



12-1-1978

### Civil Rights and Legal Order: The Work of A. Leon Higginbotham, Jr.

Donald P. Kommers

Eugenia S. Schwartz

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Donald P. Kommers & Eugenia S. Schwartz, *Civil Rights and Legal Order: The Work of A. Leon Higginbotham, Jr.*, 54 Notre Dame L. Rev. 181 (1978).

Available at: <https://scholarship.law.nd.edu/ndlr/vol54/iss2/2>

This Commentary is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# Civil Rights and Legal Order: The Work of A. Leon Higginbotham, Jr.\*

by  
Donald P. Kommers\*\*  
and  
Eugenia S. Schwartz\*\*\*

## I. Introduction

On October 11-12, 1978, Judge A. Leon Higginbotham, Jr.<sup>1</sup> delivered the Notre Dame Law School's Seventh Annual Civil Rights Lecture under the general title, "From Thomas Jefferson to Bakke: Race and the American Legal Process."<sup>2</sup> His lecture drew heavily from his recent and widely heralded book, *In the Matter of Color—Race and the American Legal Process: The Colonial Period* (1978). He plans to write four books on race and the legal process in the United States. *Matter of Color*, the first of these books, was written during the thirteen-year period when Higginbotham was building a record of considerable distinction as a Federal District Court Judge for the Eastern District of Pennsylvania.

During his tenure as a district court judge he authored several notable opinions involving racial discrimination. These opinions, in addition to being models for lucidity of expression, draw heavily upon the historical research in which he was engaged at the time. It seems to us appropriate, therefore, on the occasion of the Higginbotham lecture, to consider his work as both historian and judge. Specifically, this article will serve the threefold purpose of (1) reviewing *Matter of Color*, (2) illustrating the author's use of history in two judicial opinions dealing with the rights of black Americans, and (3) reflecting upon the implications of Higginbotham's work in legal education today.

---

\* The authors wish to thank Professor Edward M. Gaffney, Jr., Associate Director of the Center for Constitutional Studies, Notre Dame Law School, for his comments on an earlier draft of this commentary.

\*\* Director of the Center for Civil Rights, Professor of Law, and Professor of Government and International Studies at the University of Notre Dame; Ph.D., University of Wisconsin. He has been a scholar in residence at the West German Federal Constitutional Court and an Alexander von Humboldt Fellow in the law school of the University of Cologne.

\*\*\* Legal Intern, Center for Civil Rights at the University of Notre Dame; Candidate for Juris Doctor at the University of Notre Dame Law School, May 1980; B.A., 1963, Womens College of the University of North Carolina.

1 A. Leon Higginbotham, Jr., is a graduate of Yale Law School and holds sixteen honorary degrees. He has taught at Yale University, the University of Hawaii, and the law schools of the University of Michigan and University of Pennsylvania. He has been a Commissioner of the Federal Trade Commission, a United States District Court Judge for thirteen years, and is currently a Judge on the United States Court of Appeals for the Third Circuit. During his tenure as a federal district court judge he also served as Vice-Chairman of the Commission for the Causes and Prevention of Violence established by President Johnson in response to the assassination of Robert F. Kennedy. In 1978 he published *In the Matter of Color—Race and the American Legal Process: The Colonial Period*.

2 The lecture appears in this issue of the *Notre Dame Lawyer*.

## II. Race and Law

### A. *An Indictment*

If *Matter of Color* was just another tale of the indignities, disabilities, sufferings, and brutalities visited upon black persons by their white masters during the colonial period, it would not be a significant book. It is significant because it documents in rich detail how law was used, consciously and directly, to brutalize black persons and to deprive them totally of their personhood. The legal order did not simply tolerate the massive oppression of one race by another; it actively condoned that oppression by institutionalizing slavery and stripping the slave of all human rights.

Higginbotham's moral indictment against law contains a long bill of particulars: Law in colonial America supported the international slave trade, yielding large profits to many settlers, merchants, and sea captains; law denied to blacks freedom of movement and assembly; law made criminal the act of teaching a black person to read or write; law barred blacks from all free professions and trades; law forbade blacks from carrying or owning weapons of any kind; law barred blacks from leaving the premises of the master without written permission; law imposed penalties on whites aiding any black in his claim to freedom; law did not permit the punishment of a white person on the testimony of a black; law punished blacks more severely than whites and imposed especially harsh punishments for black on white sexual offenses; law imposed fines on masters failing to brand their slaves; law authorized the mutilation, limb amputation, and even private killing of runaway slaves; law permitted the whipping of blacks who lifted a hand in anger against any Christian; law limited and in some colonies actually prohibited manumission, while in others it discriminated invidiously against free blacks; and the ultimate indignity was law's definition of blacks as real estate or chattel property. In short, as Justice Taney remarked in *Dred Scott v. Sandford*, "at the time of the Declaration of Independence . . . [blacks] had no rights which the white man was bound to respect."<sup>3</sup>

The extent of law's discrimination against blacks was found to vary from colony to colony. In the major part of *Matter of Color* separate chapters are devoted to Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania. These states were selected because they provide, according to the author, "representative examples of the range of arguments and methods by which laws and judicial decisions specifically governing blacks developed, and by which slavery became entrenched in North American colonies."<sup>4</sup> What is most striking about this early history of the black experience under law is the ambiguous legal status of Negroes in several colonies in the first decades of their original arrival on American shores. Between 1619 and 1660 in Virginia, for example, there was "no systematic effort to define the rights or nonrights of blacks,"<sup>5</sup> while some blacks converted to Christianity were even permitted to

3 60 U.S. 393, 407 (1857).

4 L. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR—RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 15 (1978).

5 *Id.* at 19.

litigate their claims to certain privileges under English law. Under Dutch rule in New York, black laborers were partially free with some acquiring full legal freedom after passing through a period of servitude. In Georgia, slavery was actually banned by law under the paternalistic regime of James Oglethorpe. In Pennsylvania slavery was not statutorily recognized prior to 1700, although slaves were frequently treated as property by courts of law. The clear implication of Higginbotham's account is that lawmakers had an option at least in some jurisdictions to use law as a tool of liberation rather than as an instrument of oppression. But in the course of time law heaped more and more disabilities upon blacks, changing slavery from a *de facto* to a *de jure* institution.

