BOOK REVIEW


ERIC POOLE

Notwithstanding the famous dictum of Oliver Wendell Holmes,¹ the life of the law has very often been logic as well as experience. A legal principle tends, as Cardozo put it, "to expand itself to the limit of its logic,"² and a monster, once created, will act according to the rules of its monstrous nature. Fortunately for humankind, this process results in the accentuation of internal inconsistencies, so that there is a fair chance of the monster’s ultimate self-destruction.

Judge Higginbotham has traced in scholarly detail the way in which that most formidable monster, slavery in North America, developed as a legal structure, taking as his fields of study the colonies of Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania. He then discusses the decisions of the English courts in the colonial and post-colonial period, with particular reference to the decision of Lord Mansfield, Chief Justice of the King’s Bench, in Somerset v. Stewart³ and the later cases that worked out its implications. Finally, he considers the effect of the Revolution, and of the words of the Declaration of Independence, upon public attitudes toward slavery. Throughout the book, the reader is made conscious of Judge Higginbotham’s awareness of the application of law in the courtroom both by his analysis of the underlying meaning of statutes, and his appreciation of the importance of procedural law in determining the extent of the disabilities imposed upon a depressed social group. Again and again we meet with colonial legislation that not only imposed direct disabilities upon slaves (and indeed, upon black people generally),

¹ Visiting Professor of Law, University of Texas at Austin. LL.B. 1953, LL.M. 1958, Ph.D. 1969, London University.


(1475)
but also effectively deprived them of such rights as remained by
denying them the right to give evidence against white people or by
imposing upon them the onus of proof of their free condition.
(Moreover, those who failed to meet this burden of proof were
often severely punished.) At the same time, as we read, we are
made aware of the absurdities, as well as the cruelties, to which
this legislation gave rise; and of the impossibility of logically recon-
ciling slavery as a legal institution with ordinary human relation-
ships, or even with slavery itself as an economic institution.

The author's technique of approaching this material through
the histories of six different colonies, all with different origins,
modes of settlement, and ways of life, has been very fruitful; for it
becomes clear that slavery was not a single, consistent institution
throughout the colonies, but manifested itself differently in different
societies, despite the existence of racial and legal assumptions
common to the colonies in general. Behind all these differences,
there can be detected, in varying degrees of emphasis, the influence
of legal and administrative institutions of the Old World, and par-
ticularly of England. Perhaps the most obvious of these, to his-
torically minded lawyers of the time, was the system of villeinage,
by which rural life was governed throughout most of Europe during
the Middle Ages. It may be doubted, however, whether this
system really had much influence in America in the formative
period of the slave-holding society, for it had by then shrunk to the
status of a legal curiosity in England, discussed by writers such as Coke for its traditional rather than its actual importance. Of
far greater probable significance was the concept of the indentured
servant, who was bound to serve his master for a set term of years.

Another prevalent institution, whose influence was perhaps less
obvious, was the English Poor Law, under which each parish was

4 See A.L. Higginbotham, supra note 2, at 322-23, 339-41. For a general
description of the system of villeinage, including a compilation of the laws govern-
ing it, see E. Coke, 1 First Institute of the Laws of England §§ 172-212 (*402-38).
5 Sir Edward Coke (1552-1634), author of Institutes of the Laws of England,
cited in A.L. Higginbotham, supra note 2, at 322. See note 4 supra.
6 A.L. Higginbotham, supra note 2, at 392-95.
7 The English Poor Law, which had its origins in the social and economic up-
heavals of the sixteenth century and which survived until the mid-twentieth, is
actually a series of laws passed to provide a system of relief for the poor. Methods
of relief used by communities to aid the poor were first codified in the Poor Relief
Acts of 1597, 39 Eliz. 1, c. 3, and of 1601, 43 Eliz. 1, c. 2. The latter statute pro-
vided the foundation of English Poor Law by requiring parishes to levy taxes on
occupiers of property within their bounds in order to provide for the poor. M. Rose,
Early History of English Poor Relief (1965); I G. Nicholls, A History of
the English Poor Law (rev. ed. 1904).
obliged to maintain its own paupers out of public funds, with the inevi-
table corollary that each parish was concerned to see that no one else's paupers made their homes in it.\(^8\) This tradition seems to have been particularly strong in New York, whose legislature early began to limit the master's right to manumit slaves, lest by doing so he should shift onto the public funds the burden of maintaining them in their old age.\(^9\)

As the author reveals, the white colonists were not entirely oblivious to the inherent contradictions of slavery. Events constantly forced them
to confront the basic flaw in all systems of subjugation. There can be no successful, peaceful coexistence between master and slave: between those who are always considered human and those beings who are sometimes animal sometimes human, who are sometimes bought and sold like chattel and sometimes able to own chattel, and who are sometimes bound as perpetual slaves and sometimes free.\(^10\)

