

## REVIEW

*In the Matter of Color.* A. LEON HIGGINBOTHAM, JR. Oxford University Press, New York, 1978. Pp. xxiii, 512. \$15.00.

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Historical scholarship on race and slavery almost inevitably has contemporary political implications. Judge Higginbotham's book, although it deals in terms only with the law of race in the colonial period, is no exception. The preface notes the work's origin in an interchange with the President of Purdue University in 1944, in which Judge Higginbotham's protest against segregated housing for students was dismissed with a reference to the legality of segregation.<sup>1</sup> As a black lawyer, Judge Higginbotham's attention returned to the role of law in ordering race relations, and he has written this book with the expressly political goal of "help[ing] us better understand the history we cannot escape and caus[ing] us to assume the responsibility we owe to our future."<sup>2</sup> It is far from clear, however, that Judge Higginbotham's political perspective, understandable though it may be as one held by a successful person within a liberal political system, is fully adequate to that goal.

The book has three major parts, of unequal length. The bulk of the work consists of detailed recitations of the law of race in six colonies—Virginia, South Carolina, and Georgia in the South, Massachusetts, New York, and Pennsylvania in the North. The first part is imbued with a rather straightforward economic determinism: the law took the varying forms that it did because of the differing place slavery held in the social system of each colony, and as the economic importance of slavery grew or slacked off, the law supported the dominant economic form. The second part examines the case of *Somerset*,<sup>3</sup> in which Lord Mansfield stated that slavery was "so odious, that nothing can be suffered to support it, but positive law," and thereby deprived defenders of slavery of recourse to traditional common law rules in their defense of slavery.<sup>4</sup> This part is as deeply pervaded by a nearly pure idealism or intellectual

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<sup>1</sup> A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* vi-ix (1978) [hereinafter cited without cross-reference as HIGGINBOTHAM].

<sup>2</sup> *Id.* at 2.

<sup>3</sup> 98 Eng. Rep. 499 (K.B. 1772).

<sup>4</sup> *Id.* at 510.

determinism as the first is by economic determinism. The final part consists of a chapter whose title indicates the perspective brought to bear on its subject: "The Declaration of Independence: A Self-Evident Truth or a Self-Evident Lie?"<sup>5</sup> Here Judge Higginbotham the moralist, who is bound together with the intellectual determinist, emerges and engages in a polemic against Jefferson's hypocrisy and in an encomium to those blacks and whites who seized on the language of the Declaration as expressing the fundamental immorality of slavery. The economic-determinist view of the relation between law and other aspects of colonial society developed in the book's first part is strikingly (at least in Judge Higginbotham's presentation) inconsistent with the view put forth in the last two parts. The reader is left with an unsatisfying sense of oscillation from one view to another.

I will examine here the major divisions in Judge Higginbotham's book, using his material to sketch out a perspective that is not driven from the pole of economic determinism to the pole of intellectual determinism—an oscillation, I suggest, that is related to the liberal assumptions about race and society Judge Higginbotham holds. It should be said at the outset that it is, of course, a strength of the book that it lays the basis for an explanation that opposes the one offered by its author.

## I. THE ECONOMIC-DETERMINIST THEME: THE ORIGINS OF AMERICAN SLAVERY

### A. Economic Determinism and the Legal Basis of Slavery

Judge Higginbotham properly begins his study with Virginia, the first colony to use black slaves extensively. He provides a fuller account of all the statutes and the available cases involving race, servitude, and slavery than we have had before. The emergence of slavery—lifetime, hereditary, involuntary servitude—in Virginia has long posed a puzzle for scholars. The difficulty is this: slavery is a set of property relations, involving the ownership of one person by another; property relations such as ownership exist, it would seem, only as creatures of the law; yet the law in Virginia had very little to say about the particular set of property relations that constitutes slavery, although "servitude" was a recognized relationship.