In its treatment of blacks, colonial law followed a familiar path, beginning with a hesitant and tentative denial of rights to particular black persons, followed by general rules of increasing severity and harshness toward blacks as a whole, and culminating in their total enslavement and reduction to the level of chattel property. Virginia is a typical example of colonial law's progression from specific acts of discrimination, usually sanctioned by courts, to a full legislative policy of dehumanization. As Higginbotham notes, early criminal cases in Virginia show enormous disparities in the punishment meted out to whites and blacks, while wills and contracts were construed to sanction various forms of unjustified servitude. Later, in the mid-16th century, Virginia statutes began to discriminate against blacks, denying them rights that continued to be enjoyed by white indentured servants. Toward the end of the century the first major slave codes were introduced, consigning blacks to perpetual bondage and virtually placing slaves at the total mercy of their masters. The culmination of this depersonalizing tendency occurred in 1705 when all slaves were statutorily declared to be real estate held in fee simple. And so, with each succeeding decade, law progressively eliminated all the rights and privileges of blacks, actions that were rationalized, notes Higginbotham, "on the ground of security, without religious or moral qualm whatsoever."<sup>6</sup>

Within this pattern of law's growth, however, there were significant differences in the relation of race to the legal process, according to Higginbotham's account. In Virginia, law tended mainly to ratify massive white prejudice against blacks. In Massachusetts, law appears to have been ahead of public opinion by sanctioning (in 1641) black servitude, although blacks continued to enjoy "those basic rights enumerated in the Scriptures"<sup>7</sup> and never lost their rights in courts of law, including the right "to seek judicial determination of the legitimacy of their individual enslavement."<sup>8</sup> In New York, the black experience differed significantly under Dutch and English law, with the Dutch following a humane policy of what Higginbotham calls "half-freedom" for blacks, while the English later imposed a regime of total slavery. Still the slave systems of New York and Massachusetts were far more lenient than those of Virginia, South Carolina, or Georgia. South Carolina, having inherited the notorious slave system of Barbados, started early with a "definitive legal structure of slavery based on a fierce

---

6 *Id.* at 38.

7 *Id.* at 72.

8 *Id.* at 98.

determination to use slavery whenever it was profitable.”<sup>9</sup> In Georgia, slavery was legalized in 1750 with the subsequent “imposition of a slave code ultimately as harsh as any found elsewhere in America.”<sup>10</sup> Pennsylvania’s slave code, on the other hand, was among the most benign in the colonies; while perpetual slavery was a fact of life for most Pennsylvania blacks, legal freedom remained a possibility, although free blacks could be sold back into servitude for marrying whites, for loitering, and for similar “offenses.”

Higginbotham largely attributes these differences in the severity of the slave codes to variations in the economic value of black labor and in white fear of black insurrection, both of which appeared to depend on the number and distribution of blacks in the several colonies. Thus, the legal repression of blacks was most severe in South Carolina, Virginia, and Georgia, less severe in Massachusetts and New York, and least severe in Pennsylvania. The economies of the first three colonies, whose black populations were substantial, were largely based on slavery, thus heightening the need for a harsh patrol system complete with bounty hunters and the military surveillance of plantations. This is in contrast to Massachusetts, New York, and Pennsylvania where blacks were of only marginal importance to their respective economies. The economic motive for the *de jure* establishment of slavery in Massachusetts and New York was nevertheless strong, for the merchants and settlers of both colonies were lucratively engaged in the international slave trade during the 17th century. Moreover, alarmed by reports of slave uprisings in the Southern colonies and suspicious of their own blacks, Boston and New York in the early 1700’s augmented the master’s control over his slaves by curtailing their freedom of movement, assembly, and possession of weapons. Even in Pennsylvania, where blacks barely exceeded two percent of the population, law was purposefully employed in the post-1700 era to reduce blacks to an inferior position in society. Pennsylvania law proceeded from the assumption that blacks were basically slothful, uneducable, and prone to crime and that they were better off as wards of their masters rather than as free men. Law thus made emancipation difficult and was particularly discriminatory in punishing crime, even permitting the selling of free blacks into slavery for the commission of offenses such as adultery with a white person. The late 18th century did witness the *de jure* abolition of slavery in the three northern colonies, however, and there was some slackening in the South of the master’s legal power to punish, maim, and kill the slaves under his control.

But the author does not concede that these ameliorative laws were acts of mercy. They were certainly not in his view expressions of a growing moral consciousness among colonial white men. Public opinion supported the abolition of legal slavery in colonial New York, Massachusetts, and Pennsylvania for fundamentally pragmatic and economic reasons; the humanitarian rationale for abolition was an argument that came later, partly under the influence of English common law. Voices of compassion, religious conviction, and moral sensitivity—such as those of German Mennonites, Quakers, and some Puritan leaders—spoke out at the time, but they were hardly audible. Legal slavery was

<sup>9</sup> *Id.* at 152.

<sup>10</sup> *Id.* at 266.

abolished in Massachusetts in 1783 by judicial decree mainly because slave labor interfered with the economic condition of free white labor. The reduction in the severity of punishments that could be meted out to slaves in South Carolina was designed to preserve the health of the economy (a mutilated slave was useless as a laborer) and to prevent the outbreak of slave rebellion, just as the 1714 effort to check the slave population by law was owing to white fears of being outnumbered by blacks. The opposition to the slave trade in Georgia is similarly attributable to a desire for the physical safety of white people and not to "a response to the inherent injustice of slavery by its affront to man's highest moral ideals."<sup>11</sup> The author argues that Georgia's original policy was even viewed as a means of protecting white interests in the colony. And despite strong religious opposition to slavery in Pennsylvania, there is only a grudging acknowledgment here that religious and humanitarian concepts were behind the colony's 1780 Act for the Gradual Abolition of Slavery.

