1982

In the Matter of Color: Race and the American Legal Process: The Colonial Period (book review)

Raymond T. Diamond

Louisiana State University Law Center, ray.diamond@law.lsu.edu

BOOK REVIEW

IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD. By A. Leon Higginbotham, Jr., New York: Oxford University Press, Inc. 1978. Pp. vii, 512.

For most of American history, the legal status of black people was separate and clearly not equal to the status enjoyed by whites. *In the Matter of Color*,[1] by A. Leon Higginbotham,[2] explores the origin of the laws which governed slavery in the American colonies. His work examines fundamental issues in legal and social history, and raises new questions about the law's role in determining the future of race relations in this society.

In the Matter of Color is the first volume of a series which will examine the legal underpinnings of racial injustices in America. The study begins in 1619, the year blacks arrived in Virginia, and will end with the enactment of the Civil Rights Act of 1964. This first work explores the early American legislative and judicial acts which formed the basis for the legal treatment of slaves and their descendants. Higginbotham attempts to determine the origin of slavery in English colonial America by comparing the development of English slave law with that of the American colonies.

In examining the treatment of slavery in colonial America, Higginbotham undertakes separate analyses of the laws of six representative colonies. Among the colonies studied are Virginia, South Carolina, and Georgia, colonies which showed increasing degrees of harshness and severity in determining the character of slavery, and Massachusetts, New York, and Pennsylvania, which demonstrated an ambivalence regarding slavery.

While this has a certain symmetry, three slave and three

1 A. L. Higginbotham, Jr., In the Matter of Color (1978)

2 Judge, United States Court of Appeals for the Third Circuit

free states, one might have wished for a much broader study. There are other states with interesting histories of race relations that deserve exploration: Rhode Island, a New England colony that in the seventeenth century attempted to outlaw slavery and the foreign slave trade, only to become in the eighteenth century a state with thriving plantations worked by slave labor;[3] North Carolina, whose laws were among the first to allow free Negroes to vote, a tradition which continued until 1835;[4] New Jersey, where there is evidence that some slaves were legally permitted to vote in general elections;[5] or Maine, New Hampshire and Vermont, which by the end of the eighteenth century accorded their small black population almost total *de jure* equality with the white population.[6] Interesting as these possibilities are, Judge Higginbotham's state selections are sufficiently descriptive to allow analysis of the law's response to demographic and economic conditions and the role of the non-English settlement in developing the law of slavery and race. Together, the six states Higginbotham has chosen present a picture of our young nation groping from uncertain treatment of slavery toward two different legal and social viewpoints. Insofar as Higginbotham's description of the early development of slavery goes, it is accurate. The questions this essay raises are whether that description is complete and what issues it leaves for further study.

The remainder of this essay is divided into four parts, the first of which will suggest that Higginbotham's analysis is incomplete as a history of the law of slavery. The second part of this essay will suggest that Higginbotham's examination of the origins and development of English law relating to slavery overlooks the virulence of English xenophobia as a factor in the American approbation of slavery as a legitimate status under law. The third part will suggest the types of data that would assist in making Higginbotham's analysis complete. The final section will consist of a brief conclusion offering suggestions as

---

3. R. Cottrol, The Afro-Yankees, Providence's Black Community in the Antebellum Era ch. I *passim* (forthcoming).

4. I. Berlin, Slaves Without Masters: The Free Negro in the Antebellum South 190 (1974).

5. Wright, *Negro Suffrage in New Jersey 1776-1875*, 33 J. Negro Hist. 173, 174 (1948).

6. L. Litwack, North of Slavery: The Negro in the Free States, 1790-1860, at 75, 91, 263 (1969).

to what *In the Matter of Color* portends for the work of future historians.

I. Slavery and Law: The Problem Considered

Higginbotham's treatment of the law of slavery in early America focuses upon the status and control of slaves and the discriminatory treatment to which they were subjected. Admittedly, *In the Matter of Color* accurately documents the law, but it does not completely assess the condition of slavery in early America. The massive amount of legal and social data relevant to a discussion of early American slavery remains underexplored. Thus, Judge Higginbotham's emphasis upon the institutional evolution of slavery invites consideration of the larger sociological character and effects of slave laws.