From 1619 on, we know, there were Africans held in a system that deserves the name of slavery, and that system sporadically makes its appearance in the law. For example, the Virginia legisla-

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<sup>5</sup> HIGGINBOTHAM at 371.

ture in 1662 took a crucial step towards consolidating slavery by declaring that the status of children born of sexual relations between Englishmen and black women would be determined by the status of the woman.<sup>6</sup> As Judge Higginbotham says, this statute established a system in which the "labor force reproduced itself" despite widespread miscegenation.<sup>7</sup> But this law, like others, was the product of what Judge Higginbotham calls the "piecemeal fashion" by which slavery and race relations worked themselves into the law. Full scale recognition of the institution of black slavery did not occur until the slave codes of 1680 and 1682.<sup>8</sup> What Judge Higginbotham calls the "maturation of the Virginians' legislative process," the "culmination [of] the beginning of the legislature's partnership with masters to ensure the total subjugation of the slave and colored population," did not occur until 1705.<sup>9</sup>

For an extended period, then, slavery existed without comprehensive legal regulation. This puzzle has elicited a variety of responses from scholars. It provoked Oscar and Mary Handlin to undertake a major study that resulted in no resolution, but in an enumeration of the steps "by which the American environment broke down the traditional European conceptions of servitude."<sup>10</sup> Winthrop Jordan characterizes this early period as one of "unthinking decision," in which black servants were transformed into slaves by the dual operation of economic pressure and the availability of a convenient concept—a pervasive notion of "difference," reflected in the perception of Negroes as "heathens" and "savages"—that could accommodate black slavery without threatening the rights of white people.<sup>11</sup> Eugene Genovese, concerned primarily with slave society in a later period, passes over the problem in one paragraph.<sup>12</sup> The problem is seemingly intractable because the evidence relating to it is so thin—not primarily because material has disappeared,<sup>13</sup> but because the transformation of servitude into slavery, a process that in some sense ought to have involved the law, did not work its way into

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<sup>6</sup> See *id.* at 44.

<sup>7</sup> *Id.* at 43-44.

<sup>8</sup> See *id.* at 38-40.

<sup>9</sup> *Id.* at 56.

<sup>10</sup> O. HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 21 (1957) (originally published as Handlin & Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. (3d Ser.) 199 (1950)).

<sup>11</sup> W. JORDAN, WHITE OVER BLACK 44-98 (1968).

<sup>12</sup> E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 31 (1974).

<sup>13</sup> See, e.g., HIGGINBOTHAM at 227 (noting destruction of Georgia opinions from period before 1776).

statutes or court opinions.<sup>14</sup> The thinness of the evidence does not seem to justify Judge Higginbotham's confident economic determinism, but can be used, like the curious incident of the dog in the night, as a clue to a better explanation.

Judge Higginbotham's determinism comes through most clearly in his summary statements. In the introductory chapter, he writes, "a special lesson lies in tracing and trying to understand exactly how the American legal process was able to set its conscience aside and, by pragmatic toadying to economic 'needs,' rationalize a regression of human rights for blacks."<sup>15</sup> Evaluating New York law, Judge Higginbotham, implying the answer, asks: "When masters desired to be more lenient, the New York slave codes were not as severely restrictive on the discretion of the master. But was this greater moderation because the colony was less economically dependent on slave labor than were the more southern colonies?"<sup>16</sup> A final example is Judge Higginbotham's conclusion about Georgia, whose prohibition of slavery in 1735 was repealed in 1750:

The purpose of the antislavery law had not been to aid the welfare of blacks, but merely to further what the trustees believed were the social, economic, and military interests of whites. . . . Released from the restraints imposed by the trustees' authority, Georgia could follow what it believed were the true social and economic interests of the colony. The result was the imposition of a slave code ultimately as harsh as any found elsewhere in America.<sup>17</sup>

This economic determinism is occasionally qualified, as when Judge Higginbotham lists "a burgeoning moral and intellectual commitment to political and economic liberty" along with the "lack of economic dependence on the institution, an expanding white labor population, [and] a nonwhite population able and eager to sue for its freedom in the courts" as reasons for the increase in the numbers of free blacks in Massachusetts,<sup>18</sup> but the qualifications are not embedded in a fuller, less deterministic way of looking at things.