Nevertheless, the cases that he cites show that despite these inequalities, peaceful coexistence sometimes could be maintained, although never with complete consistency. Physical infirmity from time to time compelled, or indolence enticed, slave owners to rely upon the ministrations of slaves to such an extent that the slaves came to exercise responsibility for the affairs of the masters, and even to have power over them. So, we have the case of Captain Davis, of Georgia, in 1739, who had "'contracted such Distempers, as well nigh bereft him of the Use of both his Legs and Arms,'" and whose mulatto slave woman "'was of much Use to him; not only as a Helper to put on his Cloaths ... but ... he suffered almost every Thing to pass through her Hands, having such Con-
fidence in her, that she had the Custody of all his Cash, as well as Books ... .''\(^11\)

Similarly, there was the case of the landlord in South Carolina in 1715 who, when he tried to enter upon his tenant's plantation, was opposed by the tenant's slaves. When he threatened "'to

---

\(^8\) This concern was codified in the Poor Relief Act, 1662, 13 & 14 Car. 2 c. 12, "which gave powers to parish overseers, on complaint to justices, to return to their parish of settlement any newcomers to the parish who had no legal settlement within it." M. Rose, supra note 7, at 12.

\(^9\) See A.L. Higginbotham, supra note 2, at 128-30.

\(^10\) Id. 82.

\(^11\) 4 Colonial Records of Georgia 344 (A. Candler ed. 1906), quoted in A.L. Higginbotham, supra note 2, at 231.
break their heads,' " they told him that if "he . . . attempted any such thing they would break [his] head again and gave [him] other bold and threatening language." 12 Whatever the legal theory, it can hardly be supposed that any master would be otherwise than grateful to slaves who manifested their loyalty in this way, even though it amounted to offering violence to another white man. Indeed, employment of slaves as bodyguards seems to have been a feature of all slave-holding societies and was evidently a common practice in those colonies in which, as the author points out, wealthy persons were habitually accompanied by a large retinue of slaves and gained social prestige from being so escorted. 13 On the other side of the coin, the master's dependence upon the loyalty of domestic slaves gave rise to a fear of poisoning or arson at their hands, manifested in statutes and court decisions in the colonial period. 14

The materials described by the author suggest that the racial basis of slavery in North America and the West Indies was not explicit at the beginning. Judge Higginbotham is probably right in his explanation that "national consciousness favouring the Englishmen could loosely be translated to racial consciousness disfavouring blacks"; 15 but in fact the Old World institutions that influenced early colonial courts and legislatures may provide more definite clues about the causes of the evolution of racial prejudice and may thus be of value in analyzing the causes of such prejudice even today. We need to bear in mind that the concept of slavery that the early settlers brought with them was based on religion rather than race, and was concerned primarily with the treatment of prisoners of war. In the Old World, Christians or Muslims who captured co-religionists would hold them as security for payment of a ransom, but not enslave them. 16 It follows that enslavement would be regarded principally as a means of forcing the conversion of captured "infidels." It has also to be remembered that this was not a one-sided practice at the time in question. The seventeenth century was still an age of Turkish military aggression, 17 and of

---

13 See, e.g., A.L. Higginbotham, supra note 2, at 117.
14 These concerns are particularly apparent in the provisions of the Georgia Slave Codes, cited in A.L. Higginbotham, supra note 2, at 256, 262-63; and in the South Carolina statutes, cited in id. 181-82, 198, 205.
15 Id. 29.
widespread coastal raids by pirates from North Africa. Within the area of Europe and the Mediterranean, moreover, racial differences between contiguous communities were slight enough for captives who had adopted the religion and customs of their captors and who had been manumitted in consequence, to be readily assimilated into the community.

In America, these concepts were applied from the earliest times to relations with the Indians: in fact Columbus himself seems to have been an exponent of the art of provoking "just wars" with a view to obtaining Indian slaves, just as the legislators of Massachusetts in 1641 permitted the enslavement of "lawful Captives taken in just warres." There could, however, be no serious question of Negro slaves having this status, as far as Europeans were concerned, even though many if not most of them had probably been taken prisoner by other Africans in wars exacerbated by the slave trade itself. As long as the original concept of slavery remained, however, the courts and legislatures of the colonies were embarrassed, as the author shows, by the problem of the slave who was baptized and therefore, if the principle was applied logically, earned his freedom; for the whole point of importing slaves from Africa south of the Sahara was to gain a supply of cheap labor, paid for as merchandise, and not a chance to convert "infidels." In these circumstances, the shift to a racial basis for slavery can be seen as almost inevitable, because a racial basis premised the system of slavery upon the one criterion that the victim could never change by his own efforts and that (in contrast to the situation of the Old World) provided a ready means of distinction between one class and the other. With this shift, it was therefore necessary to construct a theory of racial superiority in order to justify the system; we can see how, by the end of the seventeenth century, the change of concepts had been made and was manifesting itself in legal


19 See S. de Madariaga, CHRISTOPHER COLUMBUS 270-345 (1940).

20 BODY OF LIBERTIES, 1641 § 91, reprinted in COLONIAL LAWS OF MASSACHUSETTS REP. FROM 1660 SUPP. TO 1672, at 53 (1889), quoted in A.L. HIGGINBOTHAM, supra note 2, at 62.