The editorial choices Higginbotham employs are illustrated by his consideration of the status of slaves as real or personal chattel. He notes, for example, that in South Carolina slaves with real property status theoretically held a higher position under the law than slaves with chattel property status.[7] In actual practice, however, "South Carolinians disregarded the freehold definition of slavery and treated slaves as personal and chattel property."[8] Whether labeled chattels or real property, the disabilities of slavery persisted. Almost certainly no change was intended in the life of the slave. What effect then was intended in the life of the slave owner?

Higginbotham's chapter on Virginia might well have been the proper place to further examine the question of real versus chattel property. As Higginbotham notes, Virginia's 1705 slave code "became a model code for other colonies."[9] The practical distinction between chattel and real property was that chattel property might be sold to satisfy the debts of the owner's estate; real property could be sold to satisfy a mortgage on that property, but was to be preserved if possible.[10] This distinction may have made no difference in the case of slave property. A 1794 case, *Walden v. Payne*,[11] explained:

---

7. Higginbotham, *supra* note 1, at 170.
8. *Id.*
9. *Id.* at 50.
10. *Id.* at 50-51.
11. 2 Va. (2 Wash.) 1 (1794), *reprinted in* 1 H. Catterall, Judicial Cases Concerning

> Slaves from their nature are chattel. They were originally so, and the law made them real estate only in particular cases, such as in descents etc. But in most other instances, and especially in the payment of debts, they were declared to be personal estate. It is true, the law has protected slaves from distress, or sale, where there is a sufficiency of other personal estate to pay debts or levies, and in this respect they differ from other chattels; but this qualified exemption does not change their nature, or give to them the qualities of real property.[12]

Nonetheless, there are indications that the designation of slaves as real property was intended to preserve the slaves who made the land productive. The fact that slaves were seen as real estate only for purposes of descent creates this inference. This point may also be inferred from various court opinions.[13] Because Higginbotham fails to address this issue in greater detail, the reader of *In the Matter of Color* cannot properly judge the signficance of the real versus chattel property distinction.

The chapter on Massachusetts furnishes an excellent illustration of the difficulties inherent in trying to deduce social behavior from judicial and legislative doctrine. The Puritans introduced slavery in Massachusetts much less ambiguously than did authorities in many southern colonies. The legal differentiations between slave and free were set forth in 1649,[14] nearly two generations before that distinction was clearly defined in Virginia law.[15] However, it is unclear whether Massachusetts' early willingness to differentiate between slave and free affected either slavery or race relations. What did have a lasting impact on slavery and race relations in Massachusetts was its small black population in the eighteenth century, averaging two percent of the total population.[16] This small population worked as servants or artisans in individual white households.

Massachusetts was a society that had slaves; yet it was not a

---

American Slavery and the Negro 103 (1926) [hereinafter cited as Catterall].

12. *Id.*

13. Henndon v. Carr, Jefferson 132 (1772), *reprinted in* 1 Catterall, *supra* note 11, at 93; Spicer v. Pope, Barradall 232 (1736), *reprinted in* 1 Catterall, *supra* note 11, at 87; Smith v. Griffin, Jefferson 132 (1772), *reprinted in* 1 Catterall, *supra* note 11, at 92-93.

14. *See* L. Greene, The Negro in Colonial New England 63 (1968).

15. Higginbotham, *supra* note 1, at 38-40.

16. *Id.* at 81.

slave society. Therefore, Massachusetts law was not designed to control slaves as a class; the law's concern was to regulate the behavior of individual slaves. The slave transgressor was brought before the courts with a concern for his transgression, not for the threat he and his class brought to the social order. Judge Higginbotham indicates that blacks received harsher treatment in Massachusetts than whites who committed similar offenses; it is difficult to determine whether this was due to developing racism, a desire to keep servants in line generally, or traditional English xenophobia.[17] Unfortunately, there is insufficient data to determine the percentage of servants or offenders who were of non-English stock. These questions remain unresolved and are perhaps unresolvable. Judge Higginbotham's chapter on Massachusetts, however, does give clear evidence that individual control rather than control of blacks as a class defined the concern of the Massachusetts legal authorities.[18]

