee by curtailing their freedom of movement, freedom of association and freedom of expression, deny blacks the right to vote;

[10] By Any Means Possible—Support any practice or doctrine from any source whatsoever that maximizes the profitability of slavery, legitimizes racism, and retaliate, including through violence, against those of both races who dare to advocate abolition or who, by their speech or actions, deny the inherent inferiority of blacks.

Higginbotham & Bosworth, *supra* note 7, at 21 n.18.

One precept is the focus of each of three articles by Judge Higginbotham and a research associate. The second and fourth precepts are the subjects of articles by Higginbotham and Kopytoff, *infra* notes 10 and 9, respectively. The sixth precept is the subject of an article by Higginbotham and Bosworth, *supra* note 6.

Judge Higginbotham began. A dialogue, sometimes of many months' duration, took place. The manuscript was picked apart and revised, argued over, edited and reedited. On one side was Judge Higginbotham with his vastly superior, indeed encyclopedic, knowledge of the history of race and the legal process in this country. On the other side was an individual researcher who, though far less knowledgeable about the larger picture, had a thorough familiarity with the specific materials of his or her chosen topic. While the differences in perspective led, on occasion, to what diplomats call "a frank exchange of views," Judge Higginbotham's graciousness and his willingness to listen meant that differences were usually resolved amicably. Finally, the judge added sections to tie the piece into his overall vision. The manuscript was then ready to send out for publication as an article or to await publication in the book.

Except for me, all of those who worked full-time on the project while I was there had had a prior relationship with Judge Higginbotham. Most of them had been students in one of his classes, or summer interns in his chambers, or both; Mike Higginbotham was his cousin. All of them knew about the project, and those who had been summer interns had spent some time working on it. While I lacked that background, I had done other things that prepared me for work on the project. Before going into law, I had been an anthropologist and had done ethnographic and historical research on Jamaican Maroons, who are descended from bands of escaped slaves. I had enjoyed working with historical materials from the seventeenth, eighteenth, and nineteenth centuries, and had published articles on the Maroons in historical as well as anthropological journals.⁸

While I was still in law school, I read about Judge Higginbotham's continuing project in one of the University of Pennsylvania's publications, I thought that working on the project might provide a good transition between my former career in anthropology and my new one in law. I wrote to Judge Higginbotham about my interest in the project and I also applied to a number of judges for judicial clerkships. Judge Higginbotham of-

8. See, e.g., Barbara K. Kopytoff, *Religious Change Among the Jamaican Maroons: The Ascendance of the Christian God Within a Traditional Cosmology*, 20 J. Soc. Hist. 463 (1987); *Colonial Treaty as Sacred Charter of the Jamaican Maroons*, 26 Ethnohistory 45 (1979); *The Early Political Development of Jamaican Maroon Societies*, 35 Wm. & Mary Q. 287 (1978); *Guerilla Warfare in Eighteenth Century Jamaica*, 19 Expedition, Winter 1977, at 20; *Jamaican Maroon Political Organization: The Effects of the Treaties*, 25 Soc. & Econ. Stud. 87 (1976); *The Development of Jamaican Maroon Ethnicity*, 22 Caribbean Q., June-Sept. 1976, at 33.

ferred me a position on the project and a clerkship, and I was delighted to accept both.

When the judge had interviewed me, over a year before I started on the project, he had described the primary work as being research for the book. By the time I arrived, most of the basic material had been gathered, and the focus of the project had shifted to drafting chapters. We still did research, but primarily in the project files of Virginia statutes and cases and in secondary sources in order to select materials for the chapters. Judge Higginbotham indicated that the increasing load of court work and other pressures meant that he would have less time to spend on drafting than he had when his first book was written. Consequently, a greater burden would fall on the research associates, who became coauthors of the chapters on which they worked.

Since only a few chapters had been claimed when I arrived on the project, I had considerable latitude in choosing the precept on which I wanted to focus. I tried the one on religion and one on the family before finally settling on the topic of racial purity. This allowed me to explore a subject that had fascinated me ever since my anthropological fieldwork in Jamaica. The racial lines were drawn somewhat differently in Jamaica from the way they were in the United States, emphasizing for me the arbitrary, cultural nature of racial classification in both countries.