The second major part of Higginbotham's book deals with the status of slavery in the English common law and the impact of that law upon colonial legal attitudes toward slavery. England of course was massively engaged, through the Royal African Company, in the international slave trade, accounting for the transportation and sale of millions of blacks to its English and non-English colonies. But as Higginbotham points out, while English common law vacillated on whether Englishmen could own slaves *in England*, several precedents tilting against the legality of slavery culminated in 1772 in *Sommersett v. Stuart*<sup>12</sup> in which Lord Mansfield ruled against a master who tried to deport a black slave purchased in Virginia to Jamaica for sale, holding that slavery in England was impermissible on both moral and political grounds. Slavery could only be justified on the ground of municipal law, said Mansfield, but in his opinion American slave law was incompatible with England's legal tradition of personal freedom. While scholars dispute the significance of *Sommersett* as a catalyst for the developing anti-slavery movement in both England and its several colonies, Higginbotham concludes that it "synthesized most of the essential ingredients or rationale for future generations to eradicate slavery" and that Mansfield himself stood in his lifetime as "a giant in the cause of human freedom and a significant contributor to the ultimate abolition process."<sup>13</sup> Higginbotham's purpose in reviewing the English experience with slavery is to highlight the contrast between the high standard of morality increasingly reflected in English law and the continued legal suppression of blacks in the colonies on the eve of the American Revolution.

A final chapter focuses on the hypocrisy that the author finds inherent in the behavior of Jefferson and others who on the one hand mounted a revolution against a foreign power on behalf of human equality and the inalienable rights of men and which on the other hand supported a regime of law that denied these rights to men of color within their own country. Yet, because the Declaration was written in universalistic terms (*all* men are created equal) it served,

11 HIGGINBOTHAM, *supra* note 4, at 247.

12 20 How. St. Tr. 1 (1771-1772).

13 HIGGINBOTHAM, *supra* note 4, at 368.

Higginbotham suggests, as a cause of inspiration for all Americans, especially blacks, who were yet to realize the dream of true equality. Whatever the moral failures of our ancestors, the Declaration represented the moral authority that prompted American legal institutions into the eventual adoption of constitutional amendments, legislative policies, and judicial decrees barring racial discrimination under color of law and eliminating invidious legal classifications based on race.

### B. *Matter of Color* and Legal History

There is of course a vast amount of literature on the black experience in early America, but seldom have treatments of this experience dwelled at length upon the central role of law in the early history of slavery. Most of the literature on slavery has been written by historians untrained in law, and they have tended to focus on the social and economic genesis of slavery, on studies of plantation life, and on the abolition movement.<sup>14</sup> As Jonathan L. Alpert remarked, they have treated slavery "as if it had some meaning apart from the legislation and judicial rulings which established it."<sup>15</sup> It is true that in recent years, particularly since the Supreme Court's decision in *Brown v. Board of Education*,<sup>16</sup> historians and other nonlegal scholars have paid increasing attention to the significance of law in the establishment and perpetuation of slavery.<sup>17</sup> But this work has hardly begun to do justice to law's role in American slave history.

It is also only recently that legally trained historians have begun to accord law more than secondary significance in the experience of American blacks. While *Matter of Color* is the first attempt known to us to systematically trace law's development with respect to the treatment of blacks on a colony-by-colony basis, there have been other fine books devoted in whole or in part to law and race.<sup>18</sup> In this regard the work of John T. Noonan, Jr., to which we shall return below, needs especially to be mentioned.

But as a discipline, legal history is marked by a paucity of books and articles on law's early role in structuring slavery.<sup>19</sup> This situation is not to be attributed

14 An excellent overview of this literature appears in S. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 1-26 (2d ed. 1968).

15 Alpert, *The Origin of Slavery in the United States—The Maryland Precedent*, 14 AM. J. LEGAL HIST. 189, 219-20 (1970).

16 *Brown v. Board of Education*, 347 U.S. 483 (1954).

17 See, e.g., ELKINS, *supra* note 14, 27-80; E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1972); R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820* (1971); K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* at 192-236 (1956); C. WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913* (1951).

18 See J. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976), which is an outgrowth of his Oliver Wendell Holmes, Jr., lectures (under the title "The Alliance of Law and History") at the Harvard Law School in the spring of 1972. See also NOONAN, *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATION OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977). For other relevant work in this area, see R. BARDOLPH, *THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW 1849-1970* (1970); R. COVER, *JUSTICE ACCUSED* (1975); L. LEVY & D. JONES, *JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE* (1974); F. TANNENBAUM, *SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS* (1956).

19 There are hardly any articles dealing with the interrelationship between race and the legal process in the first twenty-one volumes (1951-1977) of *THE AMERICAN JOURNAL OF LEGAL HISTORY*. A notable exception is Alpert, *supra* note 15. This omission is equally

to any conscious neglect of race in American law. The neglect seems owing in part to the way in which legal historians have traditionally plied their craft. They have tended to organize law's history around traditional fields of law—usually private law—and to trace the growth of legal rules within those fields. The abstract categories and concepts discussed within these works are simply incapable of capturing the full reality of slavery and discrimination and the damage it has done to human beings in our society.

An important genre of legal history that does seem capable of capturing the reality of law's significance in the history of slavery is the approach pioneered by the eminent legal historian James Willard Hurst,<sup>20</sup> and continued by such scholars as Morton J. Horwitz, Lawrence Friedman, and Maxwell Bloomfield.<sup>21</sup> Hurst's insistence upon the need to explore law's broad social role in United States history has surely been a healthy development in turning some legal historians away from a narrow concern with legal rules and onto a path that regards law as an essential aspect of social and economic history.<sup>22</sup> But his focus on law's interplay with the dominant social and economic trends in American history, together with his tendency toward highly abstract generalization, has left little room for consideration of law's role in race relations. In addition, Hurst's work has tended to stress law's marginal role in the development of the political economy as well as its liberating influence upon human beings.