Primary and secondary historical sources indicate that slaves moved about with a relatively high degree of freedom in eighteenth century Massachusetts. The Boston selectmen continually passed ordinances forbidding slaves from moving about at night.[19] The best evidence indicates that these ordinances were only minimally enforced. Slaves joined white apprentices and indentured servants in the street life of Boston. The lament of the colonial commentator that "boys and Negroes" were causing an uproar was constantly heard,[20] and yet this uproar did not mobilize the sort of legal and extralegal social controls that were the hallmark of the treatment of slaves under plantation regimes.

Instead, sources indicate that slaves petitioned courts for redress of these grievances, and some even obtained their freedom.[21] There were courts run by slaves to mete out punishment for minor offenses.[22] There was no special law enforcement mechanism specially adapted for capturing slaves; instead, constables of the towns had this responsibility and achieved only

17. *See* text at notes 27-41 *infra*.
18. Higginbotham, *supra* note 1, at 71-82.
19. Records of the Boston Selectmen, 1754-1763, at 109 (1887).
20. L. Greene, *supra* note 14, at 81.
21. *See generally* 4 Catterall, *supra* note 11.
22. Platt, *Negro Governors*, in 4 New Haven Colony Historical Society Papers (1900).

minimal success. Boston became a regional center for runaway slaves in New England, and many of these runaways became an integral part of lower class street life.[23]

The lives of lower class whites, particularly poor apprentices, and black slaves paralleled one another well into the eighteenth century, even though legal distinctions between the two groups were clearly defined in the seventeenth century. No formal or informal rules divided white work from black work. Slaves, indentured servants, and apprentices worked at the same jobs in Massachusetts, and usually next to one another. Whites and blacks often ran away together from their masters. Again, the distinction between a slave society and a society with slaves is crucial. Massachusetts enjoyed a freedom of association unhampered by what would have been the inevitable legal and social restrictions of a slave society.[24]

The exact limits of that freedom of association can be determined only by painstaking research and analysis of legal and other local records, such as court records and records of town selectmen. Such records might indicate the identities and the nature of the punishments of transgressors against the laws or reveal pertinent differences in the civil law's treatment of blacks and whites. Judge Higginbotham's decision not to undertake this research is a function of the limited nature of his inquiry. He has described the law of slavery in detail; the description of how that law was put into effect is a task for future historians.

II. From Xenophobia to Racism

Higginbotham's treatment of the legal origins of slavery forms his best and yet his most problematic work. His chapter on South Carolina, for example, shows that South Carolina's peculiarly harsh treatment of slaves and the slave's powerless position in that society were the cultural and legal offspring of Barbadian law and practice. Higginbotham's chapter on New York shows the influence Dutch settlers had on the law of slavery. He contrasts well the legal distinctions between the Dutch colonists' treatment of slavery and that of the English.[25]

---

23. Higginbotham, *supra* note 1, at 78-80.
24. *See generally* L. Greene, *supra* note 14.
25. *See* text at notes 56-60 *infra*.

Higginbotham's exposition on the origins of English attitudes toward slavery as a legal status is, however, significantly less defined than his showing of Dutch and Barbadian attitudes in New York and South Carolina. This lack of definition is the major shortcoming of the book, but is understandable if one views *In the Matter of Color* as "an effort to look at [slave] history primarily through the special focus of a legal lens."[26] Higginbotham did not intend his work to be a complete picture of slavery, but rather a fragment without which the whole cannot be complete. When so viewed, *In the Matter of Color* undertakes a more difficult task than other works that attempt to show the English origins of American slavery.

English Xenophobia

Historians of American slavery have long grappled with the elusive history of Tudor-Stuart England and its implications for the development of American racial values.[27] Most agree that English society, as it ventured into New World colonization in the late sixteenth and early seventeenth centuries, had little experience with slavery.[28] Unlike southern Europeans, the English lacked familiarity with Africa or her peoples until a relatively late period in British history. These facts formed the basis for much writing and speculation, especially by comparative historians, about the origins of Anglo-American racial practice.