The problem with the economic-determinist point of view, at least for the early period, is simply that the evidence will not bear

<sup>14</sup> W. JORDAN, *supra* note 11, is especially careful in working around the paucity of evidence.

<sup>15</sup> HIGGINBOTHAM at 15. The juxtaposition of idealism and materialism is particularly dramatic in this passage—the notion that the legal process had a conscience being set against its toadying to economic needs. See also text accompanying notes 43-45 *infra*.

<sup>16</sup> HIGGINBOTHAM at 148-49.

<sup>17</sup> *Id.* at 266.

<sup>18</sup> *Id.* at 98.

the necessary weight. Perhaps the best example of overinterpretation, though not of economic determinism, is Judge Higginbotham's analysis of *Re Warwick*,<sup>19</sup> a case that reads in its entirety: "Hannah Warwick's case extenuated because she was overseen by a negro overseer."<sup>20</sup> From this sentence, Judge Higginbotham pries out the implication that Warwick was white, that the sole mitigating circumstance attached to whatever offense she had committed was the black overseer, and

that the society was more interested in making sure that blacks did not exercise authority over whites, and that white servants knew this, than in prosecuting the infractions of Hannah Warwick. Thus, the court intimated, by extension, that whites, although wrong, could refuse to submit to the authority of blacks, even when blacks were performing as agents of the common master.<sup>21</sup>

It is a bit peculiar to find in an economic-determinist explanation the suggestion that the master class generated a rule of law that undermined its own authority. Although I must concede that this analysis cannot be shown to be wrong, it is nevertheless far too elaborate, in light of its evidentiary basis, to be accepted as correct. In other places Judge Higginbotham draws inferences that support his analysis from the absence of contrary indications in the available evidence, notwithstanding the acknowledged gaps in the record.<sup>22</sup> This process of reasoning can be defended only if we have prior reasons to expect that contrary evidence would be found if the interpretation were inaccurate, which is precisely what Judge Higginbotham has to establish.

Unfortunately for the economic determinist, the case for that point of view must be made with respect to the early period, for after that slavery had so settled into the structure of Southern society, and had been so fundamentally repudiated as part of the core of Northern society, that only a multicausal analysis will capture the relation between slave law and society. One illustration of the complexity of slavery as a mature institution is the relation between ideas and the law. As Winthrop Jordan shows, once black slavery became an accepted institution, it could draw upon established intellectual themes, which then could exert an independent deter-

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<sup>19</sup> McIlwaine 513 (Gen. Va. Ct. 1669).

<sup>20</sup> *Id.*

<sup>21</sup> HIGGINBOTHAM at 29-30.

<sup>22</sup> See, e.g., *id.* at 67.

mining effect on the law of slavery.<sup>23</sup> It seems likely, for example, that a full investigation would show that the attention devoted in Southern slave law to questions relating to degrees of African ancestry can be explained better by an understanding of the metaphor of polluting a blood stream than by referring to the need to reproduce a labor force.

The evidence in the early period is just not there to support an economic-determinist point of view. On some occasions, Judge Higginbotham's rhetoric, specifically his recurring use of the rhetorical question as a method of refuting analyses inconsistent with his own, indicates a perhaps unconscious recognition of this inadequacy. South Carolina, all historians of the subject agree,<sup>24</sup> had the most rigid slave code in the American colonies. In the early eighteenth century, however, that rigidity was relaxed in some areas: penalties for theft were reduced, for example, and punishment of the slave was replaced in part by the imposition of civil liability on the master.<sup>25</sup> There is clearly something interesting going on here. The transfer of enforcement authority from the government to private parties, which the relaxation of South Carolina law intimates, is consistent with the maturation of a slave society in which the spheres of public authority and of master-slave relations were kept apart.<sup>26</sup> But Judge Higginbotham concludes by asking: "[W]as this partial decriminalization process attributable to slaveowners' humanitarian motives or to a concern for preserving the base of economy—healthy, nonmutilated slaves?"<sup>27</sup> A similar polarization of explanations, and the rhetorical question directing that one specific explanation be adopted, occurs in the analysis of some Massachusetts cases in which flexible trial procedures were used and punishment mitigated to the apparent advantage of the black servant:

Whatever the circumstances, the black servant seems to have been accorded a just and fair hearing. And yet there is always the underlying question as to whether the court's motives were humanitarian and in consideration of [the servant] or whether the reduction in sentence was predominantly motivated by the court's concern that [the] master not sustain a financial loss.<sup>28</sup>

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<sup>23</sup> W. JORDAN, *supra* note 11, at 101-10.

<sup>24</sup> See, e.g., *id.* at 85.

<sup>25</sup> HIGGINBOTHAM at 182-83.

<sup>26</sup> I have sketched this in Tushnet, *Approaches to the Study of the Law of Slavery* (April 12, 1978) (unpublished paper, on file with *The University of Chicago Law Review*, presented at the annual meeting of the Organization of American Historians).

<sup>27</sup> HIGGINBOTHAM at 183.

<sup>28</sup> *Id.* at 73-74.

Judge Higginbotham's strategy in these passages can be analyzed in at least two ways. One explanation—that polarization of this sort is inherent in liberal theories of the relation between law and society—will be discussed later. The other is straightforward: we have here the tactic of a polished trial lawyer seeking to argue a factual case in which his interpretation may be right, but in which the evidence is thin. The lawyer poses two sharply contrasting interpretations: humanitarianism versus economic interest. We can reject humanitarianism out of hand, partly from an ingrained cynicism, but also because no one motivated by humanitarian concerns could accept, even for purposes of the case at hand, the institution of slavery. Thus we are left with economic interest to explain what happened. The flaw in this approach comes at the outset. It is surely true that under any sensible definition of "humanitarianism", nothing short of immediate abolitionism was a humanitarian position.<sup>29</sup> But those who lived with slavery equally surely did not, on a daily basis, think of themselves as moral monsters. Thus, the flaw in Judge Higginbotham's argument is not the recognition of the inhumanity of slavery, but rather the assertion of a dichotomy between humanity and interest that he imposes on the material.

## B. An Alternative to Economic Determinism

If simple economic determinism will not adequately order the material, what will? I suggest that from Judge Higginbotham's work one can identify two lines of inquiry that seem likely to be fruitful. I will label them "institutional" and "political". The institutional analysis would develop the scattered bits of evidence indicating that the courts were, in Judge Higginbotham's terms, "less vigorous in denying slaves basic human rights" than were legislatures.<sup>30</sup> Overall, the impression of differentials between courts and legislatures is a powerful one. Judge Higginbotham suggests that the courts could be "less vigorous" because they knew that what they did did not matter: "In part, the courts' inactivity in the area of slave law stemmed from a general ineffectiveness in declaring and implementing any judicial policies."<sup>31</sup> There are several difficulties here. If we recognize ineffectiveness with respect to courts, we must also

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<sup>29</sup> It may be appropriate here to note my puzzlement at the persistence in recent work on the law of slavery of the denunciation of slavery as a moral abomination. In addition to Judge Higginbotham's work, see also R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). I would have thought that went without saying, but apparently not.

<sup>30</sup> HIGGINBOTHAM at 208.

<sup>31</sup> *Id.*

recognize the ineffectiveness of legislative declarations of policy. Judge Higginbotham is unfortunately inconsistent on that issue: he notes the unenforceability of laws designed to protect slaves from their masters but fails to note the equal unenforceability of laws limiting the distribution to slaves of profits gained by their hired-out labor.<sup>32</sup> Further, to speak of courts as declaring and implementing policies is anachronistic and distorts the nature of the evidence. Colonial courts were not staffed by judges in the mold of Holmes or Cardozo, self-consciously constructing doctrine based on judgments of social policy. They were disposing of concrete, and largely isolated, disputes; while a line of dispositions might ultimately define a policy, the thinness of the evidence—and the absence of systematic reporting of decisions—makes it risky to characterize colonial judges as developing a policy that we can now discern.