The journey through the project files was one of discovery. Since the files pointed the way to key statutes, I had a quick start. I learned almost at once that the common and exclusive racial definitions developed in the United States during the twentieth century which classifies anyone with any African heritage at all as *colored*, did not operate in the eighteenth and nineteenth centuries. Many of those considered colored in the segregated St. Louis of my childhood, and *black* or *African-American* today, would have been legally *white* in eighteenth century Virginia. Furthermore, the legal definition of race in Virginia had changed several times, making the white category sometimes less and sometimes more exclusive. The total exclusion of anyone with any trace of African ancestry was a twentieth century invention. This discovery reinforced my view of race in the United States as a phenomenon that was largely culturally constructed. In Virginia, despite the frequently proffered justification that racial discrimination reinforced a *natural* order, the shifting legal and cultural classifications of race were not ordained by nature and bore little relation to a scientific or anthropological approach to race.

There were other discoveries no less intriguing. For example,

before Emancipation, the statutes prescribing punishment for voluntary interracial sexual relations were directed only toward whites. They alone were charged with maintaining the purity of the white race. No blacks, not even free blacks, were designated for punishment by the statutes or mentioned as being punished in the cases.

My first draft of the chapter on racial purity was long on the excitement of discovery and short on organization. Judge Higginbotham read it, was lavish in his praise, and gave not one word of criticism. He knew intuitively the most effective way to get me to produce quickly a second, more coherent version. When it was done, the judge and I worked on it for many months, both separately and together. We edited it; we reworked and amended it; Judge Higginbotham added substantial sections; we presented it to a faculty symposium in the sociology department; and finally we sent it out to law journals. While we were waiting for a response, the judge and I periodically discussed additional revisions that we might make in the article, but since we were inclined to revise it in different directions, we made none, and the article was accepted and published by the *Georgetown Law Journal*.⁹

Because my term on the project was somewhat longer than most, I had time to complete a second chapter with the judge, and it was also published as an article. This one was on slaves as property. Susan Ginsburg was already working on the idea of slaves as property in Virginia, and my work complemented hers. I became intrigued by the fact that Virginia law recognized slaves as human beings in some contexts, although the conventional wisdom was that the law saw them only as property. It turned out, not surprisingly perhaps, that the law recognized the humanity of slaves when to do so enhanced, or at least did not interfere with, their owners' interest in them as property. When property rights and the recognition of the slaves' humanity conflicted, property rights prevailed. The matter was one of priorities in a slave society, but it was startling to see the humanity of the slave championed in one case and ignored in another.

We finished the article the week before I left the university for the courthouse, and the *Ohio State Law Journal* accepted it for publication.¹⁰ That rounded out my work on the project. Once I

9. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967 (1989).

10. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 Ohio St. L.J. 511 (1989).

became Judge Higginbotham's law clerk, my only direct responsibilities were shepherding the two articles through the editing process at the law journals, a task made easy and pleasant by the excellent and thorough work of the staffs of both journals. I still sat in on general meetings on the book while I was at the courthouse, and Greer Bosworth was at the university. Then Greer joined me at the courthouse as a law clerk, and both of us attended some of the project meetings. Matthew Ireland succeeded Greer at the university, and, later, Valerie Bowen succeeded him.

In the fall of 1990, after I completed my clerkship and began to work for a law firm, most of the research associates who had served full-time on the project during my association with Judge Higginbotham attended a progress and planning meeting on the book. Lo and behold, the project that we sometimes thought would drag on forever seemed near completion. The planned book of ten precepts had grown to an unmanageable size. Judge Higginbotham proposed to scale down his original plan for the book to something more manageable, much of which was already written. The book would now comprise five of the original ten precepts; the remaining precepts would provide the framework for a second book on Virginia. True to his roles as a visionary and as a man who could make use of what was available, he had adapted his immediate goal to accommodate what had been accomplished.

Having come to the project with an academic background of solitary research and writing, I had wondered at times if scholarship could be produced this way. But it was, and the experience enriched us all. Those of us who had coauthored what would become the chapters of the book were part of it, as were all those whose contribution did not rise to coauthorship, either because of the limited time they could give or because of the stage of the project in which they participated. Judge Higginbotham had shown us not only how to produce a cooperative piece of scholarship, but also how to produce it with style.

Working with an ever-changing assortment of talented people with varying backgrounds in scholarship, he pursued his vision with enthusiasm, determination, and good humor. Ever gracious and lavish with praise and appreciation for our work, he was always willing to share his vast learning with us, to laud our accomplishments, and to encourage our efforts.

Those of us who were privileged to work on the project experienced the usual benefits conferred by travel, in this case by a journey through Virginia legal history. We were able to enter into another world, and, in trying to understand it, we gained new in-

sights into our own world. More importantly, we had the benefit of working closely with one of the great judges of our time and a preeminent scholar of race and the American legal process. Some part of his learning and his vision will always be with us.