Sociologist Frank Tannenbaum provided an important service for students of comparative slavery in his pioneering legal history of slavery entitled *Slave and Citizen: The Negro in the Americas*.[29] While much of his work has since been convincingly disputed,[30] Tannenbaum's study does impart a feeling for the differences in slave law that existed in Ibero- and Anglo-American societies. Unlike England, slavery was not strange to Iberian

26. Higginbotham, *supra* note 1, at 14.

27. *See, e.g.*, W. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812, at 3-40 (1968).

28. *Id.*

29. F. Tannenbaum, Slave and Citizen: The Negro in the Americas (1946).

30. *See* C. Dexter, Neither Black Nor White: Slavery and Race Relations in Brazil and the United States (1971). For a good analysis of the problem of comparing the treatment of slaves in a cross-culture perspective, see Genovese, *The Treatment of Slaves in Different Countries: Problems in the Applications of the Comparative Method*, in Slavery in the New World: A Reader in Comparative History 202-11 (L. Foner & E. Genovese eds. 1969) [hereinafter cited as Foner & Genovese].

law or custom. Enslavement of blacks predated Iberian exploration of the New World by at least one century and, by the time the New World was encountered, Spain and Portugal had both indigenous slave and free black populations.[31] Iberian law regulated the status and conduct of these populations, and often established a clear second-class status for blacks.[32]

In contrast, England lacked this traditional contact with non-Europeans, and ventured into Africa and America with no heritage of slavery.[33] This lack of experience left a vacuum in English jurisprudence. The common law's dictate that law develops through actual cases forced the American colonies to modify English traditions to accommodate burgeoning slave societies.

If that development could not depend upon legal traditions and social mores that antedated American exploration, it nevertheless was not a *tabula rasa*, totally divorced from previous English history. Historian Winthrop Jordan, in *White Over Black: American Attitudes Toward the Negro, 1550-1812*,[34] advanced the theory that the lack of contact with Africans and the relative isolation from dark-skinned people generally predisposed the English toward a virulent anti-black prejudice. The harshness of the American slave regime was thus predictable, perhaps inevitable.[35]

If England was predisposed toward racism, that racism,

---

31. F. Mauro, *Le Portugal et L'Atlantique au XVII Siecle, 1570-1670* (1960).
32. *Id.*
33. F. Tannenbaum, *supra* note 29.
34. W. Jordan, *supra* note 27, at 3-40.
35. Jordan's work stressed the value the English traditionally placed on fair skin, and the ethnographic shock English slave traders expressed on first viewing the peoples and cultures of West Africa in the sixteenth and seventeenth centuries. He placed great weight on negative connotations of the term "black" as traditionally used in the English language. Scholars of the slave experience in the Americas had long felt bound by the perceptions of scholars like Jordan and Tannenbaum, who described radically different Iberian and English traditions and argued that the different laws and customs of England and Spain produced radically different slave societies. This older view has been supplanted by scholars who have tended to look at cultural (including legal) determinants of racial and slave practices, and who have emphasized instead the role of economic and demographic variables in their histories of slave societies. Thus, many historians are now more concerned with developing fine contrasts among English, French, and Spanish Caribbean colonies at similar stages of economic development rather than macro-comparisons of English and Latin America. Still, the law, both as a reflection of the normative values of different slave societies and perhaps an indicator of actual behavior in such societies, merits considerable exploration and offers the potential for a rich yield for legal and social historians.

nonetheless, provided no strong foundation for slavery. Slavery, while not totally unknown in early feudal England's law and custom, was more of an anomaly than standard practice.[36] Furthermore, by the twelfth century, slavery had been effectively eliminated within English society.[37] Of greater significance in the English historical tradition was a feudal social and economic system over which the common law, and later the courts of equity, superimposed systems of mutually reciprocating rights and obligations upon all members of society. While the exact legal status of the medieval English villein remains a matter of dispute, he nonetheless enjoyed legal protections which extended to his life and his enjoyment of property rights.[38] The villein's rights far exceeded those accorded slaves in most American colonies and states. By the time the English explored the Americas, the whole of English society enjoyed, at least nominally, free legal status.