The real difference between colonial courts and legislatures, I suggest, lies in the ways in which they could be mobilized to act. Any private party involved in a dispute could call on the courts to resolve it if the stakes warranted the effort, and private disputes could be brought into the courts by public authorities if one of the parties could persuade officials to bring the case. In contrast, the resources needed to secure legislation were more substantial. Thus, the colonial courts were likely to consider problems that had received comparatively little screening. Put another way, the courts probably were confronted with cases across the full range of relations in slave society, whereas legislation reflected only the most serious issues. It would not be surprising, under these conditions, for the courts' treatment of particular issues to be "erratic and disjointed";<sup>33</sup> the cases were not arranged to yield a systematic result, or even to bring to the judges' attention the need for some systematic resolution. Further, the lack of screening meant that the courts would deal with disputes that the society as a whole might regard as unimportant, as when a master, for idiosyncratic reasons, sought prosecution of a slave in circumstances where other masters would have punished the slave on their own. In such cases, courts might well have been "less vigorous" in acting against slaves than they would have been in cases more central to the defense of the institution. Evidence from courts would then be systematically distorted in the direction that Judge Higginbotham suggests, not because of the ineffectiveness of courts or of the greater humanitarianism of judges, but for simple institutional reasons.

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<sup>32</sup> Compare *id.* at 196-97 (on protective legislation) with *id.* at 174-75 (on hiring out).

<sup>33</sup> *Id.* at 32.



The term "distortion", however, should not be understood to imply that legislation is in some way a truer reflection of the needs of slave society. Similar institutional mechanisms distort legislation in the opposite direction. Difficulties in mobilizing the legislature mean that statutes represented efforts to deal with the ultimate problems of slave society and not with its day-to-day ones, the ones that gave the society its "phenomenological" tone. As Jordan puts it:

Statutes provide a picture of race relations and slave control which is too clear cut, too highly rationalized, too formalized, and far too uniform. . . . [but] while statutes usually speak falsely as to actual behavior, they afford probably the best simple means of ascertaining what a society thinks behavior ought to be.<sup>34</sup>

Judge Higginbotham demonstrates how broad the limits of acceptable behavior were, but does not, because the nature of the material does not allow him to, demonstrate where within those limits master-slave relationships were typically located.

As I have suggested, the primary evidence that can be presented is from the statutes. The institutional inquiry brings to our attention the fact that legislation is enacted after political forces have been effectively brought into play and in turn leads to the political explanation of the law of slavery: the law of slavery is the result of an indeterminate political struggle, in which economic power is important as one source of political power, but is not, except perhaps "in the last instance"—to use a reasonably opaque phrase—dispositive. Judge Higginbotham's accounts of Virginia and Georgia are particularly useful in providing support for the political interpretation.

The story in Virginia is significant precisely because there was "no systematic effort . . . to define broadly the rights or non-rights of blacks"<sup>35</sup> between 1619 and 1660, and perhaps even to 1680. The absence of systematic regulation, and the presence of only piecemeal regulation, was followed by the sudden emergence of a full-blown code of race relations at a time when slavery had already become firmly established. The institution of slavery, that is, developed without legal sanction, notwithstanding my initial presentation of slavery as a set of property relations that can be defined only

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<sup>34</sup> W. JORDAN, *supra* note 11, at 588. More precisely, statutes reflect what a society regards as the morally tolerable limits to behavior.

<sup>35</sup> HIGGINBOTHAM at 19.

in terms of law. That presentation failed to consider that, in situations where the enforcement mechanisms for legal constraints on the use of force were weak or in practice unavailable, domination occurred through the simple exercise of force that might have been in some sense unlawful. Colonial America was such a situation: the institutions of law enforcement were rudimentary, and blacks lacked access to them because of language barriers and the disorientation produced by their forcible transportation from Africa to America. Thus, a set of social relations in which one person—the master—expropriated the total product of another—the slave—in exchange for whatever the master in his sole discretion chose to provide for support developed in the interstices of legal regulation. By the time that Virginia became a “slave” colony, the masters had acquired enough political power to secure a comprehensive law of slavery from the legislature, and so were able to transform the social relations of slavery into the property relations of slavery.