By contrast, Higginbotham focuses upon law's antiliberal and oppressive role in American history. He is able to tell this story of law's dark side precisely because of his careful attention to legal rules. But an exclusive focus on legal rules has liabilities. For one thing, legal rules alone do not explain the phenomenon of slavery. Admittedly, law reflects society's values. But law is not always a perfect mirror of social reality. In our own day blacks are fully aware of the wide chasm between the promise of civil rights legislation and real life. The oppression of blacks in colonial America was real enough, and certainly Higginbotham's history is a much needed undertaking, particularly at a time when contemporary Americans would prefer to forget their past. Yet legal historians

---

characteristic of general histories of American law, both old and recent. For example, when faculty members of the Yale Law School published in 1901 their collaborative volume on the growth of American law they included no more than two or three passing references to slavery. See *TWO CENTURIES OF GROWTH OF AMERICAN LAW 1701-1901* (1901). For examples of more recent works, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); W. HURST, *THE GROWTH OF AMERICAN LAW* (1950); W. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1960) [hereinafter cited as *LAW AND SOCIAL PROCESS*]. The institution of slavery is barely mentioned in the otherwise masterful work of historic scholarship by Hurst. (The omission is less glaring in his most recent book, *LAW AND SOCIAL ORDER IN UNITED STATES HISTORY* (1977) [hereinafter cited as *LAW AND SOCIAL ORDER*]. Friedman's superb history devotes a mere four pages to slavery during the colonial period (within a section on commerce and labor) and ten pages to slavery in a short chapter ("The Law of Personal Status: Wives, Paupers, and Slaves") covering the period 1776 to 1847.

20 See *LAW AND SOCIAL PROCESS*, *supra* note 19, *LAW AND SOCIAL ORDER*, *supra* note 19, W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN NINETEENTH CENTURY UNITED STATES* (1956), W. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964).

21 See M. BLOOMFIELD, *AMERICAN LAWYER IN A CHANGING SOCIETY, 1776-1876* (1976); L. FRIEDMAN, *supra* note 19; M. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

22 An excellent discussion of Hurst's contribution to the study of legal history is Flaherty, *An Approach to American History: Willard Hurst as Legal Historian*, 14 AM. J. LEGAL HIST. 222 (1970).



might well wonder whether the intrinsic immorality of the judicial decisions and statutes discussed in *Matter of Color* were fairly representative of the general attitudes of colonial lawmakers.

One of the problems with *Matter of Color* as legal history is that Higginbotham has not examined very closely, as Hurst has done in his work, the interaction between social mores and legal rules. The eclectic use of documentary sources in *Matter of Color* is one reason why this relationship may not have been systematically studied. Statutes are Higginbotham's major source of information. In his examination of some colonies court decisions loom large but with regard to others they do not. The role of the judiciary, however, seems crucial to the legal development of black servitude generally.

What did colonial judges do with slave legislation? Did they enforce the law vigorously or were they moved by compassion in the interpretation of slave statutes? How did their judicial roles affect their attitudes toward slavery? Higginbotham gives examples of judges who administered criminal law with a sense of fairness toward blacks. But how widespread was this sense of fairness in the judiciary? How widespread was the sense of unfairness? Was the judiciary as a whole as unfair as Higginbotham seems to suggest? Why were some judges fair and others unfair in their treatment of blacks? Of course, it would not be possible to answer these questions without the available court records, if indeed they are available. Higginbotham rests heavily on secondary sources throughout his study, and he does not inform his readers of the difficulties he experienced in seeking to uncover colonial records, information that would have been helpful to historians following in his footsteps.<sup>23</sup>

We are left with the main query: What motivated judges, legislators, and other lawmakers to write laws imposing slavery? Higginbotham makes reference to the early distinction between baptized and nonbaptized blacks as a basis for legal discrimination, but this rationale is not examined systematically as the laws against blacks increased in severity and harshness over the years in the various colonies. Alpert, in his study of the emergence of slavery in colonial Maryland, remarks: "The Christianity thesis only makes its appearance as *the* justification for slavery when the legal meaning of slavery has been changed. When slavery was only life service, it was too close to existing servant practices to need an elaborate justification."<sup>24</sup> Alpert maintains that "the heart of early slavery was contractual" and that "the original nature of slavery—nothing more than life service—depended upon this contractual idea."<sup>25</sup> There is a strong suggestion in his Maryland study that black slavery would have been much more difficult to justify legally had the system of indentured servitude not existed. His conclusion is worth quoting in full:

The law of servants was readily amenable to extension to slaves. Such an extension and gradual rigidization may not have been inevitable. A number of non-legal factors, however, encouraged this development. These

<sup>23</sup> An example of a study that does marshal empirical data of this character is Nash, *Fairness and Formalism in Trials of Blacks*, 56 VA. L. REV. 64 (1970).

<sup>24</sup> Alpert, *supra* note 15, at 220.

<sup>25</sup> *Id.*

factors included the manpower shortage; the value of the servant as a capital asset; the feeling that blacks were different and a consequent fear of them; the general desire of the colonists to retain their servants as long as possible; and analogies, albeit incorrect ones, to villenage. Each of these factors subsumes others. It will never be possible to estimate the relative importance of each. But in combination with master-servant law and problems they sufficed to create a legal institution which was not unique or peculiar at its inception; a legal institution which has defiled both law and men since.<sup>26</sup>

Noonan also notes that "[w]ithout acceptance of the [legal] rule that the slaves could be transferred by their owners and by the testaments of their owners, neither force nor economic incentive could have maintained the system."<sup>27</sup> This of course merely underscores Higginbotham's major premise about law's responsibility for the institution of slavery. But while Higginbotham compares the condition of white indentured servants to that of black slaves, as well as their respective treatment of colonial judges, he does not explore the interesting hypothesis that black slave law was in large part an outgrowth of the legal institution of white indentured servitude.