Combined with English freedom was a virulent xenophobia that had been exacerbated during the sixteenth and seventeenth centuries. England, the first Protestant country, found itself at odds with the Catholic countries of Europe, in particular France and Spain. Furthermore, England battled the Irish and the Scots, two peoples still not totally subsumed under British rule. Mary Tudor's persecution of English Protestants, Elizabeth's execution of Mary and conflicts with Catholic Spain, the heavy-handedness of the Stuart kings and Cromwell's revolution all were part of a background that reinforced a strong suspicion of the outsider. Especially important was England's control of Ireland, a control which gave the English their first experience with subjugating a foreign people.[39]

The harshness of Cromwell's conquest of Ireland illustrates the predisposition of the English toward those who would fall under English domain. Having exploited and developed its New World colonies more slowly than Spain, England began in earnest the process of settlement of the New World in the seventeeth century. Irish rebels who resisted Cromwell's subjugation of their homeland were one of the first groups so settled

36. 1 F. Pollock & F. Maitland, The History of English Law 35-37, 412, 424 (2d ed. 1898); 2 *id.* at 472, 529.

37. 2 *id.* at 529.

38. *Id.* at 412-32.

39. A. Harding, A Social History of English Law 298 (1966); C. Smith, The Great Hunger 26-27 (1962).

by the English.[40] In the 1640's, thousands of Irish prisoners of war, as well as kidnapped Irish and some impoverished English youth, were shipped to the British West Indies to labor in the sugar cane fields of the newly emerging English planter elite. The treatment of these Irish servants represented a major break with the English tradition of personal liberty, for the treatment was undeniably harsh and far in excess of that allowed among the English themselves.[41]

The Evolution of English Xenophobia: Virginia

In America, the seventeenth and eighteenth centuries brought about a transformation of the general English hostility toward outsiders into a more specific racism that singled out blacks for special treatment socially and legally. Higginbotham exposes the effects of this metamorphosis, but, like others, has found its development elusive.

Higginbotham's treatment of the origins of American slavery might, therefore, have been well served by some inquiry into English xenophobia and its possible effects on American attitudes and laws. Such an investigation might best have been conducted by an examination of Virginia, for as Higginbotham correctly states, Virginia "pioneered a legal process that assured blacks a uniquely degraded status. . . . Just as they emulated other aspects of Virginia's policies, many colonies would also follow Virginia's leadership in slavery law."[42]

By the seventeenth century, English law and practice were

---

40. R. Dunn, Sugar and Slaves (1972).

41. Dunn's account of Irish life in mid-seventeenth century Barbados leaves little doubt concerning the English predisposition towards cruelty to those, white as well as black, that they deemed different from themselves:

> During the initial stage of sugar production, when the white servants found themselves toiling in the same field gangs with black slaves, they became wild and unruly in the extreme. Some of the English and Irish youths shipped over in the 1640s and 1650s had been kidnapped. To be "barbadosed" in the seventeenth century meant the same as to be "shanghaied" in the twentieth. It would be hard to say whether the London thieves and whores rounded up for transportation to "the Barbados Islands" or the Scottish and Irish soldiers captured in Cromwell's campaigns and sent over as military prisoners were any less hostile and rebellious than the Negroes dragged in chains from Africa. Irish Catholics constituted the largest block of servants on the island, and they were cordially loathed by their English masters.

Id. at 69.

42. Higginbotham, *supra* note 1, at 19.

actively chauvinistic, militantly intolerant of non-Englishmen and non-English ideas. The laws of early Virginia reflected that pattern. The first royal charter authorizing the Virginia colony in 1606,[43] and charters which followed,[44] established the ascendency of English laws and customs. The "liberties of a British subject" were guaranteed for those who would live in the colony and for their descendents,[45] but it became clear that such liberties were guaranteed only for those who were already British subjects. The Virginia charters were meant to safeguard for Englishmen the rights of Englishmen, not to promise the rights of Englishmen to others. Virginia laws, by direction of the crown, were no more expansive than English laws and, perhaps equally important, were no less restrictive.