The political analysis sketched for Virginia might seem only to detail the mechanism by which economic determinism operated, for the masters’ political power derived from their economic position. What happened in Georgia, however, demonstrates the independent impact of political action. In 1735 the English trustees of Georgia, only one of whom—James Oglethorpe—lived in the colony, passed a law prohibiting slavery in the colony; that law was repealed in 1750. Judge Higginbotham shows that the repeal resulted from sustained political action on the part of the supporters of slavery and that economic determinism alone does not tell the whole story. The geographical isolation of the trustees, along with charter restrictions on financial gain by the trustees from Georgia investments, meant that the trustees had no direct interest in establishing slavery.<sup>36</sup> The prohibition of slavery was reasonably effective until the late 1740s, except in areas bordering Southern Carolina where various ruses to evade the impact of the law could be employed,<sup>37</sup> and thus a solid institution of slavery did not develop. Economic pressure, however, generated by the failure to attract enough indentured servants and by restrictions on the alienation of land, led to proslavery agitation that began as early as 1738. Georgians memorialized the trustees and presented their case to parliament, and in response to those activities the trustees first studied and then authorized the introduction of slavery.<sup>38</sup> If one wants to, and Judge Higginbotham

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<sup>36</sup> *Id.* at 219.

<sup>37</sup> *Id.* at 233, 235-36.

<sup>38</sup> *Id.* at 241-51.

does,<sup>39</sup> one can characterize the law of slavery in Georgia as determined by economics, but that description is so seriously incomplete that it is almost without value. Rather, the story is one of economic interest being expressed in and mediated by an indeterminate political process.

I cannot of course contend that the institutional political explanation offered here is complete. I do believe that the lines of investigation suggested will develop evidence and arguments that will give us a more complete, and therefore truer, understanding of the relation between slave law and slave society, and that such an understanding will better promote the goals Judge Higginbotham sets for his work.

## II. THE IDEALIST THEME: SOMERSET'S CASE AND THE DECLARATION OF INDEPENDENCE

After nearly 300 pages of economic determinism, it is disconcerting to read Judge Higginbotham's analysis of the *Somerset* case, which he describes in an intellectual-determinist way as "a classic example of public policy changing because of the intellectual strength of an advocate's argument."<sup>40</sup> Judge Higginbotham's presentation of *Somerset* does not justify that description, for it consists only of a summary of the background, of the facts, of the lawyers' arguments, and of the opinion, bracketed by short introductory and conclusory evaluations. This presentation lacks the subtlety of other recent examinations of the case<sup>41</sup> and has none of the depth of material that makes the first part of the book useful. What we need, especially after David Brion Davis has shown the importance of contract-related thinking in shaping the arguments in *Somerset*,<sup>42</sup> is a study that links the preference for freedom expressed by Lord Mansfield in *Somerset* to the law of contracts that Lord Mansfield was developing at the same time. Unfortunately, Professor Davis lacks the training and interest in contract doctrine, and Judge Higginbotham the breadth of interest, to provide us with that study.

Because the discussion of *Somerset* and the section of the book on the Declaration of Independence are substantially shorter than the first part, and add little of substance to the book, I will spend

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<sup>39</sup> *Id.* at 266.

<sup>40</sup> *Id.* at 335.