A leading question that Higginbotham puts to himself in the chapter on the English experience with slavery is why precedents in English common law favorable to blacks, particularly the case of *Sommersett v. Stuart*, were not cited and applied by colonial courts. But the query receives no satisfactory answer aside from the generally implied view that the respective social and political economies of England and America spelled the difference. But *Matter of Color* does not examine the emergence of slave law in tandem with socioeconomic developments or in terms of the sociopolitical and religious thought that undergirded slavery. A broader theoretical framework of the Hurstian variety might have yielded some working hypotheses about these relationships and provided a more solid basis for follow-up studies by other legal historians.

What has been said above is not intended to detract from the value of Higginbotham's message—and it is an important message—that law was an instigator of slavery and not merely a passive conduit for the legal expression of prevailing public attitudes toward blacks. Noonan puts it in a thimble: "Slavery was not a transient condition: the law gave it immortality."<sup>28</sup>

But the charge of hypocrisy that Higginbotham hurls at the signers of the Declaration of Independence, particularly Thomas Jefferson, seems not to be wholly justified. Once a despotism has been established by laws and regulations that affect the entire range of relationships between different peoples it is extremely hard to dismantle it, short of revolution. And if the Declaration that triggered the Revolution did not call for the liberation of blacks the reason might be found in the fact that the nation's leaders could undertake only one major fight at a time. Yet Americans generally might well have echoed the lament that flowed from Jefferson's troubled conscience: "I tremble for my country when I think that God is just."

26 *Id.* at 221.

27 See NOONAN, *supra* note 18, at 39.

28 *Id.* at 35.

### III. Higginbotham in the Judicial Role

It is clear that Higginbotham's historical research, together with his own experience as a black person in American society, has strongly influenced his behavior as a federal district court judge. His judicial opinions on race relations are marked by a conscious effort to confront the problem of discrimination in its total historical context. Fortified by citations to numerous historical studies of race in America, they are rich in quotations—mainly from nonlegal sources—designed to show the relevance of slavery and the black experience generally to current interpretations of the Fourteenth Amendment. At the same time, Higginbotham the historian is under the control of Higginbotham the judge. His opinions are tightly crafted, building, as they usually do, upon a careful consideration of statutory materials and judicial precedents, proceeding cautiously to legal conclusions solidly grounded in facts presented in the case. Yet, as a black historian on the federal bench, he is more keenly sensitive than most judges to the need for illuminating facts in the sharp glow of history. And this he has done with special cogency in those cases where he has had the opportunity to draw upon his work as a legal historian.

We limit ourselves here to a discussion of two opinions which illustrate in a special way Higginbotham's role as judge-historian and his sensitivity as a black member of the judicial branch. The two opinions arose out of a single employment discrimination dispute, which actually spawned three cases. The first, *Commonwealth of Pennsylvania v. Local Union No. 542, International Union of Operating Engineers*,<sup>29</sup> was a class action brought by the Commonwealth of Pennsylvania and twelve named black operating engineers against Local 542 under several early civil rights statutes<sup>30</sup> and the employment discrimination provisions of the Civil Rights Act of 1964. In the second action, these same black workers sought a preliminary injunction *pendente lite* to bar acts of harassment and intimidation by union members aimed at preventing plaintiffs from pursuing the original law suit.<sup>31</sup> The third came in response to a motion by the defendants in the original action to have Higginbotham remove himself, on the ground of personal bias, from further participation in the case.<sup>32</sup> Our concern is with the opinions in the second and third cases. We refer to them here as *Commonwealth II* and *Commonwealth III*.

#### A. *Commonwealth II*

This is a case of racial harassment and intimidation. It arose out of acts of violence by white operating engineers against black union members who had brought *Commonwealth I* against the union. There is evidence in the record that the violence took place within the context of racial antagonism and hatred between black and white members of the union. In fact, white operating engi-

29 The lawsuit was filed November 8, 1971. As of the time of going to press a decision had not been rendered on the merits of the case, as it was in the process of settlement.

30 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), & 1988 (1970).

31 *Commonwealth of Pa. v. Local 542, Int'l Union of Oper. Eng'rs*, 347 F. Supp. 268 (E.D. Pa. 1972).

32 *Commonwealth of Pa. v. Local 542, Int'l Union of Oper. Eng'rs*, 388 F. Supp. 155 (E.D. Pa. 1974).

neers had claimed in their defense that the violence was partially attributable to the vulgar language of a leading black plaintiff and his expressions of hatred of all whites,<sup>33</sup> although Higginbotham found as a matter of fact that the defense was without merit.<sup>34</sup> In any event, the controversy presented Higginbotham with an opportunity to describe the general ambience out of which such acts of hatred and violence emerged, an ambience that he regards as relevant to any decision in the case.

Higginbotham sees this case as "a tragic reflection of a partial failure in the twentieth century to make real for all Americans the elusive rhetoric in the Declaration of Independence and the more precise rights guaranteed by the Civil Rights Acts of 1964 and 1972."<sup>35</sup> *Commonwealth II* in his view was not simply an incidental occurrence rooted in the personalities of a few aggressive individuals; rather, it was the outgrowth of deep-seated racial hatred rooted in American history. He therefore sets out to examine the "hatred issue," as he calls it, against the backdrop of the pervasive racism so well documented in *Matter of Color*. Not content simply to find on the facts of this particular case that white union members conspired to intimidate, harass, and attack the class plaintiffs for pursuing their rights under law, he went on to show, with ample citation to congressional reports, presidential commission studies, and labor histories,<sup>36</sup> that discrimination against blacks has been widespread in American unions, including those in Philadelphia, where the *Commonwealth* cases originated. In short, racism, employment discrimination, and racial hatred are regarded by Higginbotham as interrelated parts of the entire problem of race relations in both North and South during the 19th and 20th centuries. But once again, the judge enters to restrain the natural passion and indignation of the black historian. While racial hatred in any of its manifestations is deplorable, writes Higginbotham, such hatred is a "basis for judicial intervention . . . only when, as here, . . . the hatred has been catapulted into actual repressive actions and violence."<sup>37</sup> While taking judicial notice of the fact that racism, discrimination, and racial hatred have been and are substantially prevalent in our society, he stays his hand pending a resolution of the threshold problem of federal jurisdiction.