Virginia's early intolerance of outsiders and outside ideas was not, however, merely a function of orders from the crown. Virginia was intolerant because English settlers in Virginia shared the xenophobia of those who remained in England. The English practice of treating foreigners, particularly the Irish, differently was transplanted in Virginia. Thus, the assembly resolved, in 1642, that servants who had entered the colony without a written indenture would serve four years if aged twenty or above, five years if between the ages of twelve and twenty, and until the age of nineteen if aged twelve or under.[46] Yet, in 1654, the assembly explained that "the act for servants without indentures [was] only [for] the benefitt [sic] of our own nation";[47] Irish servants without indenture would now serve six years if above sixteen years old, and until twenty-four years of age if under sixteen.[48] In 1657, the assembly reiterated this position, reenacting the 1654 act but adding the proviso that "all aliens [shall] be included in this act."[49]

Two years later, in 1659, the "Act for Irish Servants" was

---

43. Letters Patent to Sir Thomas Gates, Sir George Sommers, and others for two several Colonies and Plantations, to be made in Virginia, and other parts and Territories of America (April 10, 1606), *reprinted in* 1 W. Hening, Statutes at Large of Virginia 57 (1823) [hereinafter cited as Hening, Statutes].

44. 1 Hening, Statutes, *supra* note 43, at 57-113.

45. *See, e.g.*, Letters Patent to Sir Thomas Gates, ch. XV, *reprinted in* 1 Hening, Statutes, *supra* note 43, at 64.

46. Act XXVI, 1642-43, *reprinted in* 1 Hening, Statutes, *supra* note 43, at 257.

47. Act VI, 1654-55, *reprinted in* 1 Hening, Statutes *supra* note 43, at 411.

48. *Id.*

49. Act LXXXV, 1657-58, *reprinted in* 1 Hening, Statutes, *supra* note 43, at 471.

repealed.[50] The assembly found that the act had "carried with it both rigour and inconvenience, many by the length of time they have to serve being discouraged from comeing [sic] into the country, And by that meanes [sic] the peopling of the country retarded."[51] Whatever the satisfactions, therefore, of treating Irish and other aliens differently from Englishmen, economic necessity mandated that "no servant comeing [sic] into the country without indentures . . . shall serve longer then [sic] those of our own country, of the like age."[52] Still, the new act repealing the act for Irish Servants did not apply to blacks, for it concerned those servants "of what christian nation [what]soever."[53] Thus, while white alien servants began to acquire treatment more equal to the English, blacks were left to endure all the indignities the law might impose.

Gradually, and largely for economic reasons, white non-Englishmen were accorded the opportunity to acquire some rights which the English enjoyed.[54] By 1680, the position of the Irish and other aliens had dramatically improved. At last they were capable of attaining all the rights of Englishmen. As Higginbotham points out, the position of blacks meanwhile had deteriorated. Ambiguity had given way to the passage of Virginia's first slave code,[55] which solidified the inferior position of blacks.

Paradoxically, then, the Virginia into which blacks were first brought in 1619 was one marked by xenophobia and yet was less harsh to blacks than the Virginia of 1680. If economic necessity lessened the impact of English xenophobia on non-English whites, who were urged to emigrate, it could not ameliorate the harsh treatment of blacks. Indeed, economic necessity dictated the softening of status distinctions among whites and the sharpening of the distinctions between blacks and whites.

---

50. Act XIV, 1659-60, *reprinted in* 1 Hening, Statutes, *supra* note 43, at 538-39.

51. *Id.*

52. *Id.* at 539.

53. *Id.*

54. The Virginia assembly was quite explicit in explaining the economic rationale for expanding the rights of white non-Englishmen. *See* Act VII, 1671, *reprinted in* 2 Hening, Statutes, *supra* note 43, at 289, 290 and Act II, 1680, *reprinted in* 2 Hening, Statutes, *supra* note 43, at 464. Compare this later treatment to that allowed under earlier legislation, *e.g.*, Act CXVIII, 1657-58, *reprinted in* 2 Hening, Statutes, *supra* note 43, at 486.