<sup>41</sup> See, e.g., D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823*, 469-501 (1975); Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

<sup>42</sup> D. DAVIS, *supra* note 41, at 489-501.

less space discussing them. They are of interest for what they reveal about Judge Higginbotham's essential enterprise. He concludes the section on *Somerset* by chastising "current critics [of Lord Mansfield as] tainted with insights gained by current jurisprudential doctrines . . . and . . . oblivious to the times in which Mansfield lived" and by calling him "a giant in the cause of human freedom and a significant contributor to the ultimate abolition process."<sup>43</sup> He takes offense at Jefferson's hypocrisy in calling the colonists' situation slavery while remaining a slaveowner.<sup>44</sup> These particular items, and the general tone of the book, place it in the honorable tradition of abolitionist tracts using the law to focus indignation at slavery and racism. Judge Higginbotham has made a notable contribution to that tradition, but, acknowledging the importance of repeated reminders of our nation's persisting racism, I question the adequacy of the implicit model of social change that underlies Judge Higginbotham's book.

That model can be described on two levels. First, it combines the economic determinism of the first part of the book with the intellectual determinism of the remainder by the simple device of juxtaposition. The effect is to deny the political aspects of social change and to discourage, despite Judge Higginbotham's evident desires, mass participation in social change. Economic determinism encourages, if it does not indeed counsel, political passivity, for if the law will be what the economic system says that it must be, attempts to influence legal development are a waste of time. Intellectual determinism, in contrast, does find value in political activity, but it is activity of a very restricted sort, for it is the intellectual elite, the talented advocates and judges, and not, in particular, people like *Somerset*, who determine the way society moves.

The second description of the model of social change in the book penetrates the surface economic determinism. Despite the explicit statements of that determinism throughout the first part, it may well be that Judge Higginbotham thinks that, in the end, it was not economics but racism that determined the shape of the law; certainly his interpretation of *Re Warwick* is more consistent with a racist determinism than with an economic determinism. But racism in this context is "just" another set of ideas, and beneath the apparent disunity between the first part of the book and the remainder there is an underlying unity of intellectual determinism. Only the good guys and the bad guys are different.

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<sup>43</sup> HIGGINBOTHAM at 368.

<sup>44</sup> *Id.* at 381-82.

The combination of elite activism and popular passivity that occurs in either description of the model is a peculiarly liberal theory of social change, and in that light it is easy to understand why a person of Judge Higginbotham's experience and position would adopt that theory. Judge Higginbotham, however, misreads important aspects of the abolitionist experience by doing so. The final pages of his book contain a series of quotations showing that "abolitionists repeatedly used the language and logic of the Declaration of Independence to stroke the American conscience."<sup>45</sup> Judge Higginbotham regards the "logic" of the Declaration, "the truth [that the signers] espoused,"<sup>46</sup> as creating "a direct nexus between the egalitarian words uttered . . . and many of the changes that later took place."<sup>47</sup> But it was not the force of the abolitionists' logic or the truth of their views that led to change. What mattered was that their appeal to principle—both artful and artless—was a powerful political weapon. Abolitionists succeeded not because they appealed to the truth, though they did, but because their appeals were directed, within a specific historical setting, to a society where nearly everyone shared the ideology of equality that was the core of the abolitionist argument. Indeed, from the point of view of the Southern masters, the tragedy was that they had no way to explain how slavery was consistent with the Good that all sought, because in both the North and the South the Good included establishing true equality.<sup>48</sup> The abolitionists managed to combine moralism and political activity in an integrated approach to society, not one, like Judge Higginbotham's, that merely squeezes the two into one package. It is a combination that has rarely been duplicated in America.

The abolitionist tradition is a potent one. Judge Higginbotham mobilizes the moral passion that is part of that tradition. Yet, although he has the material at hand, he has not, because of his liberalism, recognized the importance of popular political action as a means for securing social and legal change. The glory of the abolitionists was the brilliance with which they fused, albeit unknowingly, moral passion and political sophistication; their legacy is slowly dissipated if, as Judge Higginbotham does, we honor them for only part of their accomplishment.

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<sup>45</sup> *Id.* at 382-85.

<sup>46</sup> *Id.* at 389.

<sup>47</sup> *Id.* at 383.

<sup>48</sup> See E. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE* 115-244 (1969); E. MORGAN, *AMERICAN SLAVERY/AMERICAN FREEDOM* (1976).