May a federal court issue a preliminary injunction *pendente lite* against certain members of a union in the circumstances of *Commonwealth II*? Higginbotham settled the issue in favor of the class plaintiffs, holding that the federal courts, in addition to their inherent power to protect federal litigants from harassment designed to deter the use of the federal judiciary,<sup>38</sup> were authorized to issue such injunctions under Title VII of the Civil Rights Act of 1964<sup>39</sup> and under sections 1981,<sup>40</sup> 1985 (2), and 1985 (3)<sup>41</sup> of the early civil rights acts.

33 *Id.* at 277, 278.

34 *Id.* at 281.

35 *Id.* at 271.

36 *Id.* at 279-81.

37 *Id.* at 281.

38 *Id.* at 286.

39 *Id.* at 287.

40 *Id.* at 289-90.

41 *Id.* at 291.

The major burden of his argument, however, is to illustrate that the provisions of the early civil rights acts were legitimate exercises of congressional power under the thirteenth and fourteenth amendments and specifically to demonstrate that these sections were intended to reach private as well as state actions and conspiracies designed to deprive black persons of their rights, among which is the right to "unlimited and unimpaired access to the Federal Courts."<sup>42</sup>

It is here, in the area of constitutional interpretation, that Higginbotham is most concerned with the relevance of history. A central question posed in *Commonwealth II* "is whether Congress under section 5 of the fourteenth amendment has been given an affirmative grant of legislative power to reach purely private acts of discrimination."<sup>43</sup> This of course is an old question which is the subject of continuing controversy. Higginbotham lines up with those legal scholars and general historians whose understanding of the origin of the fourteenth amendment lead them to an expansive interpretation of congressional power under section 5, even though the Supreme Court has largely interpreted the fourteenth amendment as a prohibition only of state discriminatory activity. Nevertheless, in light of his reading of constitutional history, Higginbotham concludes that section 5 empowered Congress to ban private conspiracies to deprive persons of their lawful rights, a holding that he found supported by language in *United States v. Guest*.<sup>44</sup> But are sections 1985 (2) and 1985 (3) banning private conspiracies to prevent persons from exercising their rights in court an appropriate exercise of power under the fourteenth amendment? Relying on a decision of the Eighth Circuit Court of Appeals,<sup>45</sup> which adopted the findings of one study of the fourteenth amendment's origins,<sup>46</sup> Higginbotham ruled that these sections were within the scope of congressional power under section 5.<sup>47</sup>

However, Higginbotham finds that these sections can be sustained even more authoritatively under what he calls the "newly awakened Thirteenth Amendment."<sup>48</sup> Here his principal reliance is on *Jones v. Alfred H. Mayer Co.*,<sup>49</sup> in which the Supreme Court stated that "Congress has the power under the thirteenth amendment rationally to determine what are the *badges and incidents of slavery*, and the authority to translate that determination into effective legislation."<sup>50</sup> Such legislation includes statutes prohibiting "private acts which abridge the fundamental rights of all free men—the rights 'to sue, be parties, [and] give evidence, . . . ' freely and without violence or intimidation."<sup>51</sup>

*Jones* of course opens the door to a rather liberal definition of what constitutes "the badges and incidents of slavery." Higginbotham writes:

Those who are not students of American racial history, might ask:

42 *Id.* at 297.

43 *Id.* at 292.

44 *Id.* at 295-97 (citing 383 U.S. 745, 782-84 (1966) (Brennan, J., concurring)).

45 *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971).

46 H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908).

47 347 F. Supp. at 297.

48 *Id.*

49 392 U.S. 409 (1968). The Supreme Court has reinforced its holding in several cases. See, e.g., *Runyon v. McCrary*, 427 U.S. 171 (1976).

50 392 U.S. at 440 (cited in 347 F. Supp. at 297).

51 347 F. Supp. at 298.

"What does the beating of black litigants in this case have to do with the 'badges and incidents' of slavery? How can the attitudes of defendants be related to the institution of slavery which was eradicated more than 100 years ago?" The answer is that these racist acts are as related to the incidents of slavery as each roar of the ocean is related to each incoming wave. *For slavery was an institution which was sanctioned, sustained, encouraged and perpetuated by federal constitutional doctrine. Today's conditions on race relations are a sequela and consequence of the pathology created by this nation's two and a half centuries of slavery.*<sup>52</sup>

*Jones* is a case involving equal access to housing, the denial of which, notes Higginbotham, "was no more a vestige and incident of slavery than the racially invidious discriminatory animus aimed at black plaintiffs in this case."<sup>53</sup> He concludes the case by recalling the vision of the Declaration of Independence and remarks: "It is now too late in the corridors of history for a court to sanction defendant-labor union's attempt to turn back the swelling tides for that equal racial justice which the federal law demands."<sup>54</sup> Thus history and law combine to render this case worthy of the injunction sought by the black operating engineers.

### B. *Commonwealth III*

*Commonwealth III* was a challenge by defendants to Higginbotham's further participation in the employment discrimination case against Local 542. The case showed that the study of history can be a hazardous enterprise for a black judge who presides over civil rights litigation. In support of a motion for recusal<sup>55</sup> the defendant union alleged, *inter alia*, (1) that Higginbotham publicly criticized recent Supreme Court racial discrimination cases in a speech before the Association for the Study of Afro-American Life and History, a group of black historians, (2) that he is identified with the causes of blacks and is a participant in those causes, (3) that he is a leader and a "celebrity" in the black community, (4) that he is emotionally attached to the advancement of black civil rights, and (5) that generally as a black judge he would be unable to maintain his impartiality in a civil rights action involving charges of discrimination by blacks against whites.<sup>56</sup> Because there was no allegation that Higginbotham had com-

<sup>52</sup> *Id.* at 299.