55. Act X, 1680, *reprinted in* 2 Hening, Statutes, *supra* note 43, at 481.

III. Culture and Necessity: Balancing the Determinants of the Law of Slavery

Higginbotham's discussion of the evolving legal status of blacks in New York under Dutch and Anglo-American rule demonstrates the pitfalls and complexities of investigating the legal history of slavery. These difficulties are multiplied both by the mixed cultural and legal heritage of New York and by the rapidity of social and economic evolutions there. New York is a fertile field for students of comparative legal history, a field circumscribed by a longstanding debate over whether cultural constraints, including law, or economic and demographic variables played the dominant role in affecting the slave's condition. In any event, legal history needs as a complement the examination of other cultural manifestations and economic-demographic variables that bear on the society.

The chapter on New York begins with a description of rights that blacks, slave, free, and quasi-free, enjoyed under Dutch rule. There existed a half-slave, half-free status that permitted black people to live by themselves and work for themselves while paying tribute to the government of New Amsterdam. Blacks could testify against whites in trials. Free blacks could serve in the militia. These legal rights excluded those enjoyed by blacks in the English colonies.

Yet the significance of differences between Dutch slave practice in New Netherlands and English practice in the rest of the continent remains unclear. Higginbotham contrasts the legal rights of blacks in New York with the rights of their brethren in the southern colonies. A direct comparison with New England would have been more appropriate. While the laws in the New England colonies were somewhat less liberal than in New Netherlands, available evidence does not indicate that social practices were significantly harsher. Arrangements that permitted slaves in New England to work independently and pay their owners a portion of their earnings were frequent.[56] Courts in New England heard the testimony of blacks against whites.[57] The Puritan concern for preserving the slave family seems to

56. *See, e.g.*, V. Smith, A Narrative of the Life and Adventures of Venture, A Native of Africa (1798), which presents the case of a New England slave who earned money and ultimately acquired his freedom.

57. See 4 Catterall, *supra* note 11.

have been as strong as the Dutch concern. Perhaps the central question that needs to be asked about the Dutch slave regime in the early seventeenth century in New Netherlands is to what extent Dutch legal and cultural patterns reflected the lesser need for stringent social control of slaves in the northern colonies generally.

The question is not easily answered, but the area of comparative slavery that has been best developed is the comparison between slavery in the United States and in Latin America, and the scholarship in that area may reveal some useful concepts. For over a generation Tannenbaum's legal history of slavery, *Slave and Citizen: The Negro in the Americas*, convinced scholars of the mildness of slave regimes in Latin America. Subsequent scholarship has indicated that formal law often had less to do with the daily living conditions of the slave than did the proportion of slaves in the population, the type of labor in which they engaged, and the relative availability of replacements, via the African slave trade, for slaves killed from overwork.[58] As Higginbotham demonstrates, even in English colonies, the range of slave treatment was heavily influenced by economic and demographic variables.

A valuable supplement to Higginbotham's discussion of Dutch slavery in New Netherlands would have an examination of the works of Dutch sociologist Haramnus Hoetink on the radically different patterns of slave treatment in the Dutch colonies of Surinam and Curacao.[59] Hoetink, who did not discuss the influences of Dutch law, suggested that the relative harshness of the slave system in Surinam, compared to the relative mildness of slave treatment in Curacao, was a function both of economics and the relative percentages of black population in the two colonies.[60]

Still, despite the ascendancy of what might be termed the economic-demographic approach to the comparative history of slavery, cultural factors, including legal ones, are useful indica-

---

58. *See, e.g.*, Genovese, *The Treatment of Slaves in Different Countries: Problems in the Applications of the Comparative Method*, in Foner & Genovese, *supra* note 30, at 202-11.

59. Hoetink, *Race Relations in Curacao and Surinam*, in Foner & Genovese, *supra* note 30, at 178-88.

60. *Id.*

tors. Indeed, the legal factors in various slave societies were probably strong indicators of the cultural receptivities of nations toward outsiders. These legal factors may not have been strong enough to defeat the economic and demographic constraints that shaped the many slave systems of the New World, but nevertheless deserve examination. The liberalism of the Dutch in the treatment of slaves in seventeenth century New Netherlands is a sharp contrast to the harsher slave codes of the English colonies, an indication of differences between the cultural-legal heritage of England and the Netherlands.