21 The problem of justifying the continued enslavement of blacks who were or became Christians is a recurrent theme throughout Higginbotham's analysis. See, e.g., A.L. HIGGINBOTHAM, supra note 2, at 21, 25-26, 36-37, 127-23, 200-01. Colonial legislatures and courts acknowledged the issue as problematic but always concluded that blacks ought to "be saved by Christ but never free from their masters." Id. 128. A related theme is the equally troublesome attempt by conscientious colonists, such as Patrick Henry, to reconcile the practice of slavery with their own Christian beliefs. See id. 378-79.
theory. This theory of racial superiority became so thoroughly established, even in the minds of those opposed to the institution of slavery, that in the centuries which followed, convinced abolitionists could hardly conceive of admitting black people to political equality with white people. Indeed, one of the most striking peculiarities of the American way of life, to observers from other nations, is that despite all the progress that has been made in outlawing racial discrimination, even the most liberal-minded of Americans continue to classify people as "black" or "white" according to the theory of slavery and government agencies still require one's race to be stated on official forms.

The author's insights as a judge and as a practicing courtroom lawyer, and his skill in thinking himself into the minds of lawyers of a past age, serve him well throughout the volume. His talents are particularly evident in his treatment of Somerset v. Stewart, in which Lord Mansfield held that the master of an escaped Negro slave was not entitled to recapture him in England and ship him out of the country. The arguments of counsel are set forth and analyzed in some detail, in order to elucidate the reasoning of the court and to emphasize the significance of the decision at the time. Unfortunately, the author has been less successful in his treatment of some of the other English cases, and there are errors in the text (particularly in the Latin citations) that occasionally produce absurdities, and that may create impediments to students who seek, as I hope they will, to follow up what the author has to say in this interesting field. This review is hardly the place in which to discuss these errors in detail, but the point may be illustrated by brief consideration of the author's treatment of The King v. Inhabitants of Thames Ditton. This case merits attention both because a misunderstanding by the author affects his argument, and because the facts of the case, and its human factors, are of some interest.

22 Id. 36-38, 80-81, 118, 128.
23 See, e.g., id. 92-98, 139, 143, 147-48, 268-69, 300-02.
26 See, e.g., the substitution of "habeaus corpus" for "habeas corpus," id. 331, 333; the substitution of "Fiat Justitia, ruat coelumtet" for "Fiat Justitia, ruat coelum," id. 332, 352; the substitution of "in favorem liberatis" for "in favorem libertatis," id. 333, 339; and the substitution of "Liberate Probanda" for "De Libertate Probanda," id. 339, 340.
The case in question, another decision of Lord Mansfield, involved Charlotte Howe, a black slave brought from America to England in 1781 by Captain Howe. He took her to live in Thames Ditton, about twelve miles from the center of London. After her master's death in 1783, Charlotte was baptized and continued to live with his widow. Later, the widow moved closer to London, to the parish of St. Luke's Chelsea, and Charlotte went with her. After five or six months, however, Charlotte left her mistress and went back to Thames Ditton. It is at this point that the author has, excusably, misunderstood what happened and assumed that Charlotte brought an action against her mistress for wages but had her claim dismissed by the court on the ground that she was a slave and not entitled to payment for her labour. The report shows, however, that what really happened was something quite different. In fact, the case arose out of one of the numerous squabbles between parishes as to who should look after a pauper. Having left her mistress, Charlotte was evidently destitute; but the overseers of the poor in Thames Ditton saw no reason why they should look after her when she had been living for several months in another parish. Therefore, they obtained from two justices of the peace an order that she should be taken back to Chelsea. In true eighteenth-century Poor Law style, the Chelsea overseers resisted the order and won their case on the ground that the statute required a pauper to have a “hiring” in a parish in order to gain a “settlement” there; because Charlotte had never worked for wages in Chelsea, the parish of St. Luke's could not be compelled to accept her. Presumably this meant that she was allowed to go back to Thames Ditton, where she evidently wanted to live, even though she had not worked for wages there either.

It would be nice to know what happened to her. The Poor Law had not yet become the ferocious affair that it was in the days of Dickens, and we may perhaps be entitled to imagine her with a cottage in that very pleasant village, with the children coming to see her with a kind of awed respect. Here, too, there seems scope for some research. However this may be, the case is not authority for the proposition that “while in England a slave was required to serve his or her master even when the slave had not been provided for.” Under the rule of Somerset, Mrs. Howe

---

28 See note 8 supra & accompanying text.


30 A.L. HIGGINBOTHAM, supra note 2, at 358.
could not have forced Charlotte to return to slavery in America; nor under *Thames Ditton* could she have required Charlotte to go on working in England without compensation for the rest of her days.

The book can, then, be faulted on points of detail, and on the interpretation that the author places upon some of his data. Considering the heroic range of the work, it would indeed be surprising if this were not the case. If Judge Higginbotham's scholarly work stimulates further research into the legal origins of Negro slavery, the responses of courts and legislatures to the presence of a slave population, and to the problems that the very existence of slavery posed to other jurisdictions, we may hope that, thanks to him, the years to come will bring a deeper understanding not only of the history of slavery as such, but of the racial and social prejudices which it fostered and which plague us to this day.