<sup>53</sup> *Id.* at 301.

<sup>54</sup> *Id.* at 302.

<sup>55</sup> 388 F. Supp. at 156. The motion was filed pursuant to 28 U.S.C. § 144 (1970), which provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

<sup>56</sup> 388 F. Supp. at 157, 158.

mented publicly on the Commonwealth litigation before his Court, the defendants' motion appeared to convey an implied threat to all black judges sitting on the federal bench. This case, in which Higginbotham's role as a judge was brought into question because of his racial identification, resulted in what is probably his most eloquent opinion.

He begins by examining the law of disqualification and the legal sufficiency of defendants' affidavits in support of the motion. Finding the affidavits insufficient as a matter of law to justify his disqualification and distinguishing the cases cited in support of the motion, he turns to an explanation of why he believes it "absolutely essential that [he] *not* withdraw from this case."<sup>57</sup> He then moves into a discussion of what it means to be a black person and how this is likely to affect his attitude toward civil rights cases.<sup>58</sup>

Higginbotham frankly admits his emotional commitment to the cause of black civil rights just as he makes no apology for his public criticism, as manifested later in *Matter of Color*, of American law and society for their historic oppression of blacks. In fact, he attributes his public statements off the bench largely to his study of history.<sup>59</sup> But should that be a cause for disqualification? While noting that the defendants did not flatly assert "that black judges should *per se* be disqualified from hearing cases which involve racial issues,"<sup>60</sup> he insists that the consequences of their motion and supporting affidavits amounted to "a *double standard* within the federal judiciary."<sup>61</sup> By that standard, he remarks, "white judges will be permitted to keep the latitude they have enjoyed for centuries in discussing [human rights matters, but] black judges [will be held to] a far more rigid standard, which would preclude [them] from ever discussing race relations even in the generalized fashion that other justices and judges have discussed issues of human rights."<sup>62</sup> As Higginbotham notes, he did not engage in unusual off-the-bench behavior. "Do petitioners suggest," he asks, "that it is more sinister for a black judge to speak to black historians than for the Chief Justice of the United States Supreme Court to speak to the National Conference of Christians and Jews?"<sup>63</sup> And should the Chief Justice by that fact "be barred in the future from adjudicating cases where claims of religious or racial bigotry are urged, simply because he spoke to a distinguished group which supports the concepts of the brotherhood of man, the golden rule, and fair play?"<sup>64</sup>

He is particularly concerned with the possible conflict between the role of the scholar and the role of the black judge and wonders if "defendants think it sinister that some individuals consider [him] a scholar in the race relations

57 *Id.* at 162 (emphasis added).

58 When there is ground for believing that . . . unconscious feelings may operate in the ultimate judgment, or may not fairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (statement by Frankfurter, J., explaining his recusal).

59 388 F. Supp. at 163-65.

60 *Id.* at 165.

61 *Id.*

62 *Id.*

63 *Id.* at 167.

64 *Id.*

field?"<sup>65</sup> But many other judges and Supreme Court Justices have been recognized as scholars and have sat on cases involving their areas of expertise. Thus, he makes the point of the double standard again and chastises the petitioners: "[D]efendants should not fear scholarship, but should instead be pleased that they would not have to 'educate' a judge on the rudiments of the field."<sup>66</sup> Higginbotham also recites the cases of other judges and justices who have spoken and written on matters of public interest while serving on the bench yet were not later disqualified from sitting on cases tangentially related to the area about which they had acquired scholarly reputations.<sup>67</sup>

In failing to find any legitimate reason for the disqualification request, he confronts again the double standard:

Perhaps, among some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no black judges sit on such matters or, if one cannot escape a black judge, then by having the latter bend over backwards to the detriment of the black litigants and black citizens and thus assure that brand of "impartiality" which some whites think they deserve. . . . [U]ntil 1961, white litigants in the United States District Courts never had to ponder this subtle issue which defendants now raise, because no President had ever appointed a black as a United States District Judge. If blacks could accept the fact of their manifest absence from the federal judicial process for almost two centuries, the plain truth is that [white] litigants are now going to have to accept the new day where the judiciary will not be entirely white and where some black judges will adjudicate cases involving race relations.<sup>68</sup>

What then should be the role of a black judge and what sort of conduct will insure his impartiality? Obviously cases will be decided not on the basis of the race of the litigants but by what the evidence shows,<sup>69</sup> and "so long as white judges preside over matters where black and white litigants disagree, I will preside over matters where black and white litigants disagree."<sup>70</sup>

Thus black judges should not be "robots who are totally isolated from their racial heritage and unconcerned about it," nor should they disavow or not discuss "the legitimacy of blacks' aspiration to full first class citizenship in their own native land,"<sup>71</sup> nor should they "not tell the truth about past injustices"<sup>72</sup> in order to maintain the appearance of impartiality.

While exposing the "instinct" for double standards,<sup>73</sup> Judge Higginbotham has clarified the new and vital role of black judges and has "highlight[ed] the duality of burdens which blacks have in public life. Blacks must meet not only the normal obligations which confront their colleagues, but often they must spend extraordinary amounts of time in answering irrational positions and assertions

65 *Id.* at 168.

66 *Id.* at 169.

67 *Id.* at 171-74.

68 *Id.* at 177.

69 *Id.* at 180.

70 *Id.* at 181.

71 *Id.* at 178.

72 *Id.* at 180.

73 *Id.* at 181.



before they can meet their primary public responsibilities."<sup>74</sup> If black judges would avoid succumbing to a double standard, then, they must confront the racist underpinnings of that double standard, expose them and educate others in their role in the new order of a nonracist society.