By the early eighteenth century, New York had perhaps the harshest slave regime of the northern states. The relatively mild slave practices of the Dutch had been replaced under English rule with a confrontational slave system, which in New York City was complete with slave revolts and harsh public executions of rebellious slaves. Higginbotham has correctly resisted the temptation to attribute these changes to the shift from Dutch to English rule. The late seventeenth and early eighteenth centuries were a time of increasingly more pronounced racial differentiation in America, and New York's history was a part of this process. The proportion of slaves in New York during this period stirred white fears and increased the desire to strengthen social and legal controls on slaves.

The New York chapter demonstrates that *In the Matter of Color* offers a description of the legal actions of early Americans, a description that cannot be viewed as dispositive of all the issues surrounding the law of slavery. *In the Matter of Color* should be an invitation to practices of different disciplines to further study the law of slavery.

IV. Slavery, Race and Law: The Next Chapter

If Higgingotham's discussion of slavery in New York raises interesting questions that bear further exploraton, one aspect of the legal treatment of blacks in post-emancipation New York may invite even closer scrutiny. From the late eighteenth century until 1822, free black men and white men enjoyed equal access to the ballot.[61] In 1822, the New York legislature inter-

61. Fox, *The Negro Vote in Old New York*, in Free Blacks in America, 1800-1860, at 95-112 (J. Bracey, E. Rudwick & A. Meir eds. 1970).

vened. The previous $100 property qualification was eliminated for white men and was increased to $250 for blacks.[62] Higginbotham treats this as a relatively straightforward piece of legal history. It is not.

It is instead one of the more underexplored and more important chapters in the historical and political sociology of the Northeast and of the nation. The relatively small number of free black voters in the Northeast in the late eighteenth and early nineteenth centuries had pronounced Federalist sympathies and voting patterns.[63] The numbers of these free black voters were small but highly visible, and Democratic party officials tended to use blacks as scapegoats for Democratic election losses.[64] This tendency was particularly well developed in New York, where Democrats charged that the black vote swung the state assembly election to the Federalists in 1813.[65] Throughout much of the Northeast, including New York, Democrats pressed for the abolition of the right of black suffrage.[66] In New York, due to Federalist pressure to keep black suffrage rights, a compromise developed. Black men would need $250 in property to vote, and white men would need none.

Thus, one of the more striking anomalies of nineteenth century America developed. The Democrats, who pressed hard to eliminate the legal disabilities of poor whites, were anxious to mandate *de jure* as well as *de facto* second class citizenship for free blacks. That the Democratic party became the patron of the white working class and poor undoubtedly increased the tensions between these groups and blacks, particularly between Irish immigrants and the free black populations of states like New York. Research into the role of Democratic politicians and jurists in maintaining social and legal disabilities of free black populations in the northern states is still relatively underdeveloped, and promises rewards for those seeking to understand the origins of racial conflicts in the northern United States.

In the Matter of Color should not be criticized for failing to give greater attention to extralegal factors that abound in the

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

development of the law. Higginbotham's task was large enough in simply detailing the early American law of slavery, for that is a subject about which the body of knowledge prior to his work was woefully inadequate. Other legal historians must take his work as a starting point for detailed state and local studies, to find out how the laws were enforced and whether extralegal factors outweighed the strictures of the law as passed and as decided by legislators and judges. Judge Higginbotham suggests, as have others, that peoples may act worse than their laws demand, but that no people will act better.[67] It is the task of legal historians who follow to discover whether the people of early America lived up to the level of their laws or, for better or worse, surpassed them.

ROBERT J. COTTROL*
RAYMOND T. DIAMOND**

67. Higginbotham, *supra* note 1, at 7 (quoting W. Goodell, The American Slave Code in Theory and Practice 17 (1853)).

* Assistant Dean of Arts and Sciences and Lecturer in History, Georgetown University; A.B., Ph.D., Yale University.

** A.B., J.D., Yale University; Member of the Bars of Louisiana and the District of Columbia.