#### IV. Race and Legal Education

What are the implications of Higginbotham's work for legal education today? One answer has been provided by Higginbotham himself who suggested in a 1974 review article on Derrick Bell's *Race, Racism, and American Law* that law schools should offer courses on the relationship between race and the legal process.<sup>75</sup> He found his own legal education at Yale in the early 1950's woefully inadequate from the point of view of its treatment of racial questions. In the Bell piece he was particularly concerned with a law school curriculum marked by its continuing failure to raise the issue of the relevance of slavery to contemporary problems in American constitutional law.<sup>76</sup> Evidence of this failure he found in his personal survey of twenty-two constitutional law casebooks. For example, he found that very few of these casebooks treated *Dred Scott v. Sandford* as a principal case or included Justice Harlan's dissent in the *Civil Rights Cases*, omissions that he regards as seriously damaging to any true understanding of racism in American law. "[T]he failure of renowned legal scholars to probe these racial issues adequately over the last several decades," writes Higginbotham, "may be a partial cause of our present inability or tardiness in correcting the sequelae to yesterday's and even today's brutal racial injustices."<sup>77</sup>

Whatever the nexus between legal education and racial injustice there seems to be little doubt that the academic study of law has sorely neglected race and its vital importance for the establishment of a just social order. But any solution—if there is one—to this problem would involve far more than the simple addition of a few more courses to the curriculum. For one thing, courses on law and race, when they are offered, are not likely to attract very many students. For another, issues of justice are not ordinarily raised or discussed within the framework of a conventional curriculum dominated by what Roger Cramton calls the "ordinary religion of the law school classroom."<sup>78</sup>

The study of law should embody three perspectives if questions of justice like those raised by Higginbotham are to be adequately considered in the law school classroom. The first is the historical perspective, the second a person-oriented perspective, and the third an interdisciplinary perspective. There is nothing new about any of these suggestions—and some of these perspectives have begun to work themselves into a few law school curricula—but it seems worth-

<sup>74</sup> *Id.* at 181-82.

<sup>75</sup> Higginbotham, *Race, Racism and American Law*, 122 U. PA. L. REV. 1044 (1974).

<sup>76</sup> Excellent casebooks that focus on race and the legal process are D. BELL, *RACE, RACISM AND AMERICAN LAW* (1973); H. HOROWITZ & K. KARST, *LAW, LAWYERS AND SOCIAL CHANGE* (1969).

<sup>77</sup> Higginbotham, *supra* note 75, at 1047.

<sup>78</sup> Crampton, *The Ordinary Religion of the Law School Classroom* 2 NAT'L INST. CAMPUS MINISTRY J. 172 (1977).

while in the light of *Matter of Color* to underscore their importance once again. These perspectives are very much interrelated concerns. No one of them will serve the student well without the others. Law is an important aspect of social history; that history is rooted mainly in the experience of persons; and lastly, that experience needs to be illumined by a multidisciplinary perspective.

First, the historical perspective should permeate the study of law. At present legal history is shunted to the periphery of the law school curriculum. But what is worse, much that passes for legal history is bad history. The uses of history by courts and particularly the United States Supreme Court affords ample testimony of this fact. *Dred Scott v. Sandford* is only one example of an egregious distortion of history. As Higginbotham remarked in the Bell article, Chief Justice Taney's opinion "contained numerous historical inaccuracies which were willfully slanted against blacks."<sup>79</sup> Equally egregious examples of historical misrepresentation could easily be found in the common law, underscoring Noonan's observation that "lawyers and judges are poor historians."<sup>80</sup> Of course, historical records are not always clear, and judges, like historians, will hold differing interpretations of history. But this is not the heart of the problem. The problem is the general ahistorical and even antihistorical approach that characterizes so much education in the law today. The remedy is for law students to get away from the tendency to look upon history as little more than a convenient prop for the support of a legal rule. Greater attention needs to be paid to the role that a rule plays *in history* together with its effects upon the human beings subject to the rule. By the same token, judicial decisions need systematically—not sporadically, incidentally, or casually—to be considered within their historical context for a full explanation of law's interplay with society.

Second, the study of law, if it is adequately to consider questions of justice, should embody a person-oriented jurisprudence, an approach most persuasively advocated by Noonan. Legal rules are the mainstay of legal study and, as Noonan suggests, the dominance of rules tends to blind students to the personhood of those who make the law as well as those persons who are on its receiving end. "Apart from Family Law," he writes, "no great attention is given to the impact of the rule upon the individual lives of the litigants."<sup>81</sup> He continues: "Concerned with social policy, the modern casebooks reflect the play of social interest. To a very large degree, those interests are so many severed heads, detached from the persons who carried them. Such a way of study permits masks to be taken for persons."<sup>82</sup> The indifference to persons in legal history and legal study, he adds, "is most dramatically illustrated by their unconcern for a major function of Anglo-American law for three centuries, the creation and maintenance of a system in which human beings were regularly sold, bred, and distributed like beasts."<sup>83</sup> Attention to the actual predicament of all participants in the legal process and a sympathetic understanding of their personal stories would go a long way in rendering the study of law a more humane enterprise, and thus

79 Higginbotham, *supra* note 75, at 1050.

80 NOONAN, *supra* note 18, at 152.

81 *Id.* at 7.

82 *Id.*

83 *Id.* at 10.

help to correct a major deficiency in American legal education.

Finally, a concern for justice in the study of law would be enhanced by a more disciplined interdisciplinary perspective, particularly in traditional courses like torts, property, and criminal law. Needless to say, law schools have increasingly put in courses of an interdisciplinary character, but they have been organized around "global" themes such as law and economics, law and society, law and medicine, and law and ethics, often taught jointly by lawyers and representatives of related disciplines. Although these courses seem to be popular at the undergraduate level, such is not the case at the law school level. It seems to us that the interdisciplinary approach would be most useful in the main-line law school subjects. Although courses taught from this perspective require teachers of unusual background and experience they might open new vistas of exploration and insight that would deepen and clarify law's relationship to other social phenomena, including the thoughts, feelings, and actions of persons. Such an approach might be expected to tear off many masks (as Noonan would have it) of the law, one of the most beguiling of which has tended to disguise the role of the law in fostering a system of racist oppression in America.